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Full Paper – Second World Journalism Education Congress South Africa 2010

Grahamstown, 5–7 July 2010

- Title:** Loosening the Shackles of the Truth Defence on Freedom of Speech: Making Defamation Law's Truth Defence More User Friendly for Media Defendants
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By Joseph M Fernandez*

ABSTRACT

The truth defence is defamation law's oldest defence but it remains the least attractive defence to Australian media defendants because of its onerous threshold for success. This paper argues that the shackles on the truth defence are inconsistent with established freedom of speech ideals and the public interest in having a robust media. As a result society is constrained from enlightened participation in public affairs. This paper proposes reforms to alleviate the heavy demands of the defence so as to promote the discussion of matters of public concern and to strike a more contemporary balance between freedom of speech and the protection of reputation. These reforms employ defamation law's doctrinal calculus to reposition the *protection of reputation/freedom of speech* fulcrum. The cornerstone of the reform proposals considered here is one that advocates a reversal of burdens so that the plaintiff bears the burden of proving falsity of the defamatory publication where the complainant is a public figure; the matter complained about is a matter of public concern; and the legal action is against a media defendant.

1. INTRODUCTION

Throughout history people have found ways to vindicate personal reputations from harm caused by the communication of defamatory imputations. They did so through the "duel" in the mid-sixteenth century.¹ In the modern day, courtroom mechanisms are widely seen as offering a "civilised and urbane way" to seek vindication.² One such mechanism, the law of defamation, is by far journalism's greatest nemesis and Achilles

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1 Solove DJ (2007), *The Future of Reputation: Gossip, Rumour, and Privacy on the Internet*, London: Yale University Press, at 114.

2 Solove, above n 1, at 114-5.

heel. Defamation law's origin lies in an era that could not have anticipated the formidable twenty-first century challenges of regulating speech. While defamation law remains today's primary tool for the vindication of reputation,³ in many common law jurisdictions, defamation law adopts an approach that offends against the fundamental legal principle that advocates a presumption of innocence.⁴ That is, in many jurisdictions the defamatory matter is, in effect, presumed to be false and the burden on the defendant wishing to rely on the truth (or *justification*) defence to prove the substantial truth of the allegations. This approach has been described as "one of the intrinsically nasty aspects" of defamation law.⁵ The reform argument, at one extreme, is that defamation law should be altogether abolished if we can do no better.⁶ On the other hand, no persuasive evidence is available to show that reputations are *passé* or dispensable and that defamation law should consequently be abolished. To compound matters, cyberspace is increasingly becoming the new arena for testing rules that have long applied to traditional mainstream spaces. Modern communications technology has exponentially energised freedom of speech because of its rapid and rabid ability to disseminate information.⁷ The ability to spread words that harm is only the click of a mouse away for many people. The world is under increasing pressure to take a collective and more pragmatic approach to the regulation of speech generally and of defamatory speech in particular.

This paper focuses on the regulation of defamatory speech. It selects Australian defamation law, which has been described as "stringent [and] some of the harshest in the world",⁸ as its case study locus. English defamation law occupies a similar position

3 Solove, above n 1, at 117.

4 For example, see: (a) International Covenant on Civil and Political Rights, Article 2: *Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law*; (b) Universal Declaration of Human Rights, Article 11: *Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence*.

5 Conley D and Lamble S (2006), *The Daily Miracle: An Introduction to Journalism*, 3rd Edn, Melbourne: Oxford University Press, at 410, citing Evan Whitton.

6 Anderson DA (1992), "Is Libel Law Worth Reforming?" (Chapter), in Soloski J and Bezanson RP (eds) *Reforming Libel Law*, Guildford Press, New York, at 2.

7 Joseph M Fernandez (2009), "Twitter, Trafigura and tyranny", 28 October. Retrieved 9 November 2009, from <<http://www.abc.net.au/unleashed/stories/s2724599.htm>>

8 Conley and Lamble (2006), above n 5, 408.

and it has also been the subject of reform attention.⁹ This paper argues for a review of the doctrinal calculus governing the operation of defamation law with reference to three major jurisdictions – the United States, England and Australia – to meet contemporary realities and needs.

The *truth* defence is defamation’s oldest, most obvious and principal defence – but far too few media defendants, who mount the defence, succeed. Many, discouraged by the defence’s onerousness, do not even attempt it. As a consequence the journalistic articulation of matters of public concern is stifled.¹⁰ The reforms proposed in this paper dramatically alter the prevailing *protection of reputation/freedom of speech* equilibrium in Australia. Taking the approach advocated in this paper will tilt the balance between the competing interests of *protection of reputation/freedom of speech*, in favour of the latter but it does so in a measured way.

2. REFORM PROPOSALS

The scope of any reform of the law of defamation is necessarily broad given long-entrenched principles that have been slow to keep pace of contemporary needs. This paper selects the truth defence for reform attention and while many reasons may be cited for this selection,¹¹ it suffices for present purposes to identify one – it is “the principal defence to defamation actions”.¹² At the heart of defamation law’s truth defence lies the following principle:

The reason upon which this rule of law rests, as I understand it, is that, as the object of civil proceedings is to clear the character of the plaintiff, no wrong is done to him by telling the truth about him. The presumption is that, by telling the truth about a man, his reputation is not lowered beyond its proper level, but is merely brought down to it.¹³

9 For example, see *Report of the Libel Working Group*, Ministry of Justice (UK), 23 March 2010, Foreword, at 3.

10 For example, see Dent C and Kenyon A, “Defamation law’s chilling effect: a comparative content analysis of Australian and US newspapers” (June 2004) Vol 9 No 2 *Media and Arts Law Review* 89.

11 Joseph M Fernandez, ‘Loosening the Shackles of the Truth Defence on Free Speech: Making The Truth Defence in Australian Defamation Law More User Friendly For Media Defendants’, PhD Thesis, The University of Western Australia, 2008, Chapter 1 heading 1.

12 Australian Law Reform Commission (1979), *Unfair Publication: Defamation and Privacy*, Report No 11, Para 120.

13 *Rofe v Smith’s Newspapers Ltd* (1924) 25 SR 4, at 21.

Simply stated, the law does not protect undeserved reputations. The proposed reforms are aimed at facilitating the attainment of the objective enunciated in the above extract. These reforms are part of a larger package discussed elsewhere.¹⁴

A. The presumption of falsity

Arguably the most important question to put to a plaintiff in a defamation action is this – *are the imputations true or false?* The established rule dispenses with falsity as an element of the cause of action in defamation thereby disregarding truth at a critical point in proceedings – at the start of the action. The prevailing blanket rule is that there is no place in the cause of action for a truth inquiry. This omission is particularly striking against the backdrop of the principle that no wrong is done to a person by telling the truth about him or her¹⁵ and that “[t]he central issue in defamation actions is a search for the *truth*.”¹⁶ It will be argued below that the truth element should be given a more prominent locus at the outset of the action, and that the proper way to go about this exercise is to reform the law so that the complainant should bear the burden of proving falsity, in addition to the traditional three elements – that is, the complainant should show that publication occurred; the plaintiff was identified; and the matter was defamatory.¹⁷ This proposal is given the short hand term ‘burden reversal’ in this paper. This proposal, however, comes with qualifications set against the free speech-centric focus of this paper. The burden reversal would apply only where: (a) the complainant is a – public figure; (b) the matter complained about is a – matter of public concern; and (c) the action is against a media defendant. Further qualifications are recommended, for example, the burden reversal would not apply where the matter concerned is inherently incapable of being proven true or false, but are not discussed here because of space

14 For example, see Fernandez Thesis, above n 11; Fernandez, JM (2010). *Fixing the truth defence jalopy in defamation law: Reform proposals to foster public interest speech*. Paper at the 19th AMIC Annual Conference, *Technology and Culture: Communication Connectors and Dividers*, 21–23 June 2010, Singapore.

15 See text accompanying above n 13.

16 Gibbons T (1996), ‘Defamation Reconsidered’ Vol 16 No 4 *Oxford Journal of Legal Studies* 587, at 589 (italics added).

17 Gillooly M (1998), *The Law of Defamation in Australia and New Zealand*, Federation Press, Sydney, at 104.

limitations.¹⁸ Where the matter complained about is not a ‘matter of public concern’ or the plaintiff is not a ‘public figure’ or the action is not against a media defendant, then the cause of action burden on the plaintiff should be limited to the three traditional elements referred to above.¹⁹ In such situations, the chill on speech induced by not requiring the plaintiff to bear the burden of proving falsity is an acceptable fetter on freedom of speech, if not altogether “a desirable chill that does not disproportionately infringe freedom of expression”.²⁰ Such an approach is also consistent with the approach taken in the United States, where in more US jurisdictions, plaintiffs suing in respect of a matter of private concern still enjoy the traditional protection.²¹

1. *The ‘presumption of falsity’ in the defamation context*

The notion of the ‘presumption of falsity’²² requires clarification, especially in light of the view that “the very conception of defamation involves the idea of falsity”.²³ A finding of falsity is implicit in a defamation verdict – once the plaintiff has proved the imputation to be defamatory it is presumed to be false.²⁴ Such an implication, however, rests on shaky premises if the question of falsity is not an ingredient of the cause of action.²⁵ Second, at common law, since truth is “a complete defence”,²⁶ evidence of the truth of the defamatory matter cannot be given unless truth is pleaded in justification.²⁷ These principles appear to have given rise to the view that “at common law, a plea of the general issue without a plea in justification admits that the matter complained of was

18 As to inherent incapability of proving truth or falsity, see New South Wales Law Reform Commission (October 1995), *Defamation*, Report No 75, Para 4.15. For other ‘qualifications to compensate for the burden reversal proposed see generally Fernandez PhD Thesis, above n 11.

19 See text accompanying above n 17.

20 Milo D (2008), *Defamation and Freedom of Speech*, Oxford University Press, Oxford, at 184.

21 *Garziano v El du Pont de Nemours & Co*, 818 F 2d 380 (5th Cir 1987).

22 For a historical account of the presumption of falsity see Hirth JA (2004), ‘Laying to Rest the Ecclesiastical Presumption of Falsity: Why the Missouri Approved Instructions Should Include Falsity as an Element of Defamation’, 69 *Missouri Law Review* 529.

23 See TA Street, *Foundations of Legal Liability* (1906), Vol 1, at 275 cited in *Howden v ‘Truth’ and ‘Sportsman’ Ltd* (1937) 58 CLR 416, Evatt J, at 431.

24 NSWLRC Report No 75, above n 18, Para 2.6.

25 Spencer Bower (1990), *A Code of the Law of Actionable Defamation With a Continuous Commentary and Appendices*, 2nd edn, Legal Books, Redfern, NSW, at 237; *Allen v Flood* [1898] AC 1, Cave J, at 37.

