

# 1 Defamation and privacy in an era of ‘more speech’

*Andrew T. Kenyon*

Defamation and privacy are now two central issues in media law. While defamation law has long posed concerns for media publications, the emergence of privacy as a legal challenge has been relatively recent in many common law jurisdictions. The detailed consideration of both defamation and privacy by the Australian Law Reform Commission in its 1979 report *Unfair Publication: Defamation and Privacy* stands as an exception more than a rule in Commonwealth jurisdictions.<sup>1</sup>

In Australia, privacy had long received some protection under defamation law through the requirement in five states and territories to prove the ‘public benefit’ or ‘public interest’ in publishing the matter in question, as well as its truth to establish the justification defence. Merely proving truth was not enough in Queensland, New South Wales, Tasmania and the Australian Capital Territory until the commencement of substantially uniform defamation laws across Australia in 2006.<sup>2</sup> Before then, true private facts that were also defamatory might receive protection where law recognised no public interest or public benefit in publication. In practice, the extra requirement was examined rarely in litigation, although some observers suggested it changed particular media decisions about what to publish. In any event, that particular legal position makes the detailed consideration of *both* defamation and privacy in 1970s Australia law reform less remarkable. The Australian Law Reform Commission aside, however, there was generally tangential engagement

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<sup>1</sup> Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report 11 (Canberra: Australian Government Publishing Service, 1979).

<sup>2</sup> On the early history, see, e.g., Paul Mitchell, ‘The Foundations of Australian Defamation Law’ (2006) 28 *Sydney Law Review* 477; for overviews of Australia’s uniform defamation laws when introduced, see, e.g., David Rolph, ‘A Critique of the National, Uniform Defamation Laws’ (2008) 16 *Torts Law Journal* 207; and more recently, Matt Collins, ‘Five Years on: A Report Card on Australia’s National Scheme Defamation Laws’ (2011) 16 *Media & Arts Law Review* 317.

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by Australian law with privacy and media publications. US law saw more direct consideration of both defamation and privacy during the 1960s with Supreme Court decisions about the First Amendment's effect on defamation law, followed by its effect on aspects of privacy law.<sup>3</sup> The law in England and Wales, and many jurisdictions in that tradition, did not have such developed legal treatment of privacy. It received haphazard and tangential protection through other legal actions. Privacy was not a day-to-day legal concern for the media, unlike matters such as contempt of court, reporting restrictions and defamation.

### 1.1 Rights, courts and legislative proposals

Historically, detailed analyses of journalism law did not often refer explicitly to privacy, as Australian and New Zealand examples illustrate. One could begin with the multiple editions of Geoffrey Sawer's pioneering monograph on law and journalism in Australia. The book's three editions, published between 1949 and 1984, do not directly address privacy, secrecy or even confidential information as legal concerns. Matters such as contempt of court, copyright and defamation are examined,<sup>4</sup> but privacy was largely a foreign concept. Some references exist in work from the 1980s, but the analysis then tended to focus on confidential information and protecting creative ideas rather than privacy as such.<sup>5</sup>

More recently, however, privacy has not been so foreign to antipodean media law. Texts have gradually given detailed consideration to actions that can protect privacy interests against media publication.<sup>6</sup> The change

<sup>3</sup> See, in particular, *New York Times v. Sullivan*, 376 US 254 (1964); *Time v. Hill*, 385 US 374 (1967). It is reasonably common for US privacy and defamation claims to be brought against the same publication, even though they both often face formidable hurdles: e.g., David A Anderson, 'An American Perspective' in Simon Deakin, Angus Johnston and Basil Markesinis (eds), *Markesinis and Deakin's Tort Law*, 5th edn (Oxford: Clarendon Press, 2003) 721, 735.

<sup>4</sup> See Geoffrey Sawer, *A Guide to Australian Law for Journalists, Authors, Printers and Publishers* (Melbourne: Melbourne University Press, 1949); 2nd edn (Melbourne: Melbourne University Press, 1968); 3rd edn (Melbourne: Melbourne University Press, 1984).

