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SOUTH



AUSTRALIA

**SIXTY-NINTH REPORT**

of the

**LAW REFORM COMMITTEE**

of

**SOUTH AUSTRALIA**

to

**THE ATTORNEY-GENERAL**

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**SIXTY-NINTH REPORT OF THE LAW  
REFORM COMMITTEE OF  
SOUTH AUSTRALIA RELATING TO  
GROUP DEFAMATION**

1982

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*

THE HONOURABLE MR. JUSTICE WHITE, Deputy Chairman.

THE HONOURABLE MR. JUSTICE LEGOE, Deputy Chairman.

D. W. BOLLEN, Q.C.

M. F. GRAY, S.-G.

D. F. WICKS.

A.L.C. LIGERTWOOD

The Secretary of the Committee is Miss J. L. Hill, C/- Supreme Court, Victoria Square, Adelaide 5000.

**DISSENTING OPINION TO THE SIXTY-NINTH REPORT OF THE  
LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELAT-  
ING TO GROUP DEFAMATION**

To:

The Honourable K. T. Griffin, M.L.C.  
Attorney-General for South Australia.

Sir,

I accept and agree with the material and comments contained in the report of the majority of my colleagues in the above-mentioned report down to the end of the tenth line on page 12.

However, I wish to offer my disagreement with the recommendation contained on page 12. I dissent because in my view:—

1. There is no persuasive evidence, here or in other jurisdictions where case law has produced similar issues, that there have been any number of persons suffering loss, damage or harm as a result of non-actionable group defamation. In my opinion members of a class who have individually suffered a loss sounding in damages can recover as the law presently stands.
2. The present tests for actionable defamation are adequate to cover the type of plaintiff likely to suffer harm. In particular I refer to the general statements in *Fleming on Torts*, 5th edition (1977) p.536, set out on pp.10-11 of the Report, and Duncan & Neill on Defamation (1978) chapter 6, paragraph 13 set out on pp.12-13 of the Report.
3. The application of the general defences in defamation referred to on p.12 lines 36-8 of the Report, will raise strange anomalies. If the defence of justification can be established in an action by A plaintiff, what happens if such a defence would not have succeeded had another member (S) of the class sued such as B (C, D or E etc)? Is qualified privilege to be applied equally to each member of the class, and how is the reply of Malice to be applied amongst members of the class?

In my opinion such circumstances show up the difficulties of removing or altering the shape of individual reputation as the central criteria for actionable defamation. See Lord Atkins' judgment in *Knupffer v London Express Newspaper Limited* (1944) A.C. 116 at 122. There would be a danger of creating a preference to allow an action by a person who fell within 1-4 on p.16 of the Report.

Presumably injunctive relief, in the limited sense that defamed plaintiffs can obtain such relief, is to apply to such persons bringing themselves within 32-36 on p.12 of the Report. If that is so, then, in my humble opinion, further anomalies, difficulties, and inconsistencies will arise in determining the balance of convenience between different members of the Group A, B, C and D etc. as balanced against the one or two defendants or at least the principal defendants (Publishers and author). This type of problem is analogous to that arising upon a special plea of malice by one or more plaintiffs in a group which I have mentioned above.

4. Because I agree with the comment—on p.12 (lines 44-46) that:—

“Further as the law of defamation is concerned with the protection of individual reputations, action as an individual will generally, but not necessarily, vindicate the group as a whole.”—I am unable to see why a reform such as that proposed is necessary.

In my opinion the common law areas of liability and defences in defamation actions should not be amended particularly when a member of a group may be able to sue in circumstances where he could not if he (or she) was not a member of a group.

I have the honour to be

CHRISTOPHER J. LEGOE,

A Deputy-Chairman of the Law  
Reform Committee of South Aus-  
tralia.

## SIXTY-NINTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO GROUP DEFAMATION

To:

The Honourable K. T. Griffin, M.L.C.  
Attorney-General for South Australia.

Sir,

In the course of the various reports being addressed to you on the general topic of locus standi, we come now to the subject of group defamation. This report therefore deals with the reform of the law of defamation insofar as it fails to give a remedy to a member or members of a large group of people, all or some of whom have been the objects of a defamatory statement which has affected their personal reputation.