26 Milmo P and Rogers W VH (2004), *Gatley on Libel and Slander*, 10th Edn, Sweet & Maxwell, London, at 7.

false.”²⁸ Thus, if the defendant did not plead the truth defence, he or she is not permitted to provide evidence of the truth of the defamatory matter. And, further, if the defendant has not pleaded the truth defence, it is taken as an admission that the matter complained of was false, and that therefore, there is a presumption of falsity against the defendant. The difficulty with such an approach is that the failure to justify (or plead the truth defence) cannot logically amount to a failure to deny the truth of the defamatory matter if falsity is not an element in determining whether the matter is defamatory.²⁹

2. Difficulties concerning the ‘presumption of falsity’ notion

A number of difficulties arise in this area and it may be seen in the widely conflicting views as to whether there is, in the first place, a presumption of falsity against the defendant who does not plead the truth defence. On the one hand it is said that there is a presumption of falsity. Armstrong et al have noted that a person who claims to have been defamed in the media “has a distinct advantage. The law *presumes that the media report is false*.”³⁰ Likewise, Bower and Mitchell, in their respective works, have stated that if the defendant does not prove the truth of the defamatory matter the law assumes it to be false.³¹ In *Allworth v John Fairfax*³² Higgins J said: “Where truth alone is a defence, whilst there is no presumption of falsity, a failure to plead justification will be taken as an admission of falsity.”³³ While Higgins J appears to draw a distinction between a “presumption” and an “admission”, from a defendant’s perspective there is no real difference. As for the view that there is no presumption of falsity if a defendant does not plead the truth defence, Windeyer J has stated that there “appears to be no

27 *Australian Consolidated Press v Uren* (1966) 117 CLR 185, Windeyer J, at 204.

28 *Australian Consolidated Press v Uren* (1966) 117 CLR 185, Windeyer J, at 204.

29 George P (2006), *Defamation Law in Australia*, LexisNexis Butterworths, Chatswood, NSW, at 246.

30 Armstrong M, Lindsay D and Watterson R (1995), *Media Law in Australia*, 3rd Edn, Oxford University Press, South Melbourne, at 31 (italics added). See, however, a qualification in this text (Chapter 3 endnote 1, in reference to jurisdictions where truth was not a complete defence in the sense that this defence also required the defendant pleading truth to also show that the material was published *in the public interest or for the public benefit*. In such circumstances, Armstrong et al state, it is better to avoid the notion of presumption of falsity and say that the defendant carries the burden of proving truth. See also *Singleton v Ffrench* (1986) 5 NSWLR 425.

31 Bower (1990), above n 25, at 237. See also Mitchell P (2005), *The Making of the Modern Law of Defamation*, Hart Publishing, Oxford, at 94; and *Herald & Weekly Times Ltd & Anor v Popovic* (2003) 9 VR 1, at 57.

32 *Allworth v John Fairfax* (1993) 113 FLR 254.

logical presumption either way.”³⁴ The New South Wales Law Reform Commission has gone even further to say that the assertion that there is a presumption of falsity of a defamatory imputation is “not useful and may be mischievous”³⁵ in that it gives a foothold in a fiction for the magnification of damages and perhaps in other ways” because no one can foretell what will be the consequences of treating as a fact something which may not be a fact.”³⁶ Whether the view is taken that there is a presumption or that there is no presumption, the better view is that the ‘presumption of falsity’ is just a loose way of describing the position that the onus of proving truth is on the defendant. Such an onus is too heavy for a media defendant to discharge and this consequently impairs the proper discussion of matters of legitimate public interest.

3. Arguments against burden reversal

In favour of the approach that does not impose a burden of proof of falsity on the plaintiff, it may be argued that because it is the defendant who has made a charge against the claimant, the claimant is entitled to assert that she or he is *innocent until proven guilty*.³⁷ On this approach a person is deemed to have a good reputation in the absence of evidence to the contrary.³⁸ As such, the view that the defendant is presumed guilty until proven innocent is “arguably misplaced”.³⁹ A second argument is that it is “too onerous” to put the burden of falsity on the plaintiff because the plaintiff should not be asked to prove a negative.⁴⁰ Furthermore, it is said, a claimant who faced general charges of wrongdoing, such as an accusation that a politician was associated with organised crime, might otherwise be placed in an extremely difficult position and might

33 *Allworth v John Fairfax* (1993) 113 FLR 254, at 266.

34 *Australian Consolidated Press v Uren* (1966) 117 CLR, at 205.

35 New South Wales Law Reform Commission (1971), *Defamation*, Report No 11, Appendix D – Notes on Proposed Bill and Rules, Para 35.

36 New South Wales Law Reform Commission (1971), *Defamation*, Report No 11, Appendix D – Notes on Proposed Bill and Rules, Para 35.

37 Milmo and Rogers (2004), above n 26, 269.

38 New South Wales Law Reform Commission (August 1993), *Defamation*, Discussion Paper No 32, Para 6.33.

39 Milmo and Rogers (2004), above n 26, 269.

40 NSWLRC Report No 75, above n 18, Para 4.19.

find it difficult to prove a negative.⁴¹ A third argument is that the plaintiff may be asked to disprove a vague defamatory statement whose meaning is difficult to determine, for example, that the plaintiff is a corrupt businessman.⁴² A fourth argument is that the presumption induces a spirit of caution among publishers,⁴³ that is, while it produces a chilling effect that effect is justified or desirable, because it acts as a powerful deterrent to the publication of false information.⁴⁴ These arguments, however, are far outweighed by the arguments set out in the next section.

4. Arguments in favour of burden reversal

Six main arguments may be made in favour of placing the burden of proof of falsity on the plaintiff. First, the same argument above in respect of the presumption of innocence may be applied to the defendant too. The present approach deems the defendant guilty until proven innocent and that approach goes against the grain of hallowed legal principles.⁴⁵ Second, the present approach can be viewed as contradictory to an important tort principle, that is, “the placing on the defendant of the burden of proof on what is (or should be) the central issue in proceedings having as their purpose the vindication of reputation is *out of line* with the general approach in tort law”.⁴⁶ Defamation law’s approach in relation to the present burden evokes the following question: “In every other civil action claimants must prove their case in order to win damages: why should libel be any different?”⁴⁷ The present rule is arguably anomalous in the context of a system of civil liability, which generally requires a plaintiff to prove that the defendant was at fault.⁴⁸ There are also “many instances” in which plaintiffs are

41 Milmo and Rogers (2004), above n 26, at 269 (references omitted). For other arguments opposing the view that the plaintiff should bear the onus of proving falsity in defamation cases see, for example, England and Wales, Supreme Court Procedure Committee (July 1991), *Report on Practice and Procedure in Defamation* (the “Neill Report”), at 72-73.

42 See the discussion in NSWLRC Report No 75, above n 18, Para 4.19.

43 *Report of the Committee on Defamation* (1975), UK, Cmnd 5909, Para 141 (the Faulks Committee). The Neill Committee made a similar observation: Supreme Court Procedure Committee (1991), *Working Group on Practice and Procedures in Defamation*, Para XIX4.

44 NSWLRC Discussion Paper No 32, above n 38, Para 6.33.

45 See, for instance, instruments referred to in above n 4.

46 Milmo and Rogers (2004), above n 26, at 269 (italics added).

47 Robertson G and Nicol A (2002), *Media Law* 4th Edn, Penguin, London, at 109.

48 Barendt E, Lustgarten L, Norrie, K and Stephenson H (1997), *Libel and the Media: The Chilling Effect*, Oxford University Press, Oxford, at 195.

asked to prove negatives.⁴⁹ There are even instances in which plaintiffs are asked to prove falsity, as in the tort of injurious falsehood⁵⁰ and in the law of misrepresentation where the plaintiff bears the burden of proving the falsity of the representation.⁵¹ The burden of proof in civil cases generally also stipulates that the “persuasive burden” lies upon the party who substantially asserts the affirmative of the issue.⁵²

It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons. This rule is adopted principally because it is just that he who invokes the aid of the law should be the first to prove his case; and partly because, in the nature of things, a negative is *more difficult to establish* than an affirmative.⁵³

The weight of the burden is more pronounced given that liability for unintentional defamation is a firm common law principle.⁵⁴ Third, the present approach is inimical to freedom of speech: “From the more general perspective of freedom of speech *there is no doubt* that the present rule inhibits the ability of the media to expose what they believe to be matters of public concern”.⁵⁵ Fourth, quite apart from the incompatibility of the presumption of falsity with freedom of speech:

...one can doubt whether it is reasonable to expect the defendant to show the truth of matters, in the nature of things generally outside his personal knowledge, rather than require the plaintiff to show the allegations are false. After all, the plaintiff will always know the truth about his or her conduct.⁵⁶

Fifth, burden reversal supports a key aim of the defamation action – vindication. The “whole purpose” of defamation law is to enable a plaintiff to clear his or her name.⁵⁷ An important consequence of reversing the burden by placing upon the plaintiff

49 Auburn J, Bagshaw R, Day D, Grevling K, Hochberg D, Hollander C, Mirfield P, Oakley AJ, Pattenden R and Whale S (eds) (2005), *Phipson on Evidence*, 16th Edn, Sweet & Maxwell, London, at 131-133, discusses “statutory reverse burdens”, and the impact of the *Human Rights Act* 1998 (UK) on reverse burdens and presumptions (at 142-150).

50 NSWLRC Report No 75, above n 18, Para 4.19 (references omitted).

51 NSWLRC Report No 75, above n 18, Para 4.19 n 33. Barendt E (1993), “Libel and Freedom of Speech in English Law”, *Public Law* 449, at 457 makes a similar observation.

See further *Spencer Bower and Turner, The Law of Actionable Misrepresentation* (1974), 3rd Edn, Butterworths, London, Para 68, where the authors state that “the burden of alleging and proving falsity in fact, which alone turns a representation into a misrepresentation, *rests on the party who sets it up*”.

52 *Phipson on Evidence*, above n 49, at 127. The authors’ description of the “persuasive burden” includes references to it as “the legal burden”, “the probative burden”, and “the ultimate burden” (at 125).

53 *Phipson on Evidence*, above n 49, at 127 (italics added, references omitted).

54 See *Hulton v Jones* [1910] AC 20.

55 Milmo and Rogers (2004), above n 26, at 269 (italics added).

56 *Phipson on Evidence*, above n 49, at 196 (reference omitted). For a similar argument see NSWLRC Report No 75, above n 18, Para 4.20.

57 *Reynolds v Times Newspapers Ltd & Ors* [1994] 4 All ER 609, Lord Cooke, at 641.

the onus of proving falsity will be to make falsity “a central aspect of the claimant’s claim”.⁵⁸ Taking into account that vindication is the primary purpose of defamation law and that truth plays a critical role in the human dignity argument for reputation,⁵⁹ reversing the burden honours more faithfully the core objective of defamation law. As Milo has noted:

Adjudication on truth or falsity *would facilitate the restoration of the reputation* of an unjustly defamed plaintiff. It is the case that this adjudication takes place in any event if the defendant pleads justification for the law of defamation, but a failed defence of justification does not amount to a finding of falsity in favour of the claimant; all it implies is that the defendant has failed to prove as a matter of probability that the statement was true. This is not the same as a finding that as a matter of probability the statement was false.⁶⁰

Sixth, through some defamation defences the common law accepts the “chilling effect” argument and acknowledges that it is better to tolerate the damage occasioned by speech than to inhibit the publication of material which is of public interest (or *public concern* as will be argued below)⁶¹ and which may well be true.⁶² This acknowledgement, however, is confined to the defences of absolute and qualified privilege and excludes the truth and honest opinion defences.⁶³ This exclusion places an unfair burden upon the defendant:

The defendant must prove the truth of the facts relied on if these latter defences are to be pleaded successfully. There is a presumption of falsity. The risk of a necessarily fallible legal process, in other words, is largely borne by the defendant. In view of the popular hostility to sections of the press that is quite a substantial risk.⁶⁴

B. Falsity burden and other approaches

This section focuses on the falsity burden in three jurisdictions – the United States, England and Australia. Two contrasting approaches, with significant ramifications for the balance between freedom of speech and the protection of reputation are evident in these jurisdictions. On one side is the United States with a legal regime that favours freedom of speech over the protection of reputation. On the other side lies England and Australia, with a reverse approach.