<sup>5</sup> For example, Colin Golvan and Michael McDonald, *Writers and the Law* (Sydney: Law Book Co, 1986); Sally Walker, *The Law of Journalism in Australia* (Sydney: Law Book Co, 1989). Similarly, concern with confidential information and its use against material leaked to the media was addressed in professional media law seminars: see, e.g., Anthony F Smith, 'Actions for Breach of Confidence' in Carol Bartlett (ed), *Current Legal Developments: Media Law Seminars* (Clayton: Monash Law Press, 1985) 223.

<sup>6</sup> See, e.g., Mark Pearson, *The Journalist's Guide to Media Law* (St Leonards: Allen & Unwin, 1997) and subsequent editions (jointly written by Mark Pearson and Mark Polden from 4th edn 2011) which initially dealt with matters more in terms of journalistic ethics. See also, e.g., Paul Chadwick and Jennifer Mullaly, *Privacy and the Media* (Sydney: Communications Law Centre, 1997).

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is illustrated by the leading New Zealand work by John Burrows, more recent editions of which have been co-authored with Ursula Cheer. The first edition from 1974 – with detailed chapters on defamation, copyright and contempt of court among other matters – contained no explicit discussion of privacy, although it did outline breach of confidence and made brief reference to the lack of clear legal avenues to protect privacy.<sup>7</sup> In 1990, the third edition took a similar approach. It provided a chapter-long analysis of breach of confidence, but it dealt directly with privacy and media publications in only two pages in another chapter.<sup>8</sup> By the end of that decade, the fourth 1999 edition contained a full chapter addressing privacy in addition to an updated chapter on breach of confidence.<sup>9</sup> That approach has continued in subsequent editions.<sup>10</sup>

Unlike privacy, defamation has long been a central legal topic for journalism and other public speech. This was true in the nineteenth century and has remained so.<sup>11</sup> In many jurisdictions, the greatest changes to defamation law appear to have followed increased legal recognition of public speech's value. That can be seen in notable historical changes – such as the introduction of defamation codes in four Australian defamation jurisdictions from the late 1800s and case law under them which gradually established strong protection for public speech.<sup>12</sup> Equally, it is evident in more recent developments, such as the broader qualified privilege defences that have emerged in many common law jurisdictions during the last two decades.<sup>13</sup> In many places, more critical speech can now be published than a century ago without liability for defamation.<sup>14</sup> Free speech has moved

<sup>7</sup> John F Burrows, *News Media Law in New Zealand* (Wellington: Sweet & Maxwell, 1974) 337; there are also brief references to, e.g., obtaining information.

<sup>8</sup> John F Burrows, *News Media Law in New Zealand*, 3rd edn (Auckland: Oxford University Press, 1990) 187–9.

<sup>9</sup> John Burrows and Ursula Cheer, *Media Law in New Zealand*, 4th edn (Auckland: Oxford University Press, 1999) 171–98.

<sup>10</sup> John Burrows and Ursula Cheer, *Media Law in New Zealand*, 5th edn (Auckland: Oxford University Press, 2005); 6th edn (Wellington: LexisNexis NZ, 2010).

<sup>11</sup> See, e.g., *Wason v. Walter* (1868) LR 4 QB 73 and discussion in Andrew T Kenyon and Sophie Walker, 'The Cost of Losing the Code: Historical Protection of Public Debate in Australian Defamation Law' (2014) 38 *Melbourne University Law Review* 554, 559–67.

<sup>12</sup> See Kenyon and Walker, above n 11.