King David sang: "I said in my haste, All men are liars" (Psalm 116:11). By stating his proposition in that way the King showed from whom the wisdom of his son and successor Solomon was derived, for by stating the proposition as a universal and not condescending to particulars no action would lie for defamation. Similarly St. Paul's ethnic slur on the Cretans (Titus 1:12) would not subject any of his present day successors who repeated the slander to any action at the suit of a Cretan. In the eyes of the law it is easier for a camel to go through the eye of a needle than for one member of a large group which has been defamed as a group to establish a right of action at law.

It is necessary to say at the outset that not all criticisms of the present state of the law can be justified, because in a number of the cases where the plaintiff has failed, his object has been to redress a real or fancied injury to his feelings rather than damage to his reputation. As was said in Illinois in *Duvivier v. French* (1900) 104 F. 278:—

"The gravamen of an action for libel is not injury to the plaintiff's feelings but damage to his reputation in the eyes of others . . . It is not sufficient that the plaintiff should understand himself to be referred to in the article. It is necessary to constitute libel that others than the plaintiff should be in a position to understand that the plaintiff is the person referred to."

For example, in *O'Brien v. Eason and Sons and Others* (1913) 47 *Irish Law Times* 266 a weekly journal called *The Throne* published defamatory remarks about the Ancient Order of Hibernians. However there was no evidence at all to show that the plaintiff was in any way defamed. As Holmes L. J. said at page 267:—

"Mr. O'Brien brings this action not for any personal attack upon himself, but by reason of the fact that he is a member of a body which this journal does not associate with him in any way. I am of opinion that, under these circumstances, this action does not lie at all; that it could not be maintained and that it has been brought not for the purpose of freeing Mr. O'Brien from imputations upon him, but for the purpose of setting up this order and preventing any attacks upon it in certain journals published in England and circulated in this country."

Similarly in *Campbell v. Wilson* 1934 *S.L.T.* 249 the plaintiff, a Miss Campbell, was a member of the Scottish Society for the Protection of Wild Birds. A letter was published in the *Glasgow Evening Citizen* relating to the caging of wild birds and referring to the Society, but

there was nothing in the letter which in any way suggested any imputation against the reputation of the plaintiff. As Lord Mackay pointed out at page 251, Miss Campbell was in fact saying that a voluntary society of unlimited size was slandered because an unworthy action of theirs deceived the public and that therefore she as a member of the Society was slandered in her person and feelings, and he had no hesitation in rejecting the action.

Secondly, the class may be described in terms which are so vague that it is impossible to say who in fact belongs to the class. A typical example of this type of case is *Braddock and Others v. Bevins and Another* [1948] 1 K.B. 580 where the plaintiffs were Mrs. Braddock, a member of Parliament for one of the Divisions of Liverpool, three Labor members of the Liverpool City Council and a member of the Labor Party who was a candidate for a municipal election. The Court of Appeal held that the trial Judge, Stable J., had rightly dismissed the action of the plaintiffs other than Mrs. Braddock because the words "the Socialist M.P. for the Division and her friends in Abercromby" were too widely expressed to say what the meaning of "friends" in such a connotation might be. The action was allowed to proceed in relation to Mrs. Braddock herself as she was the M.P. referred to, but the claims of the other plaintiffs were struck out.

Thirdly, the class may be completely indeterminate, as for example all persons who express dissent from a particular legislative proposal where the publication does not contain anything to direct the mind of a reader to particular plaintiffs. Such a case was the Western Australian case of *Dowding v. Ockerby* 1962 W.A.R. 110. In that case a bill had been introduced into the House of Representatives to amend the Crimes Act, 1914. According to an advertisement published by the Liberal Party, the opponents of the bill were "Communists, fifth columnists, industrial saboteurs, shabby little malcontents, vicious rabblers and Quislings". It was admitted that the words of the advertisement were defamatory but both the trial Judge and the Full Court held that it was impossible to say that those words were published of and referred to five individual plaintiffs, a Minister of religion, an employee of the Post-Master General's Department, a Professor of Philosophy at the University of Western Australia, the then Federal President of the Australian Labor Party, and a Labor Senator.