58 Milo (2008), above n 20, at 165.

59 Milo (2008), above n 20, at 166. For a more detailed consideration of that argument see 33–41 (*ibid*).

60 Milo (2008), above n 20, at 165–166.

61 See heading C sub-heading 2 below.

62 Barendt (1993), above n 51, at 456 (reference omitted).

63 Barendt (1993), above n 51, at 456.

1. *Falsity burden and the United States*

In stark contrast to the current Australian and English approach,⁶⁵ the United States has made important strides towards protecting freedom of speech in its law of defamation. In the United States “anyone involved in a matter of public concern who sues the mass media for libel must now offer evidence of falsity to have a case.”⁶⁶ This rule is closely linked to the ‘public figure’ requirement. This approach in a nutshell classifies people who may be legitimately targeted for scrutiny so that those falling into ‘public figure’ categories must yield varying concessions to freedom of speech interests. The US Supreme Court has revised the rules on truth as a libel defence, particularly shifting the burden of proof from the media to the plaintiff. As Overbeck notes:

Thus, the rule today is that to win a libel case resulting from the media’s coverage of any issue of public concern, the plaintiff always bears the burden of proving that the libellous statement is false. But what about libel cases not involving issues of public concern? The Supreme Court left that up to the states: the states are constitutionally required to place the burden of proof on plaintiffs only in cases involving public issues. However, some states have *completely abandoned* the common law rule that presumed all libellous statements to be false and *now require all plaintiffs to prove the falsity of every allegedly libellous statement*.⁶⁷

In most US jurisdictions, however, plaintiffs suing in respect of a matter of private concern still enjoy the traditional protection.⁶⁸

64 Barendt (1993), above n 51, at 456.

65 The common law of England carries a presumption of falsity although there has been discussion on this. However, an amendment (*Defamation Bill* 1996) moved in the House of Lords Committee stage to place the onus on the plaintiff to show falsity was defeated: see *Phipson on Evidence*, above n 49, at 195; and n 156 below.

See also Barendt (1993), above n 51, at 457, where the author advances the argument that there is a logical basis for English courts to “alter the rules concerning the burden of proof, just as in the United States it is usually for the plaintiff to prove that the libel is false.”

66 Holsinger R and Dilts JP (1997), *Media Law*, 4th Edn, McGraw-Hill, New York, at 163. This position was arrived at as a result of the *New York Times v Sullivan* 376 US 254 (1964) decision. In that case a police official sued the newspaper for publishing an advertisement placed by civil rights activists in which it was claimed that Negro students engaged in non-violent demonstrations were being met by an unprecedented wave of terror. The advertisement contained several false statements, some of which were minor inaccuracies. The police chief, who was not named in the advertisement, joined three others in suing the newspaper. The US Supreme Court affirmed and extended the burden on the plaintiff to prove falsity by holding in *Philadelphia Newspapers v Hepps* 475 US 767, 12 Med L Rptr 1977 (1986), that even private individuals who sue in connection with a matter of public concern must prove falsity. The majority said that to hold otherwise would have a chilling effect that would be contrary to the First Amendment’s protection of true speech on matters of public concern.

67 Overbeck W (2007), *Major Principles of Media Law*, Thomson Wadsworth, Belmont, CA, at 127 (italics added).

68 See, for instance, *Garziano v EI du Pont de Nemours & Co*, 818 F 2d 380 (5th Cir 1987). There, the plaintiff sued his employer who accused him of workplace sexual harassment and referred to the event in an information bulletin on sexual harassment. While the court agreed that the bulletin was protected by privilege, it found that there was no reason to spread that information in the community at large.

For some professional communicators, the common law of libel, with its easy assumption of falsity and harm, *is still there and can be used by private individuals* whose lives are needlessly defamed...Such plaintiffs need prove only identification, publication, and defamation. Harm and fault are assumed. From then on, the burden of proof is on the defendants to justify their acts, if they can.⁶⁹

Thus, American defamation law “has not been completely brought under the realm of the First Amendment”⁷⁰ which otherwise heavily influenced the way American defamation law has developed. Private individuals who are needlessly defamed are, as just noted, still protected by the common law of defamation “with its easy assumption of falsity and harm”. Importantly, for present purposes, in cases that involve matters of public concern, the First Amendment protection of freedom of speech has come to bear heavily on the development of defamation law.⁷¹ Its primary characteristic that is of relevance to the present discussion is the free speech priority achieved by way legal liability is designed. That is, the media benefits as a result of heavier burdens placed on plaintiffs than those shouldered by plaintiffs in jurisdictions such as England and Australia. The complete picture of the American plaintiff’s burden, with some qualifications to be seen shortly, is to show up to *six* elements: (a) the matter was published; (b) the words were of and concerning the plaintiff; (c) the material is defamatory; (d) the defendant is at fault (the defamation was published as a result of negligence or recklessness); (e) the material is false (a burden only for persons suing for defamation related to matters of public concern); and (f) personal harm (such as loss to reputation, emotional distress, or the loss of business revenues).⁷²

69 Holsinger and Dilts (1997), above n 66, at 139 (italics added). As to the view in the quotation that fault is assumed see the discussion below under heading 3.3.2 where it is noted that “every person suing the media for libel must prove some level of fault.”

70 Holsinger and Dilts (1997), above n 66, at 139. The First Amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

71 The following forceful defence of freedom of speech expressed by the majority in *Gertz v Robert Welch Inc*, 418 US 323 (1974), at 339-340 provides a useful exposition of the principle:

However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society’s interest in “uninhibited, robust, and wide-open” debate on public issues (reference omitted).

72 These six elements are cited by Middleton KR and Lee WE (2009), *The Law of Public Communication*, 7th Edn, Pearson Education Inc, Boston, at 99; and by Holsinger and Dilts (1997), above n 66, at 163. Pember DR (2003/2004), *Mass Media Law*, McGraw-Hill, New York, at 136, however, cites only five elements (excluding the injury element).

The falsity and fault elements are “fairly recent additions” to American defamation law;⁷³ and they only apply to cases that impinge on the First Amendment right to free speech.⁷⁴ Nonetheless, in practice this means that “[m]ost plaintiffs have to satisfy *all six* elements of a libel suit.”⁷⁵ Furthermore, even private-figure individuals must prove falsity provided that the action involves matters of a public concern. There is no longer any doubt that the First Amendment requires a private plaintiff to prove falsity against a media defendant that publishes matters of public concern.⁷⁶ The US Supreme Court has held:

[T]he need to encourage debate on public issues that concerned the Court in the governmental-restriction cases is of concern in a similar manner in this case involving a private suit for damages: placement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result. Because such a “chilling” effect would be antithetical to the First Amendment’s protection of true speech on matters of public concern, we believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant.⁷⁷

The US approach has been described as the “clearest example of departure from the common law.”⁷⁸ This approach recognises that “requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so” but such an approach has been justified primarily on the ground that the First Amendment requires the protection of some falsehood in order to protect speech that matters.⁷⁹ Thus, the US courts have been willing to insulate even “demonstrably false speech” from liability so as to provide “breathing space” for true speech on matters of public concern.⁸⁰ This, however, does not mean that the media are given a *carte blanche* to

73 Pember (2003/2004), above n 72, at 136-137.

74 Holsinger and Dilts (1997), above n 66, at 163.

75 Middleton and Lee (2009), above n 72, at 100 (italics added). The burden of proof for private persons suing for defamation depends on state law (ibid, at 119).

76 Hirth (2004), above n 22, at 542.

77 *Philadelphia Newspapers v Hepps* 475 US 767, 12 Med L Rptr 1977 (1986), at 777 (references omitted).

78 Milmo and Rogers (2004), above n 26, at 269 n 22 citing *Philadelphia Newspapers v Hepps* 475 US 767, 12 Med L Rptr 1977 (1986).

79 *Philadelphia Newspapers v Hepps* 475 US 767, 12 Med L Rptr 1977 (1986), at 778.

80 See *Philadelphia Newspapers v Hepps* 475 US 767, 12 Med L Rptr 1977 (1986), at 778. See further the view expressed in *Hustler Magazine Inc et al v Jerry Falwell* 485 US 46, at 52 (1988) (references omitted):

False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective. But even though falsehoods have little value in and of themselves, they are "nevertheless inevitable in free debate," and a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted

peddle falsity because once the plaintiff's burden is satisfied the attention turns to the defendant and the inquiry then will "generally encompass evidence of the falsity of the matters asserted."⁸¹ It is probably an exaggeration to say that "the American rule may be said to be a rule whereby it is better that ten false publications remain unpunished than that one true one be suppressed."⁸² Given that the elements of falsity, fault and harm are not comprised in the Australian formulation of the cause of action, and also given that these elements considerably influence the fate of a defamation action in the USA, these three elements are considered below in more detail.

(a) The requirement of proof of falsity

The US defamation law position makes a distinction between 'public' and 'private' persons and between matters of public and private 'concern'. The governing principle, briefly stated, is as follows: "Public officials, public figures, and private persons involved *in matters of public concern* must prove not only recklessness or negligence to win libel suits but also falsity."⁸³ Private persons who are not involved in matters of public concern still must prove at least negligence but *not necessarily falsity*.⁸⁴ That said, however, the plaintiff's burden of proving falsity, where the burden arises, is not as onerous as it might appear, and "it may be somewhat easier to prove falsity than to prove fault."⁸⁵ In *Philadelphia v Hepps* the US Supreme Court said its decision "adds

"chilling" effect on speech relating to public figures that does have constitutional value. "Freedoms of expression require 'breathing space.'" This breathing space is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove both that the statement was false and that the statement was made with the requisite level of culpability."

81 *Philadelphia Newspapers v Hepps* 475 US 767, 12 Med L Rptr 1977 (1986), at 778 (references omitted).

82 Schauer F (May 1980), "Social foundations of the law of defamation – a comparative analysis", Vol 1 No 1, *Journal of Media Law and Practice* 3, at 12. One Australian Law Reform Commission appeared to concur with Schauer's view: see NSWLRC Discussion Paper No 32, above n 38, Para 10.12.

In any event the law's accommodation of such lop-sidedness in burdens is well-acknowledged in the criminal standard of proof maxim: "For the law holds, that it is better that ten guilty persons escape, than that one innocent suffer" (Sir William Blackstone (1783), *Commentaries on the Laws of England*, 9th ed., Book 4, Chapter 27, at 358 (reprinted 1978)).

83 Middleton and Lee (2009), above n 72, at 144 (italics added).

84 See *Philadelphia Newspapers v Hepps* 475 US 767, 12 Med L Rptr 1977 (1986), at 776-777:

To ensure that true speech on matters of public concern is not deterred we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern....

85 Holsinger and Dilts (1997), above n 66, at 163.

only marginally to the burdens that the plaintiff must already bear”.⁸⁶ Although the standard of proof for fault is that the evidence has to be clear and convincing, US appeal courts have held that falsity need only be proved by a “preponderance of the evidence,” that is, there need be only more evidence than not that the statements were false.⁸⁷ If, however, the evidence indicates that the statements are true, they are not actionable, regardless of the extent of harm caused and regardless of the defendant’s motives. In *Garrison v Louisiana* the Supreme Court held that truth “may not be the subject of either civil or criminal sanctions where the discussion of public affairs is concerned.”⁸⁸

(b) The requirement of proof of fault

Given the close nexus between falsity and fault – the degree of journalist’s fault is said to be “the central issue” in many libel suits⁸⁹ – it is useful to consider the latter element in the American defamation scheme. Since the decision of the US Supreme Court in *Gertz v Welch* “every person suing the media for libel must prove *some level* of fault.”⁹⁰ The historical turning point in this area is the US Supreme Court decision in *New York Times v Sullivan* where the Court declared unconstitutional the common law of strict liability when the media defamed a public official.⁹¹ This decision, commonly referred to as the *public figure defence*, revolutionised and constitutionalised US defamation law, with its ruling that the robust political debate necessary in a democracy is inadequately protected by a common law requiring a libel defendant to prove the truth to overcome presumed falsity.⁹² Australian defamation law took a leaf out of the

86 *Philadelphia Newspapers v Hepps* 475 US 767, 12 Med L Rptr 1977 (1986), at 778.