<sup>13</sup> Select examples include in Australia: *Theophanous v. Herald & Weekly Times* (1994) 182 CLR 104 and *Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520; Canada: *Grant v. Torstar Corporation* [2009] 3 SCR 640; Malaysia: *Anwar Bin Ibrahim v. Mahathir Bin Mohamad* [2001] 2 MLJ 65 and *Irene Fernandez v. Utusan Melayu* [2008] 2 CLJ 814; New Zealand: *Lange v. Atkinson* [2000] 3 NZLR 385; South Africa: *National Media v. Bogoshi* [1999] 1 Butterworths Constitutional Law Report 1; and the UK: *Reynolds v. Times Newspapers* [2001] 2 AC 127; *Flood v. Times Newspapers* [2012] 2 WLR 760 (now see Defamation Act 2013 (UK) s 4).

<sup>14</sup> I am thinking here of many common law systems, but there have been some reforms that have limited defences, notably the abolition in Australia's uniform defamation laws of a

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from being a residual value – that is, a space left untouched by all the laws that restrict speech – to a value protected, to a degree at least, as a basic element of the constitutional order. In the UK, for example, that constitutional value is clearly established and one could chart much of its evolution through the successive editions of Eric Barendt's major work on free speech.<sup>15</sup> In the US, the First Amendment became a foundational element of the constitutional order through twentieth-century case law and dramatically reshaped defamation law.

In contrast, privacy has not received the same degree of legal attention overall. Even so, the relevance of privacy for media publications has been recognised for a very long time. I am not thinking just of Warren and Brandeis' late nineteenth-century scholarship about an action against media invasions of privacy, later adopted by US courts.<sup>16</sup> That is certainly significant, especially for US law and commentary. But England offers another example of long-term concern about media publication of private information and about media intrusion during newsgathering. For decades, there have been Bills debated in parliament and official enquiries into privacy. The Younger Committee, for example, 'received more complaints about the activities of the press than on any other aspect' of privacy.<sup>17</sup> Even so, enquiries repeatedly recommended against a general tort action for privacy,<sup>18</sup> preferring instead to call for improved media self-regulation.<sup>19</sup> After English courts established a privacy action against media publication during the last decade, great attention continued to be

public interest-style defence that existed under Australian defamation codes (see Kenyon and Walker, above n 11), and in some Commonwealth jurisdictions, free speech retains a lesser value than in places like England; see, e.g., Clive Walker and Russell L Weaver, 'Libelocracy' (2014) 41 *Journal of Malaysian and Comparative Law* 69; David Tan, 'The Reynolds Privilege in a Neo-Confucianist Communitarian Democracy: Reinvigorating Freedom of Political Communication In Singapore' [2011] *Singapore Journal of Legal Studies* 456; Andrew T Kenyon, 'Investigating Chilling Effects: News Media and Public Speech in Malaysia, Singapore, and Australia' (2010) 4 *International Journal of Communication* 440.

<sup>15</sup> Eric Barendt, *Freedom of Speech* (Oxford: Clarendon Press, 1996) and 2nd edn (Oxford: Oxford University Press, 2005).

<sup>16</sup> Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193. See also William L Prosser, 'Privacy' (1960) 48 *California Law Review* 383.

<sup>17</sup> UK, Committee on Privacy, *Report of the Committee on Privacy*, Cmnd 5012 (1972) [116] ('Younger Committee').

<sup>18</sup> *Ibid.*; UK, Committee on Privacy and Related Matters, *Report of the Committee on Privacy and Related Matters*, Cmnd 2135 (1990) ('Calcutt Committee').

<sup>19</sup> *Ibid.* See also the earlier UK, Royal Commission on the Press, *Royal Commission on the Press, 1947–1949: Report*, Cmnd 7700 (1949). From the same period, interesting comparisons could be drawn with the US experience from the Hutchins Commission on Freedom of the Press; see, e.g., Victor Pickard, *America's Battle for Media Democracy: The Triumph of Corporate Libertarianism and the Future of Media Reform* (New York: Cambridge University Press, 2015).