Nothing in this report is intended to change the law where there is no damage to reputation or where the class itself is vague or indeterminate. Nevertheless where a plaintiff can demonstrate that he is a member of a group whose reputation is impugned by a defamatory statement, should he not have a right of action where the statement does damage his reputation as distinct from his feelings? It is to this question that we address ourselves in this report. We should add that we are not concerned in this report with the right of a group which is incorporated to sue for defamatory statements affecting the reputation of the incorporated body. There are many cases which allow a right of action in such circumstances. A typical example is *South Hetton Coal Company Limited v. North-Eastern News Association Limited* [1894] 1 Q.B. 133.

The present law on the topic of group defamation is well set out in *Clark & Lindsell on Torts 14th Edn. (1975)* para. 1666 page 950 where the learned authors point out that the crucial question is whether the words were published of the plaintiff in the sense that he can be said to be personally pointed at. They go on to say that "normally where the defamatory statement is directed to a class of persons no individual belonging to the class is entitled to say that the words were written or

spoken of himself", but they say by way of exception that words which appear to apply to a class may be actionable if there is something in the words or the circumstances under which they were published, which indicates a particular plaintiff or plaintiffs, or if the defamatory words refer to each member of a limited class or group then all will be able to sue. Clearly in such circumstances much turns on the size of the class as well as the wording of the alleged defamatory statement. As it is put in an article "*The Individual Member's Right to Recover for a Defamation Leveled at the Group*" by Lewis in (1963) 17 *Uni. of Miami L.Rev.* 519 at 520—

"It has often been said that when the direction of the language is to a large group then 'one might as well defame all mankind' and since a fundamental requirement of a libel or slander is that the words must refer to some ascertainable person, and that person be the plaintiff, this requirement not having been met, no action will lie."

and the writer goes on to give a number of examples of that proposition. The reported cases are however not uniform in their application of this test. Thus, for example, in *Macphail v. Macleod* [1895] 3 *S.L.T.* 91 Lord Kyllachy allowed a libel action to go forward where an allegation in a newspaper that all the Ministers who were members of the Presbytery of Lewis were guilty of drunkenness was held to give an individual right of action to every one of the ministerial members of the Presbytery. The report does not give the number of ministerial members of the Presbytery of Lewis but Scottish Presbyteries are larger in size, generally speaking, than similar bodies in Australia, and even allowing for the fact that the Presbytery of Lewis is in the Western Highlands where a large number of the inhabitants are either Roman Catholics or Free Church, the number of ministerial members of the Presbytery must have been substantial. The largest number we have been able to find is in the case of *Pienaar and Another v. Argus Printing & Publishing Co. Ltd.* 1956 (4) *S.A.L.R.* 310. In that case all one hundred and fifty six Nationalist candidates for the Senate of the South African Parliament were granted damages for defamation, in relation to an article which spoke generally of Nationalists scrambling for seats in the Senate of the South African Parliament and suggesting that they were only doing it for monetary reward. Where the numbers are small recovery has in a number of cases been permitted. A typical example is *Browne v. D. C. Thomson & Company* [1912] *S.C.* 359 where a libel against the Roman Catholic religious authorities in Queenstown was held to entitle the Bishop of Queenstown and six of his clergy, who were all those who exercised religious authority in the name and on behalf of the Roman Catholic Church in Queenstown, to maintain separate actions for damages. However Lord Mackay in *Campbell v. Wilson* (supra) thought that Browne's case went "as far as the law may safely go" (see p.252). Similarly in Canada where a jury was libelled in regard to allegations arising out of a murder case, eight of the jurymen took action in respect of the libel and were held to be entitled to do so: see *MacKay and Another v. Southam Co. Ltd. and Another* (1956) 1 *D.L.R.* 1. The case of *LeFanu and Bull v. Malcomson and Others* [1848] 1 *H.L.C.* 637; 9 *E.R.* 910 is often referred to in this context. However in the defamatory statement in that case, there was a specific reference to "a certain factory in the south of Ireland" and there were descriptions as to what went on in the factory concerned, so that there was little difficulty in identifying the plaintiffs' factory as being the one hit at. That is a different set of circumstances from the one which we are considering in this report.