87 Holsinger and Dilts (1997), above n 66, at 163; *Ratray v City of National City*, 23 Med L Rptr 1779 (9th Cir 1995), cert filed, *City of National City v Ratray*, US No 94-2062; *Goldwater v Ginsburg*, 414 F 2d 324, 1 Med L Rptr 1737 (2d Cir 1969).

88 379 US 64, 85 S Ct 209, 12 L Ed 2d 1042, 1 Med L Rptr 1548 (1964).

89 Middleton and Lee (2009), above n 72, at 117. Soloski J (1985), “The Study and the Libel Plaintiff: Who Sues for Libel?”, 71 *Iowa L Rev* 217, at 218, notes that in one study negligence or malice was the central legal issue in nearly ninety per cent of libel cases against the media.

90 See *Gertz v Robert Welch Inc*, 418 US 323 (1974) (italics added).

91 *New York Times v Sullivan* 376 US 254 (1964).

92 In *Sullivan* the US Supreme Court raised the burden of proof for public officials by introducing what has come to be called the *New York Times* actual malice. The Court said the First Amendment protects criticism of government officials even if the remarks are false and defamatory. The Court said that public officials cannot successfully sue for defamation unless they establish that defamation has been published with knowing falsity or reckless disregard for the truth.

Sullivan page in developing the implied freedom of political communication⁹³ defence but did not go quite as far as the US did, partly because the “conceptual foundation” for the two approaches was deemed to be different.⁹⁴ Even so, it is arguable that in addition to the First Amendment imperative, the extent of the leeway given to American defamation defendants is itself a product of the free speech-oriented *interpretation* of the First Amendment by US Courts, rather than being the product of an incontrovertible constitutional injunction.⁹⁵

In the US, a further turning point came in *Gertz v Welch*,⁹⁶ which not only defined public figures but also eliminated the doctrine of strict liability in defamation law for private persons.⁹⁷ Since then the law has developed in a way that a defamation plaintiff – aside from proving defamation, identification and publication – must also prove that a media outlet erred in the preparation of a story. Since the *Gertz v Welch* decision every person suing the media for libel must prove some level of fault – plaintiffs cannot succeed unless they can show that the media defendant published “with fault, usually

93 For a discussion of Australia’s constitutional implied freedom of political communication, see what Chesterman M (2000), *Freedom of Speech in Australian Law: A Delicate Plant*, Ashgate Dartmouth, Hants, England, at 15, refers to as “the seven major ‘free speech’ cases in constitutional law which gave birth to the constitutional principles”: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Cunliffe v Commonwealth* (1994) 124 ALR 121; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; and *Levy v The State of Victoria & Ors* (1997) 189 CLR 579.

94 *Levy v The State of Victoria & Ors* (1997) 189 CLR 579, Kirby J, at 637:

The conceptual foundation for the constitutional freedom of communication in Australia is different from that derived from the First Amendment to the United States Constitution, *as it has been interpreted* (italics added).

See also *Levy v The State of Victoria & Ors* (1997) 189 CLR 579, McHugh J, at 622:

Unlike the Constitution of the United States, our Constitution does not create rights of communication.

95 See, for instance, the view expressed by Brennan J for the majority in *New York Times v Sullivan* 376 US 254 (1964), at 269:

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been *settled by our decisions*. The constitutional safeguard, *we have said*, “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people” (italics added, reference omitted).

96 418 US 323 (1974).

97 *Gertz v Robert Welch Inc*, 418 US 323 (1974). The term “public figure” has since undergone refinement so that a distinction is made between “public officials”; “public figures”; “limited, or ‘vortex’ public figures”; “involuntary public figures”; “public personalities”; and “private individuals”: see Holsinger and Dilts (1997), above n 66, at 164-177.

negligence for private plaintiffs, recklessness for public officials and figures.”⁹⁸ This revolutionising of US defamation law, however, was not unbridled so as to leave the media free to wreak havoc on reputations. In respect of *fault*, once a court decides that a person is a public official, a public figure, or a private person, the focus of the case “turns to the question of *fault*, that is, whether communicators published the alleged libel carelessly or maliciously.”⁹⁹ Private persons must prove that a publisher acted deliberately, negligently or carelessly, while public officials and public figures must prove that the publisher knew that the publication was false or published it with reckless disregard for the truth.¹⁰⁰ A defendant who is a non-media entity private plaintiff, and is not involved in a matter of public concern, is permitted to sue for presumed damages without proving fault.¹⁰¹

(c) The requirement of proof of harm

Although the ‘harm’ element is not directly relevant for the purposes of the reforms proposed in this work, its role in the American defamation scheme is briefly noted here in the interests of gaining a complete picture of the “six” hurdles placed in the path of most American defamation plaintiffs.¹⁰² Proof of harm is the sixth element of a plaintiff’s defamation case in the United States: “A plaintiff *cannot* sue successfully over a harmless libel, although some harm to reputation may be ‘presumed’.”¹⁰³

2. *Falsity burden and England*

98 Middleton and Lee (2009), above n 72, at 117. Robertson and Nicol (2002), above n 47, at 75 described the US view of the English approach as follows:

What US courts found repugnant about United Kingdom law was how it placed the burden of proving truth on the defendant, and held him liable to pay damages for statements he honestly believed to be true and had published without negligence.

99 Middleton and Lee (2009), above n 72, at 134 (*italics in original*).

100 See *Philadelphia Newspapers v Hepps* 475 US 767, 12 Med L Rptr 1977 (1986), Stevens J, at 782, where his Honour referred to the principle in *Gertz v Robert Welch Inc*, 418 US 323 (1974), at 347:

While deliberate or inadvertent libels vilify private personages, they contribute little to the marketplace of ideas...it helps to remember that the perpetrator of the libel suffers from its failure to demonstrate the truth of its accusation only if the ‘private-figure’ plaintiff first establishes that the publisher is at ‘fault’ i.e. either that it published its libel with ‘actual malice’ in the *New York Times* sense (“with knowledge that it was false or with reckless disregard of whether it was false or not,”) or that it published with that degree of careless indifference characteristic of negligence (references omitted).

101 Holsinger and Dilts (1997), above n 66, at 139.

102 See above heading 2A4.

Unlike in the United States, the English law of defamation remains weighted in favour of the plaintiff although in more recent times, as a result of a clamour for law reform in this area, the burden reversal crusade has gained new momentum and this is discussed below. In England, an earlier proposal to place the burden of proving falsity on the plaintiff made to the Faulks Committee was greeted by what Robertson and Nicol have described as a “pompous response”,¹⁰⁴ that is, the Committee favoured the retention of the burden of proving truth on the defendant because it “tends to inculcate a spirit of caution in publishers of potentially actionable statements which we regard as salutary”.¹⁰⁵ There is older English authority, however, in support of the view that the burden of proof of falsity should be on the claimant. One such authority comes from the late nineteenth century where “Lord Esher MR seemed to be departing from that general rule, and saying that the burden of proof of falsity was on the claimant.”¹⁰⁶ Additional support for this idea comes from an earlier case where it was held that the burden of proof of falsity automatically moved to the claimant seeking an interlocutory injunction.¹⁰⁷ A leading American commentator writing at the time understood that the burden of proof was reversed in English law. Townshend summarised the English position as being that “the court will not in general interfere unless satisfied that the statements complained of in the document are untrue.”¹⁰⁸ However, the transfer of the burden to the plaintiff did not gain acceptance, notwithstanding the celebrated position favouring freedom of speech taken in *Bonnard v Perryman*¹⁰⁹ where the court underscored the freedom of speech imperative. Lord Coleridge CJ, delivering judgment of an impressive majority, said:

The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the

103 Middleton and Lee (2009), above n 72, at 145-6.

104 Robertson and Nicol (2002), above n 47, at 109.

105 Committee on Defamation, HMSO, 1975, Cmnd 5909, Para 141.

106 Mitchell (2005), above n 31, at 94, citing *William Coulson and Sons v James Coulson and Co* (1887) 3 TLR 846.

107 *Quartz Hill Consolidated Gold Mining Co v Beall* (1882) 20 ChD 501.

108 Mitchell (2005), above n 31, at 94, citing Townshend (1890), *A Treatise on the Wrongs Called Slander and Libel*, 4th Edn, New York, at 692.

109 [1891] 2 Ch 269.

contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel.¹¹⁰

In recent years, however, fuelled by the growing emphasis that both the common law and constitutional or quasi-constitutional instruments have been giving to freedom of speech, there has been a growing recognition of the need for reform:

[Reform is] now clearly seen to be necessary to effectuate free speech as well as to bring libel law clearly into line with other civil actions. A reversal of the burden of proof is essential if the purpose of Article 10 is to be achieved, namely to inculcate a salutary spirit of caution in wealthy public figures who wish to use the law to silence their critics.¹¹¹

This view was set in the English context where the view has been taken that “there is a constitutional right to freedom of expression.”¹¹² In the *Reynolds* case Lord Steyn noted that the *Human Rights Act* 1988 (UK) “reinforced” the constitutional dimension of freedom of expression, and that that was “the backcloth” against which the defamation appeal before the court should be considered.¹¹³ His Lordship noted:

The new landscape is of great importance inasmuch as it provides the taxonomy against which the question before the House must be considered. *The starting point is now the right of freedom of expression*, a right based on a constitutional or higher legal order foundation. Exceptions to freedom of expression must be justified as being necessary in a democracy. *In other words, freedom of expression is the rule and regulation of speech is the exception requiring justification.*¹¹⁴

The free speech imperative has earned a place in the election manifestoes of Britain’s major political parties in the 2010 general elections. The three parties in their manifestoes pledged to “reform libel laws to protect freedom of speech” (Conservatives); “bring forward new legislation on libel to protect the right of defendants to speak freely” (Labour); and “protect free speech, investigative journalism

110 *Bonnard v Perryman* [1891] 2 Ch 269, at 284 (Lord Esher MR, and Lindley, Bowen and Lopes LJJ concurring).

111 Robertson and Nicol (2002), above n 47, at 109. Article 10 refers to the European Convention on Human Rights incorporated into English law by Section 12, *Human Rights Act* 1998 (UK). For a similar view about modern influences on freedom of speech see Tipping A (2002), “Journalistic Responsibility, Freedom of Speech and Protection of Reputation – Striking the Right Balance Between Citizens and the Media”, Vol 10 *Waikato Law Review* 1, at 2. See further Milo (2008), above n 20, at 156.

112 *Reynolds v Times Newspapers Ltd & Ors* [1999] 4 All ER 609, Lord Steyn, at 628.

113 *Reynolds v Times Newspapers Ltd & Ors* [1999] 4 All ER 609, at 628.

114 *Reynolds v Times Newspapers Ltd & Ors* [1999] 4 All ER 609, at 628–629 (italics added). In the same case Lord Nicholls also made similar remarks. While Lord Nicholls appeared on the one hand to be referring to freedom of speech in relation to “political matters”, his Lordship also acknowledged on the other hand that one of the “contemporary functions of the media is investigative journalism [which] as much as the *traditional activities of reporting and commenting*, is part of the *vital role* of the press and of the media generally” (at 622, italics added). This latter formulation appears to protect freedom of speech more broadly.