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given to improving press regulation.<sup>20</sup> During the same period from the 1960s, there were at least five Bills as well as draft Bills produced by civil society organisations.<sup>21</sup> The Bill that perhaps has the highest profile was introduced by Lord Mancroft in 1961. It proposed an action against publication by press, broadcasting or film that related to personal affairs or conduct and that would cause distress or embarrassment. The Bill received strong support in the House of Lords but not from the Lord Chancellor. Even so, the general aim retained currency, with Zelman Cowen later writing:

While I am fully aware of the difficulty of formulating an effective and workable legal remedy to protect privacy, I should on balance like to see the enactment of legislation following broadly the lines of Lord Mancroft's proposals. I do not believe that it will encourage a flood of frivolous litigation, and it will not and should not bring solace to all wounded susceptibilities. But I believe it may do a useful job.<sup>22</sup>

Some calls for privacy protection were motivated by human rights concerns, with references made to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.<sup>23</sup> While the Younger Committee noted the human rights issues, the role of human rights is most clear in the minority report of Donald Ross QC. Unlike the majority, he concluded that a privacy action was needed. He started 'from the point of view of principle', noting these international instruments as well as the European Convention on Human Rights, and said that UK law 'should now be brought into line with these important declarations' through a statutory privacy action.<sup>24</sup> Those human rights pressures gradually increased and reshaped the law, an influence which also became apparent in defamation.

The situation was broadly as Raymond Wacks had predicted. In 1980, he suggested that 'the most powerful catalyst for change [in the UK] may either be the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . or the adoption by Parliament of a Bill of

<sup>20</sup> See Right Honourable Lord Justice Brian Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press*, HC 780 (2012).

<sup>21</sup> Younger Committee, above n 17, discusses Bills introduced by Lord Mancroft (1961), Alexander Lyon (1967), Brian Walden (1969), as well as draft Bills from Justice and the National Council for Civil Liberties. All these Bills are reproduced in Younger Committee, Appendix F. Calcutt Committee, above n 18, also discusses Bills from William Cash (1987) and John Browne (1989).

<sup>22</sup> Zelman Cowen, *The Private Man: The Boyer Lectures 1969* (Sydney: Australian Broadcasting Commission, 1969) 27.

<sup>23</sup> See, e.g., *ibid.*, 11; Younger Committee, above n 17, 5.

<sup>24</sup> DM Ross, 'Minority Report' in Younger Committee, above n 17, 213.

Rights which incorporates a “right to privacy”.<sup>25</sup> Wacks then called for a carefully drafted statutory action protecting personal information against publicity.<sup>26</sup> By 1995, his prediction had developed slightly: while he continued to press for a statutory action against disclosure of private information, Wacks concluded that if politicians would not act, ‘the courts must’.<sup>27</sup> And courts could do this by drawing on sources including developments in breach of confidence and decisions from Strasbourg under the Convention.<sup>28</sup> As Ross had called for at the start of the 1970s, courts eventually did just this.

Thus, one pressure for change in privacy law has been the gradual recognition of privacy as a human right, protected in international, regional and national instruments. The approach, on occasion, linked privacy and reputation conceptually, in a manner that calls to mind more recent statements of the European Court of Human Rights (analysed later in this collection). For example, the 1967 Nordic Conference on the Right to Privacy defined privacy in terms of a right to be let alone and made reference to ‘private, family and home life’, as well as being protected against ‘disclosure of irrelevant embarrassing facts’ about private life and attacks on ‘honour and reputation’.<sup>29</sup> While incorporating reputation so explicitly has not been common when describing privacy in common law jurisdictions, a basis in human rights has been a more frequent reference. Of course, as part of that human rights’ awareness, there has also been recognition of free speech. As a result, English developments in privacy law may well have been more tempered than was the case for its defamation law in earlier periods – when those who could afford to sue were offered extremely strong protection for reputation.