There is no doubt that at the beginning of the seventeenth century there was a flood of actions of defamation and the Judges did everything they could to discourage them. As *Holdsworth: History of English Law Vol. VIII pages 353* and following points out "in the first place the Star Chamber was doing all that it could to suppress duelling and therefore those who thought that their honour had been stained were driven to the law courts and in the second place . . . litigation of all kinds is always encouraged when, in a naturally turbulent age, the law courts are sufficiently strong, and the law which they administer is sufficiently developed, to provide a remedy for real or fancied wrongs." Holdsworth goes on—

"No doubt some cautious discouragement of these actions was needed; but the methods of discouragement devised by the common law judges, being somewhat hasty and ill-advised, did permanent harm to the development of this common law action, and therefore to the development of the tort of defamation."

In the course of a very learned argument by Mr. T.F. Ellis for the plaintiffs in error in *LeFanu's case*, quotations are given from which it is obvious that the limitation that we are now discussing comes from the period that Holdsworth is dealing with in the passage above cited. Mr. Ellis said at page 647 of the House of Lords Report—page 915 of the English Reports:—

"Similar instances are given in Rolle's Abridgment (1 Ro. Ab. 81, *Action sur Case*, H.). Thus, pl.12: '*Lou les parols en eux mesme sont incerten, issint que ne poet estre intend, que ils fueront parle d'ascun person certain, la ils ne poient estre fait actionable per ascun averrment, Mich. 3 Jac., B.R.—per Tanfeild. Come si home dit, one of my brothers is, etc. Nul action gist per ascun averrment, Mich. 3 Jac., B.R. per Tanfeild. So pl. 13. 'En un action enter A. et B. si 3 homes severalement devant les justices d'Assises done evidence al un Jury vers A. et sur ceo A. dit al eux, There is one of you that is perjured in the giving of this evidence. Sans nomer ascun de eux, nul de eux poet aver action per averrment que les parols fueront parle de luy.' Placitum 14 is stronger still, and goes much beyond any doctrine necessary for the present plaintiffs in error. 'Si home dit, My enemy, etc. Chargeant luy ove scandalous matters, que violent mainctayner action, uncore nul action gist per ascun, per un averrment que les parols fueront parle de luy, et per un innuendo, etc. Pur ceo que les parols en eux mesme sont tout ousterment uncertaine, Trin. 39 Eliz. B.R. Enter Jones and Daukes adjudge. Issint en cest case l'action ne giseroit per averrment auxi que al temps del parlance del parols il mesme fuit l'enemie del defendant, et que le defendant adonque navoit ascun auter enemie forsque le plaintiffe, car ceo est uncertain, nec poet estre conus si il avoit auter enemie preter le plaintiffe'."*

(A translation of this passage is to be found in the Appendix).

Without doubt another source of limitation came from the fact that many of the libels were, and they still can be but are not usually in practice, prosecuted by way of criminal libel. Thus in *The King v. Alme and Nott 3 Salkeld 224; 91 E.R. 790* (also reported in 1 Lord Raymond 486 sub nomine *The King v. Orme and Nott*) it was ruled by the King's Bench in Trinity Term 11 Will. III (i.e. 1699):—

"Indictment for a libel against several subjects, &c. to the jury, unknown, et per curiam, Where a writing which inveighs against mankind in general, or against a particular order of men, as for instance, men of the gown, this is not libel, but it must descend to particulars and individuals to make it a libel."

However in *The King v. Osborne 2 Barn. K.B. 138* an information was moved in Easter Term 1732 against Osborne for printing a libel reflecting upon the Portuguese Jews in England and the Court at first doubted whether the information would lie: see 94 E.R. 406, but the matter came on for further hearing in Trinity Term and the Court allowed the libel prosecution to go forward: see page 167 of Barn. and 425 of the English Reports. However as is said by *Holt: Law of Libel (1816) page 238* on this case, even where an information for libel may be improper, the publication of such a paper is deservedly punishable on an information for a misdemeanour "and that of the highest kind because such sorts of advertisements necessarily tend to raise tumults and disorders among the people." Obviously on Holt's understanding the matter did not go forward as a criminal libel but as an information for a misdemeanour for words tending either towards a breach of the peace or towards sedition. Similarly in *R. v. Gathercole [1838] 2 Lewin 237; 168 E.R. 1140 at pp. 251-2* of Lewin and 1144-1145 of the English Reports, a prosecution for a libel on all the nuns in a Roman Catholic Nunnery at Scorton was allowed to go forward. A similar attitude was taken in a civil case by Willes J. in *Eastwood v. Holmes (1858) 1 F.&F. 347; 175 E.R. 758*, when an article dealing with recent forgeries of the small mediaeval lead objects known as pilgrim signs was held to reflect only on a class of person dealing in such objects and not on the plaintiff personally. In relation to criminal libels, Belton in an article "*The Control of Group Defamation: A Comparative Study of Law and its Limitations*" in *34 Tulane Law Review 300 at 302 says:—*