[and provide] a robust responsible journalism defence” (Liberal Democrat).¹¹⁵ This was described as a “big boost”¹¹⁶ for libel campaigners. An earlier Ministry of Justice review that considered the push for reform, however, does not hold promise for the burden reversal argument proposed in this paper. That report focussed on “four principal areas in which the case for reform has been urged with particular emphasis in recent times”¹¹⁷ but none of the four principal areas directly pertain to burden reversal. Likewise, a slightly earlier consideration of the issue by the House of Commons, while acknowledging “the difficulties with the whole burden of proof being placed on the defendant”¹¹⁸ did not agree that “defendants should be required to prove the truth of their allegations.”¹¹⁹ One justification cited for this position was such a reversal would “often require claimants to prove a negative.”¹²⁰ The example cited there for this justification is the case of Kate and Gerry McCann who were libelled repeatedly by the press in relation to their missing daughter.¹²¹ The Committee’s reservation on this point can be easily disposed of – the McCann’s were not ‘public figures’ and, within the scheme of the proposals in this paper, would not be ideal candidates for the burden reversal principle.

3. *Falsity burden and Australia*

The prevailing position in Australia in this area is similar to the one in England. While Australia lacks an express constitutional premise for the protection of free speech such as the one recognised in England, several justifications may be cited for a reassessment of the present Australian position. The burden reversal was proposed more than a

115 Respectively they are – Conservative Manifesto 2010, at 79. Retrieved 4 May 2010, from <<http://www.conservatives.com/Policy/Manifesto.aspx>>; Labour Party Manifesto 2010, Chapter 9, at 9:3. Retrieved 4 May 2010, from <labour.org.uk/manifesto>; and Liberal Democrat Manifesto 2010, at 93. Retrieved 4 May 2010, from <http://www.libdems.org.uk/our_manifesto.aspx>

116 See Sweeny M and Hirsch A (2010), ‘Libel Law Reform Promised in Labour Manifesto’, *The Guardian*, 12 April. Retrieved 14 April 2010, from <<http://www.guardian.co.uk/media/2010/apr/12/labour-manifesto-libel-legislation?&CMP=EMCMEDIEML665>>

117 *Report of the Libel Working Group*, above n 9. The report noted that although the burden of proof was among the issues “recognised to be of significant interest” it was not discussed as a priority “given the limited time available” (at 44).

118 House of Commons Culture, Media and Sport Committee, *Press Standards, Privacy and Libel*, Second Report of Session 2009-10, Volume 1, 24 February 2010, Para 135.

119 *Press Standards, Privacy and Libel*, Report, above n 118, Para 135.

120 *Press Standards, Privacy and Libel*, Report, above n 118, Para 134. See also text accompanying above n 40 on this point. “**prove a negative**”

121 *Press Standards, Privacy and Libel*, Report, above n 118, Para 134.

decade ago by the New South Wales Law Reform Commission which recommended that “[i]n general falsity should be an essential ingredient of the cause of action” in defamation and that the “burden of proving that a defamatory imputation is false should rest on the plaintiff.”¹²² Some of the Commission’s justifications for this proposal were:¹²³ (a) a failure to put falsity in issue could enable defamation law to be used to protect undeserved reputations; (b) speaking the truth should generally not give rise to civil liability simply because the truth is defamatory; (c) although the determination of truth or untruth of the defamatory imputation is the gravamen of the plaintiff’s complaint in most cases truth or falsity does not play a critical role on the present approach; (d) the plaintiff, who ‘knows the truth’, is better placed to prove falsity than the defendant to prove truth;¹²⁴ (e) forcing the plaintiff to either litigate the issue of truth or concede it is consistent with the value that vindication comes primarily from a finding that a defamatory publication is false;¹²⁵ and (f) freedom of speech would be facilitated.¹²⁶ The Commission said further:

[I]t is only by making this change that the law of defamation can be made to fulfil its *essential function of vindicating* plaintiffs’ reputations in a way which not only addresses many intractable and long-standing problems of the law of defamation but also promotes the flow of accurate information.¹²⁷

The Commission also proposed two exceptions to the rule: (a) when the publication does not involve a matter of public concern; and (b) when the plaintiff establishes that the matter concerned is “not capable of being proved true or false”.¹²⁸

These proposals have been largely ignored in the Australian legal framework and attention to or discussion on it has been cursory at best. For instance, even though it was claimed during the Australian defamation law reform exercise in the middle of the last decade that “[t]he defence of truth has been the *touchstone* of reform focus”,¹²⁹ except for the introduction of a uniform truth and contextual truth defence into statute, the

122 NSWLRC Report No 75, above n 18, see Recommendations 5 and 7 and Para 4.1.

123 NSWLRC Report No 75, above n 18, Paras 4.7-4.20.

124 NSWLRC Report No 75, above n 18, Paras 4.8-4.20 generally.

125 NSWLRC Report No 75, above n 18, Para 4.11.

126 NSWLRC Report No 75, above n 18, Para 4.12.

127 NSWLRC Report No 75, above n 18, Para 1.16 (*italics added*).

128 NSWLRC Report No 75, above n 18, Para 4.15. See also Para 4.22 and Recommendation 8.

129 Standing Committee of Attorneys-General (SCAG), “Proposal for uniform defamation laws” (July 2004), SCAG Working Group of State and Territory Officers, Item 4.9.4, at 23, in the discussion preceding Recommendation 14 (*italics added*).

Uniform Defamation Acts (UDA) made little headway in reforming the truth defence. The UDA introduced no new significant feature into the truth defence apart from substituting the *truth alone* defence for the *truth plus* defence in those jurisdictions, where only the latter had been available and codifying the contextual truth defence. The truth defence – “the principal defence to defamation actions”¹³⁰ – has consistently failed to attract deeper reform scrutiny. This is unfortunate especially given the need for the law to keep abreast of changing conditions. As the Full Court of the High Court acknowledged in *Lange*:

Since 1901, the common law — now the common law of Australia — has had to be developed in response to changing conditions. The expansion of the franchise, the increase in literacy, the growth of modern political structures operating at both federal and State levels and the modern development in mass communications, especially the electronic media, *now demand the striking of a different balance from that which was struck in 1901.*¹³¹

One explanation for why the truth defence has slipped under the reformers’ radar may be found in the view taken by the States and Territories Attorneys-General working group that “the reality is that *truth is not in issue* in the vast preponderance of matters that are litigated. In practice, the issue is *hardly ever relevant.*”¹³² This was a surprising position and was accordingly roundly contradicted by a prominent bar association, which said: “Truth is on very many occasions highly relevant”.¹³³ Another explanation for the absence of attention to substantive reform of the truth defence may lie in the duress that accompanied the UDA’s introduction. The UDA was introduced amidst “considerable pressure”,¹³⁴ it was “probably defective [and based on] the lowest common denominator in relation to achieving uniformity”,¹³⁵ because it was made up of a “hodge-podge”¹³⁶ that “appears to have been cobbled together”¹³⁷ in the eastern States

130 ALRC Report No 11, above n 12, Para 120 citing *Gatley*, 7th Edition.

131 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ, at 565 (italics added).

132 SCAG Working Group of State and Territory Officers, “Proposal for Uniform Defamation Laws”, above n 129, Item 4.9.4, at 23, in the discussion preceding Recommendation 14 (italics added).

133 See New South Wales Bar Association in its Submissions to the Standing Committee of Attorneys-General Working Group of State and Territory Officers, July 2004 Proposal for Uniform Defamation Laws.

134 Pearson M (July 2007), “A review of Australia’s defamation reforms after a year of operation”, Vol 29(1) *Australian Journalism Review* 41, at 41.

135 Hon V Chapman, *Defamation Bill 2005* (South Australia), Second Reading, Debate, Hansard, 13 September 2005, at 1840ff.

136 Ackland R (2005), “Correction not cash”, *The Walkley Magazine*, Issue 32 April/May, at 37

137 Hon Sue Walker, *Defamation Bill 2005* (Western Australia), Consideration in Detail, State Legislative Assembly, Hansard, 15 September 2005, at 5486

of Australia. Thus, the opportunity for achieving a truly “historic milestone”¹³⁸ in the development of defamation law as claimed by the States and Territories Attorneys-General, was missed.

C. Scope of matters of public interest: *public figures*; *public concern*

Having examined the question of burden reversal above, we may now turn our attention to the three caveats placed on this proposal in this paper – that is, such burden reversal should occur only in instances where the burden shifts only in respect of defamatory publications where the complainant is a public figure; the matter complained about is a matter of public concern; and the legal action is against a media defendant. The term ‘media defendant’ is potentially also problematic but is not within the scope of this paper. It may, however, be broadly stated that the term ‘media defendant’ for present purposes may be defined to refer to defendants who are either individuals or a corporate entity and they are engaged in the publication of news and information or who practice the craft of journalism.¹³⁹ Given the potential for vagueness about the terms *public figure* and *matters of public concern* it is necessary to examine the two terms and to lay further groundwork for reform recommendations. At the outset, it is useful to emphasise that the term ‘public figure’ here is distinct from the term ‘matter of public concern’. The primary difference is that the former pertains to the *person* bringing the action and, for instance, that person’s conduct in relation to the matter that gives rise to the action whereas the latter pertains to the *subject matter* complained about. Each term is examined in turn below.

1. Defining ‘public figure’

This paper advocates a broad interpretation of what constitutes matters of public concern so as to give priority to freedom of speech but the test is amenable to proportionality controls. The American approach has been to classify *people* who may be legitimately targeted for scrutiny so that those falling into ‘public figure’ categories

138 Hon Jim McGinty, *Defamation Bill 2005* (WA), Introduction and First Reading, State Legislative Assembly, Hansard, 17 August 2005, at 4129.

139 See, for example, the *Broadcasting Services Act 1992* (Commonwealth), s 202(5) where ‘journalist’ is defined as someone engaged in the profession or practice of reporting for photographing, editing, recording or making television or radio programs; or datacasting content of a news, current affairs, information or documentary character. This definition, appearing as it does in ‘broadcasting’ legislation, does not include the print medium.

must yield varying concessions to freedom of speech interests. The terminology commonly used to describe such a person is ‘public figure’. Such a person is distinguishable from a ‘private person’ in that the latter “does not meet the definition of a public official, an all-purpose public figure, or a limited-purpose public figure”¹⁴⁰ (these terms will be examined shortly). This, in turn, means that the plaintiff, being a private person, in most American jurisdictions is not required to prove that the defendant lied or exhibited reckless disregard for the truth in publishing the libel.¹⁴¹

The *public figure* test “has radically altered the cause of action in United States defamation law.”¹⁴² It has also “been severely criticised both in the United States and Australia”¹⁴³ and has been consistently rejected in Australia. The High Court in *Theophanous* case¹⁴⁴ in Australia did entertain the prospect of a form of public figure test for Australia¹⁴⁵ although the approach in the *Lange* case¹⁴⁶ has led to the view that the High Court “unanimously dispensed with *Theophanous* without formally overruling it”.¹⁴⁷ Or, as other commentators have put it: “the constitutional defence (established by *Theophanous*) disappeared without trace”;¹⁴⁸ the High Court in *Lange* adopted “a

140 Pember (2003/2004), above n 72, at 180.

141 Pember (2003/2004), above n 72, at 180. Most plaintiffs will only have to demonstrate that the defendant failed to exercise reasonable care in preparing and publishing the defamatory material, although there are a few exceptions to this rule. Varying burdens are placed on “private” plaintiffs in some states so that in these states (including California, Colorado, Indiana, Alaska and New York) they must prove a higher degree of fault than simple negligence when suing a media outlet for defamation based on a story about a matter of public interest (ibid, references omitted).