## 1.2 Technologies, data, communication

Another point of pressure, relevant to both defamation and privacy law, has been technology. Invasive technologies have long been an issue for privacy – the concern of Warren and Brandeis with media intrusion was linked to reporting technologies.<sup>30</sup> But technology has

<sup>25</sup> Raymond Wacks, *The Protection of Privacy* (London: Sweet & Maxwell, 1980) 9–10.

<sup>26</sup> *Ibid.*, 179.

<sup>27</sup> Raymond Wacks, *Privacy and Press Freedom* (London: Blackstone Press, 1995) 173.

<sup>28</sup> *Ibid.*; see also Raymond Wacks, *Privacy and Media Freedom* (Oxford: Oxford University Press, 2013), which contains a draft Protection of Privacy Bill, added to those produced earlier by law reform bodies, civil society organisations or debated in parliament; see above n 21.

<sup>29</sup> International Commission of Jurists, *Conclusions of the Nordic Conference, May 1967, on the Right to Privacy* (Geneva: ICJ, 1967) 2.

<sup>30</sup> Warren and Brandeis, above n 16.

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probably gained particular significance for privacy since the 1960s, when privacy was seen to face threats of a new 'nature and scale' due 'chiefly' to technological change.<sup>31</sup> Technological concerns exist in many publications from the period and, perhaps most influentially, in Alan Westin's US analysis of surveillance.<sup>32</sup> Since then, issues related to computers, databanks and surveillance have gained ever-greater traction. Even by 1980, the literature on information collection and storage was described as 'astonishingly prodigious'.<sup>33</sup> If that was the descriptor thirty-five years ago, it is difficult to settle on an appropriate one now, after WikiLeaks, Edward Snowden and more. Defamation law has also seen change linked with digital communication networks, transnational litigation being an important example. It has, at times, led to important reforms via case law or legislation – consider, for example, decisions such as *Jameel v. Wall Street Journal Europe*<sup>34</sup> and the various statutory responses to 'libel tourism'.<sup>35</sup> Somewhat similar issues involving transitional publication can also be seen in recent privacy litigation.<sup>36</sup>

Changes in the environment for public speech, allied to networked communications, provide further impetus for doctrinal reform. When commenting on defamation in 2014, I noted that opportunities clearly exist for 'more speech':

Public speech is changing. Institutional media remains significant, but in a very different context than even 10 years ago, let alone what is often called the era of broadcast news. With internet-based communications, many more people can reach a public directly with less editorial influence on their speech ... [T]here are clear opportunities for 'more speech' and, it seems plausible to think,

<sup>31</sup> International Commission of Jurists, 'The Legal Protection of Privacy: A Comparative Survey of Ten Countries' (1972) 24 *International Social Science Journal* 413, 418 (survey of nearly 200 pages commissioned by UNESCO).

<sup>32</sup> Alan F Westin, *Privacy and Freedom* (New York: Atheneum, 1967). See also, e.g., Cowen, above n 22; ICJ, above n 31; Younger Committee, above n 17, which includes chapters on surveillance devices and computers; and WL Morison, *Report on the Law of Privacy* (Sydney: Government Printer NSW, 1973).

<sup>33</sup> Wacks, above n 25, 18. <sup>34</sup> [2007] 1 AC 359.

<sup>35</sup> See, e.g., SPEECH (Securing the Protection of our Enduring and Established Constitutional Heritage) Act 2010 (US) § 4102(a); Defamation Act 2013 (UK) s 9. The issue is older than this recent debate: see, e.g., Kyu Ho Youm, 'The Interaction between American and Foreign Libel Law: US Courts Refuse to Enforce English Libel Judgements' (2000) 49 *International and Comparative Law Quarterly* 131. Evolving approaches to jurisdiction and choice of law can be traced through, e.g., Mathew Collins, *The Law of Defamation and the Internet* (Oxford: Oxford University Press, 2001); 2nd edn (Oxford: Oxford University Press, 2005); 3rd edn (Oxford: Oxford University Press, 2010) and now *Collins on Defamation* (Oxford: Oxford University Press, 2014).

