"Is it not possible to place law reform on an Australia-wide basis? Is it not unworthy of Australia as a nation to have varying laws affecting the relations between man and man? Is it beyond us to make some attempt to obtain a uniform system of private law in Australia?

(1957) 31 *A.L.J.* 340 at p.342

Privacy Inquiry's First Fruits: Publishing Private Matters

"[H]owever it may be ultimately defined there is a zone of privacy surrounding every individual, a zone within which the state may protect him from intrusion by the press with all its attendant publicity".

White J. in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1974).

During the last quarter, the A.L.R.C. has published its second discussion paper *Privacy and Publication - Proposals for Protection*. It is important for several reasons :

* It is part of the new A.L.R.C. approach to involve the whole legal profession of Australia in the process of law reform. Discussion papers are brief (designed to be read in an hour or so), not too boring and, with the help of the Law Book Company have been distributed to all subscribers to the *Australian Law Journal*.
* The proposals on privacy represent a"package deal" with the earlier proposals for a uniform defamation law. They represent an attempt to strike a balance between the common law and code approaches to defamation law, so far taken in Australia.
* The proposals are the first fruit of the A.L.R.C.'s major reference on privacy protection.

It is not easy to construct a uniform law in Australia. The history of our achievements shows that. The task is not made easier when two entirely different approaches have been taken that are difficult to reconcile. This is the case in defamation law reform. South Australia and Victoria have stuck to the common law. Most of the other States and Territories have had code systems. In most States the defence of justification is not simply "truth" as it is at common law (and in Victoria and S.A.) An additional element must be proved : either "public benefit" or "public interest" to justify publication of true but defamatory material. Having to justify this additional component has had a privacy protective effect. The mere fact that an item was true did not warrant publication if, because it was private, it was not for the "public benefit" to publish it. How to strike a balance between these two very different approaches?

The first A.L.R.C. discussion paper *Defamation - Options for Reform* proposed a defence of truth alone. But it foreshadowed the second paper which replaces the broad, uncertain, vague "public benefit" with specific guidelines. Without providing a general, equally vague, right of privacy, an attempt has been made to spell out the *private zone* asserted by White J. in the U.S. Supreme Court. Publication will be prima facie actionable if it is about :

* *the home and personal relationships :* material relating to private behaviour, home life or personal or family relationships including photographs of persons in a private place.
* *health :* material relating to a person's health or photographs of him in an injured, ill or distressed condition.
* *old criminal prosecutions :* except by contemporaneous report or legal report or writing.

These are the "hands off" zones. But it is suggested that even here, invasions of

privacy should be allowed if one of six defences can be made out :

* Consent
* Legal Authority
* Privileged Occasion
* Fair report of Parliament or Courts
* Protecting the interests of the publisher
* Public interest (as defined)

The proposals have had a mixed reception. The *Australian* conceded that "there can be no real argument with the Commission's essential aim of preserving the within-the-home privacy of the ordinary individual". The restriction on photographs was attacked as going too far. This was also the thrust of the *Sydney Morning Herald*'s two editorials. Essentially they bore the message : leave privacy protection to us.

The Melbourne *Age* took a more reflective stance :

> "We cannot deny that the absence of any legal right to privacy has resulted in some violations of common decency. The reform of defamation law and the introduction of privacy protection in the realm of publication, should be simultaneous, perhaps in separate parts of one new, uniform Act. ... We accept the general lines of the proposed legislation ... and we hope that our legislators will act as carefully as the Commission has done in this important discussion paper".

The legislators are involving themselves in this new effort for a uniform Act. The Commissioner in charge of the reference, Mr. Murray Wilcox, has seen all State Attorneys-General in the course of visits to each State, timed to coincide with public sittings and seminars. The seminar in Brisbane on 28 May was opened by the Minister of Justice and Attorney-General, Mr. Lickiss. Other State Ministers and Parliamentarians participated in a lively debate. The Perth seminar was opened by Federal Minister Peter Durack. A large team of M.P.s took part in the Canberra debate on 25 June, including Senator James McClelland, former Labor Minister. Everywhere there is agreement about the need for a single uniform law in the age of mass communications. Striking the proper compromise between two very different approaches to defamation law will not be easy. If it can succeed, we may enter a new period of uniform laws in appropriate areas.

Defamation : Home Thoughts from Abroad

> "It is generally much more shameful to lose a good reputation than never to have acquired it".
>
> *Pliny the Younger, Letters,* 8.24

The standard text on the *Law of Torts* in Australia is by Professor John Fleming. Born in England, he was between 1955 and 1960 Robert Garran Professor of Law at the then Canberra College. Now Professor of Law at the University of California, Berkeley, he still keeps a lively interest in legal developments "down under".

During a recent visit to Australia, in discussions with the A.L.R.C. Chairman, he sparked an interest in some long-held views about defamation law reform. Copy of the A.L.R.C. proposals have been sent to him for comment.

Professor Fleming has now replied, with an article that makes reference to the poverty of ideas in defamation law reform in the past. He is a strong supporter of the general approach of the A.L.R.C. in its discussion paper *Defamation - Options for Reform.* Take for example his comments about the remedy of damages :

> "The preoccupation of our law of defamation with damages has been a crippling experience over the centuries. The damages remedy is not only singularly inept for dealing with, but actually exacerbates, the tension between protection of reputation and freedom of expression, both equally important values in a civilised and democratic community".