142 NSWLRC Report No 75, above n 18, Para 5.7.

143 See *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, Mason CJ, Toohey and Gaudron JJ, at 134.

144 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.

145 See the view of the New South Wales Law Reform Commission in NSWLRC Report No 75, above n 18, Para 5.5, that the High Court’s decisions in *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 and *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 “may establish a form of public figure test”.

146 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

147 Potter R (1997), “Constitutional Defamation Defence Disappears as *Theophanous* Effectively Overruled”, Vol 16 No 3, Communications Law Bulletin 1, at 1. The author also notes that in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, the High Court “said that it was arguable that *Theophanous* did not contain any binding statement of constitutional principle” (ibid).

148 Gillooly (1998), above n 17, at 192.

change of analysis”;¹⁴⁹ or the *Theophanous* defence “was abolished by the High Court in *Lange*”.¹⁵⁰

The American approach to public figures remains attractive. As the New South Wales Law Reform Commission noted, albeit on the basis of *Theophanous*, it is “essential to give consideration to the public figure test as it has developed in American jurisprudence and to the possible lines of development of Australian defamation law.”¹⁵¹ The term ‘public figure’ in the American context envisages three categories of individuals who “should meet heavier burdens of proof when suing the media for libel than private plaintiffs”:¹⁵² (a) public officials;¹⁵³ (b) all-purpose public figures;¹⁵⁴ and (c) limited-purpose (or ‘vortex’) public figures.¹⁵⁵ Of the three categories the last-mentioned is the most contentious. Such public figures must meet three criteria: (a) the alleged defamation must involve a public controversy; (b) the plaintiff must have voluntarily participated in the discussion of that controversy; and (c) the plaintiff must have tried to affect the outcome of that controversy.¹⁵⁶ The limited-purpose category

149 Butler D (September 2000), “Lange revisited: exploring the implied freedom of communication concerning government or political matters”, Vol 5 No 2 Media and Arts Law Review 145, at 156.

150 Walker S (2000), *Media Law: Commentary and Materials*, 1st Edn, LBC Information Services, Pyrmont, NSW.

151 NSWLRC Report No 75, above n 18, Para 5.6 (italics added).

152 Middleton and Lee (2009), above n 72, at 127. See Pember (2003/2004), above n 72, at 181, for a useful summary of the three kinds of public persons.

153 This refers to those who are at the very least among the hierarchy of government employees who have or appear to have a substantial responsibility to the public for or control over the conduct of governmental affairs: see *Rosenblatt v Baer*, 383 US 75 (1966). In the four decades since the *Sullivan* decision, American courts have ruled that public officials include those elected to public office and non-elected government employees who play major roles in the development of public policy: see Middleton and Lee (2009), above n 72, at 123. See also Pember (2003/2004), above n 72, at 181.

154 They “occupy positions of such pervasive power and influence that they are deemed public figures for all purposes”: *Gertz v Robert Welch Inc*, 418 US 323 (1974), Powell J for the majority, at 345. Some examples of all-purpose public figures in the US are activist Jane Fonda, publishing mogul Ted Turner and actress Carol Burnett: see Middleton and Lee (2009), above n 72, at 128, for more examples. See also Pember (2003/2004), above n 72, at 181. It has been observed that on occasion plaintiffs “puffed up with self-importance, have happily admitted that they were all-purpose public figures”: Pember (2003/2004), above n 72, at 165, citing *Masson v New Yorker Magazine Inc*, 881 F 2d 1452 (1989).

155 *Gertz v Robert Welch Inc*, 418 US 323 (1974), Powell J, at 345:

Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society.

Powell J found that the plaintiff in that case “did not thrust himself into the vortex” of the issue at hand (at 345).

156 Middleton and Lee (2009), above n 72, at 129.

holds great utility for media defendants because it widens considerably the scope of those who may be considered public figures. Some US courts have conferred limited public figure status on entertainers, athletes and others who attract attention because of visible careers and many lower courts have held that those who seek public attention during their careers ought to have to prove actual malice when the alleged defamation relates to their public performances.¹⁵⁷ In the US, businesses and corporations can sue for defamation, and so can also be classified as public figures in such an action.¹⁵⁸

(a) Public figure and nature of the controversy

The nature of the controversy that generated the libel is an important factor in determining whether a plaintiff is a limited-purpose public figure. Thus, the following qualifications have been made in American judicial decisions: (a) a public controversy is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants;¹⁵⁹ (b) the media is not permitted to manufacture a controversy with the purpose of ensnaring those participating in that controversy as limited-purpose public figures;¹⁶⁰ and (c) not all issues that attract the public's interest are controversies for the purpose of this test.¹⁶¹

(b) Public figure and extent of voluntariness

The starting point is that it is critical, for the purpose of determining whether a person is a limited-purpose public figure, to establish whether the actions of the plaintiff involved in a controversy were voluntary.¹⁶² American courts, however, have been divided on what constitutes voluntariness and even lawyers who specialise in libel law find the decisions "often confusing".¹⁶³ The difficulties that give rise to contradictory judicial

157 Middleton and Lee (2009), above n 72, at 132.

158 Pember (2003/2004), above n 72, at 176.

159 *Foretich v Capital Cities/ABC Inc*, 37 F 3d 1541 (1994).

160 *Khawar v Glob International Inc*, 965 P 2d 696 (1998). This was a classic case of "bootstrapping, which is not permitted": see Pember (2003/2004), above n 72, at 174. See also below n 164 below on this point.

161 *Time, Inc. v Firestone*, 424 IS 448, 1 Media L Rep 1665 (1976). It has also been held that the outcome of a public controversy has "foreseeable and substantial ramifications" for those not directly participating in the debate while news coverage is an indication of a public controversy but is not of itself a sufficient criterion: *Waldbaum v Fairchild Publications*, 627 F 2d, at 1292, 5 Media L Rep 2629, at 2635-36.

162 Pember (2003/2004), above n 72, at 174.

163 Pember (2003/2004), above n 72, at 176. In *Foretich v Capital Cities/ABC Inc*, 37 F 3d 1541 (1994) the plaintiffs, who were publicly accused of sexually abusing their grand daughter, did not become public

findings are not insurmountable in Australia where, unlike the United States, a relatively uniform approach is taken in defamation law. It is suggested that for present purposes a potential plaintiff not be regarded as a public figure simply because he or she felt compelled to rebut accusations or was otherwise drawn into public discussion against their will.¹⁶⁴ Thus, the mere existence of a public controversy does not give rise to a basis upon which to claim that all participants in that controversy are public figures.¹⁶⁵ The public controversy must be a genuine dispute over a specific issue affecting a segment of the general public¹⁶⁶ and the nature and extent of the plaintiff's participation in that issue should be taken into account.

(c) Answering objections to the "public figure" test

It is appropriate to briefly answer some objections made to the introduction of a public figure requirement into Australian defamation law. One objection is that the public figure test is a creature of American defamation law with its accompanying characteristics and is therefore unsuitable for adoption in Australia.¹⁶⁷ Briefly stated, that argument is answered by the growing recognition in Australia that "freedom of expression is a fundamental tenet of a liberal democracy."¹⁶⁸ A second objection is that the public figure test does not effectively deter litigation by public figures, or promote free speech.¹⁶⁹ In reply, it is noted that in the United States there is a high incidence of

figures because they appeared at press conferences and public rallies to deny these charges. In *Jewell v Cox Enterprises Inc*, 27 MLR 2370 (1999), aff'd, *Atlanta Journal-Constitution v Jewell*, Ga Ct App, Nos A01A15b4-66, 10/01/01, however, a libel plaintiff who stepped into the controversy was a public person because he voluntarily stepped into the controversy by giving interviews to the press and was not merely defending himself against accusations that he had planted a bomb in a knapsack in a park during the 1996 Summer Olympic Games in Atlanta.

164 On this point see the reference in above n 160 on "bootstrapping". It is not unknown for the media to "bait" people into participating in a public controversy. That is, an individual may be reluctant to engage with a particular issue but may be forced to do so in order to counter deliberately planted misconceptions or misrepresentations. Evidence of such tactics is never easy to come by but the common media practice of relying heavily on media releases and material supplied by parties with vested interest illustrates the potential for the media to fall victim to manipulation.

165 On this point see text accompanying above n 121.

166 See Middleton and Lee (2009), above n 72, at 129.

167 See NSWLRC Discussion Paper No 32, above n 38, Paras 10.1, 10.6 and 10.7-10.11.

168 Australian Law Reform Commission (September 2007), *Review of Australian Privacy Law*, Discussion Paper No 72, Vol 3, Para 38.105.

169 NSWLRC Discussion Paper No 32, above n 38, Para 10.6. Curiously the same Discussion Paper states:

The public figure test removes the "chilling" effect on the media by removing liability for even gross negligence, where stories about public figures are concerned. The test encourages publication and contribution to the flow of information available to the public (Para 10.39).

successful appeals by defendants and a high incidence of overturning or massive reductions of jury awards.¹⁷⁰ Furthermore, a “significant aspect” of the *Sullivan* decision,¹⁷¹ which laid down new and more demanding criteria of liability for defamation actions brought by public officials in the US, “was its role in protecting critics of government action” from “an unwarranted and excessive penalty at the hands of a government official.”¹⁷² A third objection is that the public figure test causes undesirable side effects.¹⁷³ One suggested example of this is that in the United States there is inadequate emphasis on the vindication of a reputation wrongly tarnished.¹⁷⁴

Another criticism is that the adoption of the public figure test:

...places little or no value on truth or care, and in fact encourages the dissemination of totally false information, which the media need not even investigate. The test thus encourages careless and irresponsible journalism and does not satisfy the public interest in fairness and accuracy.¹⁷⁵

Assuming that these are not extravagant claims it is suggested that concerns in this regard are well-addressed by the prevailing regulatory framework governing the Australian media. This framework includes the role played by the Australian Communications and Media Authority (ACMA)¹⁷⁶ and an extensive range of laws that impact on freedom of speech in Australia.¹⁷⁷ In response to the above concern about “inadequate emphasis on the vindication of a reputation wrongly tarnished” this paper advocates a restoration of defamation law’s vindicatory aim. This can best occur by

170 NSWLRC Report No 75, above n 18, Para 5.16.

171 The decision has been hailed as a victory for press freedom: see Lidsky LB and Wright RG (2004), *Freedom of the Press: A Reference Guide to the United States Constitution*, Praeger, Westport, Conn, at 68.

172 Chesterman (2000), above n 93, at 24–25. While the author notes the existence of a “substantial body” of critics of the Sullivan rule, the author also concedes that the critics “generally defend the aspirations of the Sullivan decision” and that dissatisfaction with the Sullivan rule is “by no means unanimous” (at 157).

173 NSWLRC Discussion Paper 32, above n 38, Para 10.6.

174 NSWLRC Discussion Paper 32, above n 38, Para 10.28.

175 NSWLRC Discussion Paper 32, above n 38, Para 10.39.

176 ACMA requires broadcast service providers “to be responsive to the need for a fair and accurate coverage of matters of public interest”: see section 3(1)(g), *Broadcasting Services Act 1992* (Commonwealth). See further ACMA’s role in overseeing the broadcast sector’s complaints handling process provided for under section 3(1)(i). See also section 5(1)(b)(ii) which empowers ACMA to “deal effectively with breaches” of the rules established by the Act.