"After an early setback, the law of criminal libel was extended in the case of *Rex v. Osborne* (K.B. 1732) to punish libel of a group of persons. On the basis of this precedent a few subsequent indictments were sustained in England for libel of a group, and it became common for English legal writers to say that such was the law. The fact remains, however, that prosecutions for defamatory libel of a group have been very rare in England, and probably could not be maintained today.

And he refers to *Kenny: Outlines of Criminal Law 16th Edn. (1952) page 181 note 6* where the author says:—

"An indictment will lie, provided only that the class defamed be not indefinite . . . but a definite one . . .",

and he then refers to cases which support Kenny's view.

Fleming sums up the present position on group defamation in his *Law of Torts 5th Edn. (1977) page 536* as follows:—

"The problem of identification becomes singularly acute in cases of group defamation. The common law sets its face against civil sanctions for vilification, not of individuals, but of a whole class of persons distinguishable by race, colour, creed or calling, in part because in only rare cases would an individual member deserve damages for himself, in part for fear of unduly inhibiting political discussion and criticism. In the last resort, the criminal law of seditious libel provides a residual, though no longer favoured, weapon for combating the most odious of this kind of demagoguery. At any rate, so far as civil claims are concerned, the plaintiff is up against the requirement that the words were published 'of and concerning' him, and 'the reason why a libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was, in fact, included in the defamatory statement, for the habit of

making unfounded generalisations is ingrained in ill-educated or vulgar minds, or the words are occasionally intended to be a facetious exaggeration.

But this difficulty the plaintiff may yet overcome by proving himself to be specifically identified, either because the group is so small that the accusation can reasonably be understood to refer to each and every one of its members, or because the circumstances of publication permit the conclusion that it was he who was aimed at from amongst the group. Most relevant, though not necessarily decisive, are of course the size of the class, the generality of the charge and its extravagance. . . .

It has been said that a defamatory publication referring to either one of two persons in the alternative affords redress for neither because it is uncertain which one of them was aimed at. But this bizarre pendency surely has no place in modern law, for incontestably a slur is cast on both."

The learned author there refers to the judgement of Madden C.J. in *Chomley v. Watson* [1907] *V.L.R.* 502 where the defamatory statement was that "either Mr. Dick or Mr. Chomley must have suppressed or delayed the letter". Madden C.J. decided the case on the basis of old cases of 1666 and 1714 but we do not think that that represents the present law for the reasons given by Fleming.

The leading case on the law as it stands at present is the decision of the House of Lords in *Knupffer v. London Express Newspaper Limited* [1944] *A.C.* 116 in which a libel was published by the defendant newspaper on an immigrant group of Russians calling themselves Mlado Russ, i.e. Young Russia. There was no doubt that the article was libellous but the House of Lords held that the statement could not in law be regarded as capable of referring to Knupffer, one member of the Mlado Russ group, who sued for libel. However it must be said that neither Lord Atkin nor Lord Porter in Knupffer's case would have been deterred by the size of the class alone, and Lord Atkin disapproved of the judgment of Willes J. in *Eastwood v. Holmes* to which we have referred. Lord Atkin said at page 122:—

"It will be as well for the future for lawyers to concentrate on the question whether the words were published of the plaintiff rather than on the question whether they were spoken of a class. I agree that in the present case the words complained of are, apparently, an unfounded generalization conveying imputations of disgraceful conduct, but not such as could reasonably be understood to be spoken of the appellant."