<sup>36</sup> See, e.g., *Weller v. Associated Newspapers* [2014] EWHC 1163 (QB).

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opportunities for speech of more varied styles from a wider variety of speakers to circulate in more public forms than was commonplace in twentieth-century mass media.<sup>37</sup>

These opportunities for ‘more speech’ change the context for both defamation and privacy law. They prompt renewed consideration of the forms and availability of legal actions and, perhaps particularly, remind one of long-standing calls to address deficiencies in existing remedies.<sup>38</sup> The changes do not remove the significance of political economy nor the host of other factors that influence the creation, dissemination and reception of public speech. Far from it, rather the entities warranting attention in scholarly analysis and the questions raised are evolving as the environment for speech changes.

### 1.3 Comparative analysis

One final prompt for change may be greater comparative legal analysis. This has been seen both in legal scholarship and many judgements. And it is consistent with the move to comparative analysis in media studies.<sup>39</sup> The legal development would appear to have been influenced by changes in communications technologies, particularly the development of digital networked communication – another aspect of the ‘more speech’ that now exists.<sup>40</sup> An illustration of the trend in judgements is provided by defamation law decisions developing qualified privilege defences for matters of public interest (or political communication in the Australian instance). In the decisions, reference was frequently made to a host of Commonwealth decisions and, even if not always directly, to the iconic

<sup>37</sup> Andrew T Kenyon, ‘Protecting Speech in Defamation Law: Beyond *Reynolds*-Style Defences’ (2014) 6 *Journal of Media Law* 21, 21 (note omitted).

<sup>38</sup> See, e.g., John G Fleming, ‘Retraction and Reply: Alternative Remedies for Defamation’ (1978) 12 *University of British Columbia Law Review* 15; David A Barrett, ‘Declaratory Judgements for Libel: A Better Alternative’ (1986) 74 *California Law Review* 847; Marc A Franklin, ‘A Declaratory Judgement Alternative to Current Libel Law’ (1986) 74 *California Law Review* 809; Rodney A Smolla and Michael J Gaertner, ‘The Annenberg Libel Reform Proposal: The Case for Enactment’ (1989) 31 *William & Mary Law Review* 25; John Soloski and Randall P Bezanson (eds), *Reforming Libel Law* (New York: Guilford Press, 1992); New South Wales Law Reform Commission, *Defamation*, Report 75 (Sydney: NSW Law Reform Commission, 1995); Alastair Mullis and Andrew Scott, ‘Tilting at Windmills: The Defamation Act 2013’ (2014) 77 *Modern Law Review* 87, 107–8.

<sup>39</sup> Among a very large literature, see e.g., Daniel C Hallin and Paolo Mancini, *Comparing Media Systems: Three Models of Media and Politics* (Cambridge: Cambridge University Press, 2004); Toril Aalberg and James Curran (eds), *How Media Inform Democracy: A Comparative Approach* (New York: Routledge, 2012).

<sup>40</sup> The leading legal website Austlii (the Australasian Legal Information Institute) and its host of international parallels appear to have an important part in that history.

US decision in *Sullivan*.<sup>41</sup> One could see similar tendencies in privacy developments, as well as in calls for comparative privacy scholarship.<sup>42</sup>

These interests – in defamation, privacy and speech – and the changing context in which law addresses them, have prompted this book. Contributors draw from one or more of the developments to address legal issues in defamation, privacy or their relationship, focussing on media in a range of common law jurisdictions. Many of the jurisdictions have seen defamation law reforms and privacy law developments in recent years, or extensive consideration of them. The changes have often drawn on, or reacted against, approaches or ideas in other jurisdictions. In addition, the emergence of divergent views about the legal protection of reputation and privacy – prompted in part by case law under Article 8 of the European Convention on Human Rights – raises challenging conceptual questions about the interests involved. The developments in each area of law and the ways in which they display similarities and differences have led to a comparative collection encompassing both areas of law.