177 See Moss I (2007), Report of the Independent Audit into the State of Free Speech in Australia, 31 October. The report was commissioned by the “Australia’s Right to Know” Coalition, comprising major Australian news organizations. According to that Coalition Australian laws contain more than 500 separate prohibitions and restrictions on what the public is allowed to know: see “The State of Free

ensuring that the defamatory material is neutralised by setting the record set straight, as “plaintiffs most want”.¹⁷⁸ A fourth objection is that the American approach to public figures has created complex categories of plaintiffs.¹⁷⁹ In response, it is arguable that such categories are inevitable if we are to attain fairness in deciding the extent of leeway to allocate to freedom of speech. A fifth objection is that the public interest in the lives of “media personalities, prominent sports stars and such like” is not justified because “public interest in the lives of [such persons] is of a frivolous nature”.¹⁸⁰ Apart from the slippage in the use of the term ‘public interest’ in this statement (to mean ‘public curiosity’ or ‘prurient interest’ as opposed to ‘public concern’) it is not within the contemplation of this paper that protection be offered to ‘frivolous’ publications but that the protection be restricted to matters of public concern. The sixth objection that the public figure test in the United States “appears only to contribute to the problems of lengthy and costly proceedings, with the sole emphasis on damages as a remedy”,¹⁸¹ is tenable only if we resort to a “wholesale importation of that package.”¹⁸² This paper does not advocate an importation of such scale.

2. *Defining ‘matter of public concern’*

As a preliminary matter, it should be noted that the use of the expression ‘public concern’ in the context of the present reform, rather than the more common term ‘public interest’, is deliberate, although occasionally it has been necessary to rely on the term ‘public interest’ when citing authorities. The term ‘public concern’ is preferable for the purpose at hand. In a broad sense the argument for giving special treatment to matters of

Speech In Australia” (n.d.), Media Statement, released at the launch of the free speech campaign by Australia’s Right to Know Coalition.

178 Chesterman (2000), above n 93, at 169.

179 Chesterman (2000), above n 93, at 159. For another discussion opposing the public figure defence see Attorney-General’s Task Force on Defamation Law Reform (2002), Defamation Law – Proposals for Reform in NSW, at 14-23. Retrieved 17 December 2007, from: <http://www.lawlink.nsw.gov.au/report/lpd_reports.nsf/pages/def_law_proposal>

180 Western Australian Defamation Law Committee (September 2003), Committee Report on Reform to the Law of Defamation in Western Australia, Para 40.

181 NSWLRC Report No 75, above n 18, Para 5.22.

182 To borrow the words of the New South Wales Law Reform Commission itself: Report No 75, above n 18, Para 5.22. The term “package” in the NSWLRC’s usage referred to the US “public figure test” and the “package of reforms made in the wake of *New York Times Inc v Sullivan*” that provide special criteria governing liability for plaintiffs in particular categories, making it more difficult for those plaintiffs to establish a cause of action in defamation: see Paras 5.22 and 5.1.

public concern can be simply stated in the terms set out by Gillooly, albeit in a slightly different context:

In the writer's submission, it is of critical importance that the interests of a group [the recipients of defamatory communications] so intimately connected with defamation law be taken into consideration if we are to arrive at a balanced and coherent legal regime that meets the needs of society in the 21st century.¹⁸³

'Matters of public concern' are determined by assessing the matter concerned by reference to the subject matter or nature of the topic, rather than the nature of the speaker, although often the divide between the two may be unclear. A wide range of *topics* have been said to qualify for inclusion as matters to which the implied freedom of political communication established in the Australian free speech cases applies.¹⁸⁴ Those topics are referred to by the common shorthand name – "matters of government and politics".¹⁸⁵ The meaning of the expression "communication about a government or political matter" is imprecise, but there is support for the view that nothing said in *Lange* derogates¹⁸⁶ from those matters identified in *Theophanous*, where it was said that "political discussion" extended to "all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about".¹⁸⁷ However, the reasoning in *Lange v Australian Broadcasting Corporation*, given as it was in the context of qualified privilege, did not mean that qualified privilege extended to *all* matters of public interest.¹⁸⁸ Such matters, it has been said, must be limited to the

183 Gillooly M (2004), *The Third Man: Reform of the Australasian Defamation Defences*, Federation Press, Leichhardt, NSW, at 20. See further the author's paper 'Re-examining the Public Interest Imperative in News Evaluation', presented at the Journalism Education Conference, 30 November –2 December 2009, Perth, Western Australia.

184 See above n 93.

185 In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, the Full Court of the High Court said, at 559:

Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be "directly chosen by the people" of the Commonwealth and the States, respectively (*italics added*).

For the range of matters that may be considered to be "matters of government and politics" see text accompanying n 190 below. See also Butler D and Rodrick S (2007), *Australian Media Law*, Lawbook Co, Pyrmont, NSW, at 79; George (2006), above n 29, at 295–296; Gillooly (1998), above n 17, at 190–191.

186 On this point note the views concerning the "overruling" of *Theophanous* referred to in the text accompanying n 147-150 above.

187 Butler and Rodrick (2007), above n 185, at 79 (*italics added*).

188 See also *Peek v Channel Seven Adelaide Pty Ltd* (2006) 228 ALR 553; *Herald and Weekly Times Ltd & Anor v Popovic* (2003) 9 VR 1.

extent that the text and structure of the Constitution establish it.¹⁸⁹ It is suggested here that the development of our defamation law need not be limited by similar considerations. ‘Matters of public concern’ includes but is a far broader term than matters relating to politics and government.

It was held in *Theophanous* that the matters within the scope of the term “matters of government and politics” includes discussion about the conduct, policies or fitness for office of government members, political parties, public bodies, public officers and those seeking public office; the discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate, for example, trade union leaders, Aboriginal political leaders, political and economic commentators; and the concept is not exhausted by political publications and addresses which are calculated to influence choices.¹⁹⁰ In *Theophanous*, the High Court cited Barendt’s reference to “all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about” and added that “it was this idea which Mason CJ endeavoured to capture” in an earlier case when he referred to “public affairs” as a subject protected by the freedom (of political communication).¹⁹¹ The High Court also cited another eminent free speech advocate Alexander Meiklejohn’s view that freedom of speech “is assured only to speech which bears, directly or indirectly with issues which voters have to deal with – only, therefore, to the consideration of matters of public interest” *but not* to “[p]rivate speech, or private interest in speech”.¹⁹² Support for a broad approach to what should be considered available for public discussion can be found in the following observation by Lord Simon:

The first public interest involved is that of the freedom of discussion in a democratic society. People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions. Much of such fact-finding and argumentation necessary has to be conducted vicariously, the public press being a principal instrument.¹⁹³

189 See *Brown & Ors v Members of the Classification Review Board of the Office of Film and Literature Classification* (1998) 154 ALR 67, at 86.

190 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, Mason CJ, Toohey and Gaudron JJ, at 124; Deanne J, at 179–180. See also Butler and Rodrick (2007), above n 185, at 79.

191 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, Mason CJ, Toohey and Gaudron JJ, at 124, referring to *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, at 138–140. The Barendt work cited in *Theophanous* was *Freedom of Speech* (1985), at 152.

192 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, Mason CJ, Toohey and Gaudron JJ, at 124.

193 *A-G v Times Newspapers* [1974] AC 273, Lord Simon of Glaisdale, at 315.

Importantly, that observation expands the scope of what may be considered matters of public concern beyond matters of politics and government to more broadly cover matters that affect people's lives. Matters of public concern should not be limited to but should include the matters covered by the *Lange* scope which as noted earlier was made in the context of qualified privilege and not intended to be an exhaustive statement of what constitutes matters of public concern.

(a) Scope of 'matters of public concern'

It is suggested that the notion of 'matter of public concern' should be applied broadly to enable a wide range of matters to qualify as matters of public concern. Lord Denning MR in his classic statement on the meaning of matters of public interest favoured such a breadth:

I would not myself confine it within narrow limits. Whenever a matter is such as to affect people at large, so that they may be *legitimately interested* in, or *concerned* at, what is going on; or what may happen to them or others; then it is a matter of public interest on which everyone is entitled to make fair comment.¹⁹⁴

American defamation law tends to prefer the term "public concern"¹⁹⁵ to 'public interest' although the US Supreme Court "has never defined 'matters of public concern'."¹⁹⁶ In the *Bonnick* case¹⁹⁷ the Privy Council, building on the terminology in the *Reynolds* case, which dealt with qualified privilege,¹⁹⁸ appears to have deliberately chosen the expression 'public concern' rather than the more familiar 'public interest'.¹⁹⁹ What then is the difference between 'public interest' and 'public concern'? Tipping J

194 *London Artists Ltd v Littler* [1969] 2 QB 375, at 391 (italics added). Also see *Allsopp v Incorporated Newsagencies Co* (1975) 26 FLR 238, at 244-5. For a more recent view on the attitude of the courts in England towards "public interest" see Milmo and Rogers (2004), above n 26, at 312:

To a very large extent, whether an imputation relates to a matter of public interest or not is determined by value judgment, by the individual perception of the tribunal charged with the task of making the decision, and current mores and attitudes. The courts now treat many more matters as being of legitimate public concern or interest than would have been the case in the nineteenth century, a tendency accentuated by Article 10 of the European Convention on Human Rights.

195 See, for example, *Philadelphia Newspapers v Hepps*, 475 US 767, 12 Med L Rptr 1977 (1986), at 777. See also *Dun & Bradstreet Inc v Greenmoss Builders Inc*, 472 US 749 (1985), at 758, where the US Supreme Court noted that it had long held that not all speech is of equal First Amendment importance, but that it is speech on matters of public concern that is at the heart of the First Amendment protection.

196 Middleton and Lee (2009), above n 72, at 145. The common equivalent term 'public interest' has similarly also "never been defined" in English and Australian law: e.g. see *Reynolds v Times Newspapers Ltd & Ors* [1999] 4 All ER 609, Lord Nicholls, at 615.

197 *Bonnick v Morris & Others*, Unreported, PC 30/2001, 17 June 2002.

198 *Reynolds v Times Newspapers Ltd & Ors* [1999] 4 All ER 609.

offered the following explanation, in the context of qualified privilege, for preferring ‘public concern’ rather than ‘public interest’ citing the danger of slippage between the two terms:

It is not necessarily in the public interest to publish to the world at large matters *which are of interest to the public*...The use of the word ‘concern’ does not necessarily signify worry, but it does signify that the subject-matter of the publication must be something about which the public is entitled to be informed. The subject-matter must be something about which the public has a right to know, as Lord Nicholls put it in *Reynolds*.²⁰⁰

A further ground is the confusion that tends to accompany the term ‘public interest’. This confusion takes two forms. One is as to the distinction between *public* and *private* interests. It has been colourfully noted that the media “are peculiarly vulnerable to the error of confusing the public interest with their own interest.”²⁰¹ Another may be identified as a possible misapprehension of the nomenclature.²⁰² It is suggested that the scope of matters of public concern should properly acknowledge the full range of matters that intelligent citizens should think about and this should include issues such as: child or sexual abuse; social misdemeanour by sports and entertainment personalities; substance abuse in sport; business relationships involving political personalities; and relationships that expose a conflict between public and private interests. As Lord Steyn noted, there is a compelling argument to expand the scope of matters of public concern beyond political discussion:

There are *other* public figures who exercise great practical power over the lives of people or great influence in the formation of public opinion or as role models. Such power or influence may indeed *exceed that of most politicians*. The rights and interests of citizens in democracies are *not restricted to the casting of votes*. Matters other than those pertaining to

199 This was Justice Tipping’s observation: see Tipping (2002), above n 111, at 7.

200 Tipping (2002), above n 111, at 7 (italics added). See also the justification for caution expressed by Kirby J in *Channel Seven Adelaide Pty Ltd v Mannock* [2007] HCA Transcript 414 (7 August 2007), albeit in a slightly different context:

[S]ometimes it has been known for media items to parade as being concerned with great issues of social importance, but the actuality of the item is focused, in the nature of media today, on an individual and a sort of infotainment approach.

201 *Francome v Mirror Newspapers* [1984] 2 All ER 408, Donaldson MR, at 413. See further the distinction drawn between matters that “the public takes great interest in”, on the one hand and, on the other hand, matters that “affect property of considerable value” and is of “public importance” going beyond the plaintiff and defendants and having “a very substantial character”: see *Johansen v City Mutual Life Assurance Society Ltd* (1905) 2 CLR 186, Griffith CJ (delivering judgment of the Full Court), at 188.

202 See, for instance, Pearson (July 2007), above n 134, at 50, where the author states that “journalists need a strong public interest defence to defamation”. This suggestion was made in the context of the adverse impact of various laws on the flow of information. The term “public interest” here was arguably used to justify greater press freedom. There is, however, another valid interpretation of the term – that the public interest requires a weighing up of competing public interests as a result of which the “public interest” may justify a curb on the flow of information in particular circumstances.

government and politics may be *just as important* in the community; and they may have a strong claim to be free of restraints on freedom of speech.²⁰³

The task of defining the scope of matters of public concern can be accomplished by the courts conducting an evaluation having regard to all the circumstances while ensuring that it does not supplant the editor's role in the newsroom. The following proposition from Lord Nicholls, although it was expressed in the context of a privileged occasion, provides a useful basis upon which to approach the present task:

Whether the public interest so requires *depends upon an evaluation* of the particular information in the circumstances of its publication. Through the cases runs the strain that, when determining whether the public at large had a right to know the particular information, the court has regard to all the circumstances. The court is concerned to assess whether the information was of sufficient value to the public that, in the public interest, it should be protected by privilege in the absence of malice.²⁰⁴

(b) Answering objections to the “matters of public concern” test

Two main objections may be identified against the “matters of public concern” test proposed. First, it may be argued by defendants that this test is a constraint on freedom of speech because it is more demanding than the ‘public interest’ test. That is, it would impede the publication of matters that are of interest to the public. This argument is easily rebutted. The ‘public concern’ test does no more than draw attention to the need to provide greater protection to matters that the public may legitimately take an interest in, as opposed to matters of lesser import to public participation in public affairs.²⁰⁵ Furthermore, as noted above, the media have themselves already committed to confining their reach only to matters of public concern. This is illustrated by the position taken by Australia's peak press publishing entity – the Australian Press Council

203 *Reynolds v Times Newspapers Ltd & Ors* [1999] 4 All ER 609, at 640 (italics added).

204 *Reynolds v Times Newspapers & Ors* [1999] 4 All ER 609, Lord Nicholls, at 617 (italics added). In the same passage Lord Nicholls cited *Cox v Feeney* (1863) 4 F & F 13, at 19, 176 ER 445, at 448, where Cockburn J approved an earlier statement by Lord Tenterden CJ that “a man has a right to publish, for the purpose of giving the public information, that which it is proper for the public to know” (italics added).

See also *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70, Tamberlin J, at 75–76:

The public interest is not one homogenous undivided concept. It will often be multi-faceted and the decision-maker will have to consider and evaluate the relative weight of these facets before reaching a final conclusion as to where “the public interest” resides. This ultimate evaluation of the public interest will involve a determination of what are the relevant facts of the public interest that are competing and the comparative importance that ought to be given to them so that “the public interest” can be ascertained and served. In some circumstances, one or more considerations will be of such overriding significance that they will prevail over all others. In other circumstances, the competing considerations will be more finely balanced so that the outcome is not so clearly predictable.

205 See, for instance, Tipping J's observation that it is “not necessarily in the public interest to publish to the world at large matters which are of interest to the public”: above n 111.

has acknowledged that “[f]reedom of the press carries with it *an equivalent responsibility* to the public”²⁰⁶ and further that it would give “first and dominant consideration to what it perceives to be in the public interest” in the sense of what people “might be *legitimately* interested in, or *concerned* about”.²⁰⁷

The second objection is that ‘matter of public concern’ is difficult to define.²⁰⁸ The rebuttal simply is that “what is in the public interest is a well-known and serviceable concept”.²⁰⁹ Furthermore, the adoption of the ‘matter of public concern’ test in the present context does not introduce a radical shift in burdens and this test is neither alien to defamation law nor to the truth defence itself. Importantly, the public concern requirement would not impose a heavy burden if it were given a reading that recognises the importance of freedom of speech.²¹⁰ In the context of the present reform scheme, if in fact the public concern requirement imposes a constraint on the media, it is a legitimate one.

1. CONCLUSION

The freedom of speech imperative for the present argument is well established and needs no further elaboration.²¹¹ In the English common law system, for example, freedom of speech is no longer a residual liberty but a legal principle to which the courts must pay attention.²¹² In the freedom of speech scheme, the truth imperative occupies an important place not only in the freedom of speech scheme but in human

206 See the Australian Press Council commitment expressed in the preamble to its *Statement of Principles* shows (italics added). Retrieved 7 February 2008, from <<http://www.presscouncil.org.au/pcsite/complaints/sop.html>>

207 Australian press Council *Statement of Principles*, above n 206.

208 See, for example, text accompanying n 41 and 42 above, where the ALRC noted that the term is “an amorphous concept” and “impossible to define”: see Australian Law Reform Commission (1995), *Open Government: A Review of the Federal Freedom of Information Act 1982*, Report No 77, Para 8.13.

209 See *Reynolds v Times Newspapers Ltd & Ors* [1999] 4 All ER 609, Lord Steyn, at 634.

210 See for instance, *Allworth v John Fairfax Group Pty Ltd* (1993) 113 FLR 254, at 262-263:

What is or is not a matter of public interest may be interpreted widely or narrowly: see *London Artists Ltd v Littler* [1969] 2 QB 375, Lord Denning MR; cf *Allsopp v Incorporated News Agencies Co Pty Ltd* (1975) 26 FLR 238, Blackburn J, at 244-245. It can be decided only by reference to the nature of the matter made public and the context of its publication. To say that a matter is of public interest is to say that it is not merely of private concern but a matter which properly might concern the ordinary reasonable reader as a member of the public.

211 For example, see Barendt E (2007), *Freedom of Speech*, 2nd edn, Oxford: Oxford University Press, Chapter 1. See also the freedom of speech commitments in England’s major political party manifestoes for 2010 (above n 115).

endeavour generally. The rule as to burden of proof in defamation proceedings, as Lord Lester expressed in forceful terms, is “derived from the Star Chamber’s concern with preserving peace is hardly consistent with modern day notions of freedom of speech”.²¹³ Lord Lester added: “The time has come to throw off the shackles of the Star Chamber and to adjust the law of defamation to contemporary notions of free speech.”²¹⁴ The increased regard in which freedom of speech is held among the governed in democratic society is driven by utilitarian rather than hedonistic considerations:

Reputation, the cousin of respectability, is now regarded as *less important* than it was, since one is not supposed to care what other people think. Freedom of speech, on the other hand, is now regarded as *more important* than it was: to the utilitarian view that its effects are good (“the truth shall make you free”) is added the more modern hedonistic view that self-expression is fun.²¹⁵

Furthermore, particularly in light of the legislative responses globally towards the so-called “threat of terrorism”, many encroachments, not all justified, have been made into individual rights and liberties.²¹⁶ Freedom of speech has been a notable casualty of such encroachments.²¹⁷ In defamation law the importance of truth is reflected in the principle in the *Rofe* case seen earlier – especially its dictum that no wrong is done to a

212 Barendt (2007), above n 211, at 41.

213 See House of Lords Committee stage of the *Defamation Bill* 1996 (UK), 571 HL Deb, 2 April 1996, Col 239.

214 House of Lords Committee stage of the *Defamation Bill* 1996 (UK), 571 HL Deb, 2 April 1996, Col 241.

215 Weir T (2000), *A Casebook on Tort*, 9th Edn, Sweet & Maxwell, London, at 520 (italics added). See further *Cusson v Quan* [2007] ONCA 771, Sharpe JA (Weiler and Blair JJA agreeing), Para 122:

While evolution of the law of defamation has produced a variety of solutions in different jurisdictions, *the evolution away from* the common law’s traditional bias in favour of the protection of reputation is strikingly uniform (italics added).

216 Chief Justice Terrence Higgins (2004), “Australia’s First Bill of Rights – Testing Judicial Independence and the Human Rights Imperative” (Speech), National Press Club, 3 March, noted in clearly forceful terms:

In the fight against terrorism, *truly draconian legislation* has been passed which allows anyone to be detained on the mere suspicion, held by the Attorney-General, that such detention will “substantially assist the collection of intelligence”... Various legislatures have passed enactments protecting various rights... But these measures, even taken together, provide no protection of even some of the most basic human rights (references omitted, italics added).

See also Pearson (July 2007), above n 134, at 50 where the author refers to the present era as “a time” when anti-terrorism laws, Freedom of Information exemptions and suppression orders “are all impacting on the reportage of important public issues”.

217 See, for instance, the sweeping amendments to the country’s sedition laws effected through Schedule 7 of the *Anti-Terrorism Act (No 2)* 2005 (Cth). In a subsequent review, the Australian Law Reform Commission recommended that the term “sedition” should be removed from the federal statute book, and offences urging force or violence against the government or community groups should be redrafted: see Australian Law Reform Commission (2006), “‘Sedition’ should go, focus on urging violence: ALRC”, Media Release, 29 May. See further Australian Law Reform Commission (May 2006), *Review of Sedition*

person by telling the truth about that person.²¹⁸ Defamation law is “weighted against defendants”.²¹⁹ The practical operation of the defamation law generally – with its “low threshold”²²⁰ the plaintiff must cross to establish the action – and the onerousness of the truth defence in particular, exposes a disjuncture between the *Rofe* principle and the practical reality of its application. If, as the practitioners argue, truth is relevant in deciding whether to proceed at all to a hearing²²¹ the irrelevance of truth to the cause of action, and the relegation of concern for the truth to a later stage of proceedings, renders the procedure in respect of this defence highly unsatisfactory. A convenient and desirable remedy is to put truth in issue at the outset. The burden reversal of the kind proposed in this paper will achieve a balance that is consistent with the contemporary dictates of democratic society as to the desirable locus of the fulcrum on the *freedom-of-speech/protection-of-reputation* scales.

Laws, Discussion Paper No 71; and Fernandez JM (2005) “Free speech and journalism: Australia Joins the Race to Tighten Up”, Vol XXXV No 1, *Insaf*, Malaysian Bar Journal 15.

218 *Rofe v Smith’s Newspapers Ltd* (1924) 25 SR (NSW) 4: see text accompanying above n 13. See also *M’Pherson v Daniels* [1829] 10 B & C 263, Littledale J, at 272, where his Honour noted that truth is an answer to the action “because the plaintiff is not entitled to recover damages in respect of an injury to a character which he either does not, or ought not to possess.”

219 Burrows J and Cheer U (2005), *Media Law in New Zealand*, 5th Edn, Oxford University Press, Melbourne, at 29.

220 *Hawke v Tamworth Newspaper Co* [1983] 1 NSWLR 699, Hunt J, at 723.

221 New South Wales Bar Association’s Submissions, above n 133.