#### 1.4 Defamation: comparative reform, constitutions and common law

The law of defamation traditionally offered limited protection to matters of public interest published widely. Defences would protect some speech – it might be proven to be true, it might be an honest comment based on facts that are proven true, it might be a fair report of a statement made in parliament, and so forth. The law took a categorical approach, with free speech interests considered, so far as they were, in the formulation of defences. Arguably, the law in England and some other jurisdictions is moving towards a more flexible approach where the overall interests in speech and reputation will be given more attention in any particular case. To date, one way in which that flexibility has been pursued is through reformed privilege defences that have emerged in many common law countries since the mid-1990s.<sup>43</sup> This style of change in defamation

<sup>41</sup> For example, in *Reynolds v. Times Newspapers* [2001] 2 AC 127, direct reference was made to the earlier House of Lords decision in *Derbyshire County Council v. Times Newspapers* [1993] AC 534 (which prevented elected government bodies from suing in defamation). In *Derbyshire*, English law explicitly endorsed the chilling effect rationale of *Sullivan*.

<sup>42</sup> See, e.g., Ronald J Krotoszynski Jr, 'Responding to a World Without Privacy: On the Potential Merits of a Comparative Law Perspective' in Austin Sarat (ed), *A World Without Privacy: What Law Can and Should Do?* (New York: Cambridge University Press, 2015) 234.

<sup>43</sup> See above n 13.

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law, as well as the US *Sullivan* model that preceded it, is addressed in various chapters.

Hilary Young examines Canadian developments in defamation law through *Grant v. Torstar*<sup>44</sup> and subsequent case law on the responsible communication defence. Her analysis suggests that courts may interpret the defence too conservatively, perhaps especially when dealing with non-journalistic publications. The Canadian situation offers some echoes of English experience, with less flexibility in assessing the ‘responsibility’ of communication than appears warranted by the defence’s rationale. This leads Young to suggest the defence should become focussed on a ‘reasonableness’ standard, as in negligence law, developing ideas seen in some commentary after *Reynolds*.<sup>45</sup>

Andrew Scott addresses an omission from the reforms in the Defamation Act 2013 (UK), which focussed on areas of substantive law, rather than dispute management, resolution and remedies. He examines how ending the single meaning rule in defamation, along with introducing discursive remedies, could lead to a much better ‘triangulation’ of social and individual interests in reputation and free speech. Finding ways to deal more effectively with a publication’s meaning in defamation law certainly has great potential for ameliorating some of the law’s worst problems.<sup>46</sup> Scott suggests how reconsidering the single meaning rule along with remedial reform offers a relatively simple way of providing most litigants with ‘mutually acceptable’ and quicker results in defamation disputes. Under the current approach, defamation litigation becomes ‘strategy and semantics’ more than ‘the attempt to address any core dispute’. Notably, changing the single meaning rule could be pursued by courts, not merely by legislation. While the argument of principle is independent of the recent statutory reforms, it may be that reform to the single meaning rule becomes more palatable for courts after jury trials have become the exception in English defamation law.<sup>47</sup>

The analyses of Young and Scott both have wider resonance: their concerns and suggested approaches could have application in a host of Commonwealth jurisdictions at the least. But the US, in many ways, remains a place apart for matters of media law. Commentators, however, differ as to the degree to which that separation does, or should, exist. In

<sup>44</sup> [2009] 3 SCR 640.

<sup>45</sup> See, e.g., Eric Descheemaeker, ‘Protecting Reputation: Defamation and Negligence’ (2009) 29 *Oxford Journal of Legal Studies* 603.

<sup>46</sup> Much of my own earlier research has addressed other ways in which the treatment of a publication’s meaning creates unwarranted complexities in defamation law; see, e.g., Andrew T Kenyon, *Defamation: Comparative Law and Practice* (Abingdon: UCL Press, 2006).

<sup>47</sup> Defamation Act 2013 (UK) s 11.