The same test was applied very recently by Comyn J. in *Orme and Another v. Associated Newspapers Group Ltd.* "*The Times*" 4th February, 1981 in which case a libel published in the Daily Mail against the religious group known as the Moonies was held to be actionable at the suit of Orme who was the leader of the Moonies in England. The number of Moonies in England is not stated but obviously it must have been substantial so that the possible number of the class does not seem to have played any part in the Judge's decision.

We think that the test of the earlier High Court of Australia in *Gohard v. James Inglis & Company Limited* (1904) 2 *C.L.R.* 78 is correct that if a plaintiff can be reasonably identified as one of the persons defamed he is entitled to a verdict and that the later test in *David Syme & Co. v. Canavan* (1918) 25 *C.L.R.* 234 which requires the defamatory statement to be "necessarily referable" to the plaintiff states the test too narrowly.

We think it should be sufficient if the plaintiff is a member of the group defamed, that the statement necessarily defames him, and will cause him loss of reputation personally.

A good general summary of the present position is contained in *Duncan & Neill on Defamation (1978)* Chapter 6 para. 13 as follows:—

“It is submitted, though there is no satisfactory modern English authority on the matter, that the right approach is that even a general derogatory reference to a group may affect the reputation of every member, and that the court would adopt as its test the intensity of the suspicion cast upon the plaintiff.

Where therefore allegations are made against members of a class the question for consideration is whether, having regard to the size of the class, the gravity of the imputation, the number of members of the class against whom the allegation is made and any other relevant circumstance, reasonable persons would understand that the plaintiff himself had actually done the act alleged or (as the case may be) was reasonably suspected of having done it. Furthermore, there may be cases where the allegation in the words complained of implicates directly only some of the members of a class but the words may nevertheless bear a further inferential meaning (which would involve all the members of the class) that the remainder were, for example, associates of criminals, or were persons who had not made sufficient inquiry as to the character of their business associates. Indeed the problems presented by class libels underline the importance in every case of deciding what the words in their context would be reasonably understood to mean.”

To this exposition of the law may be added a reference to the judgement of the High Court of Australia in *Lee v. Wilson and Mackinnon (1934)* 51 C.L.R. 276 in which it was held that if defamatory words capable of relating to more than one person are found actually to disparage each of them among the respective groups of the community which know them, because the words are reasonably understood to refer to each of them, they may all maintain actions notwithstanding that the writer or publisher intended to refer to still another person to whom his words were also capable of referring.

In our Fifteenth Report, we recommended in effect that any person who was able to show that by reason of the comment made on the group he had been dismissed from a position or had lost the opportunity of obtaining one, or had otherwise been damaged in his business, should be able to maintain an action. That introduced the concept of special damage into all defamation if it were considered in relation to a group. We note that Mr. Keeler, a member of the Committee, offered a dissenting opinion to the effect that although he agreed that the law should deal with inflammatory remarks made about a group or class, he did not think that the law of defamation was the appropriate vehicle for it. He drew attention to the undoubtedly accurate fact that class libels usually occur in relation to comments made about or in debates on politics, social circumstances or religion. Consistently with this view the majority of the Australian Law Reform Commission in its Report on Unfair Publication, Defamation and Privacy number 11, felt that there should be no amendment of the law to allow a right to sue on the part of a member of a group which had been defamed. That majority preferred to wait to see how legislative vehicles (e.g. Racial Discrimination Act 1975 and equivalent State legislation) would fare in dealing with this sort of thing. Clearly the majority thought that persuasion and conciliation should be able to lead to some correction of defamatory remarks made about classes.

Two members of the Australian Law Reform Commission thought that there should be an amendment. They proposed a Bill to allow a member of a group to obtain a corrective order, declaration and injunction (but not damages) if he were a member of a group which had been defamed. Presumably those two would have supported the idea which was mentioned in the Commission's working papers (but not translated into the report) that once one member had obtained relief no other member of the group could sue. Of course, the views of the two members were much coloured by the general dislike of damages and approbation of corrective orders on the part of the whole Commission.

Despite the formidable arguments to the contrary, particularly based on the right to free speech and the restriction that might occur in political, social or religious debates, a majority of us think that the law should be amended to permit a person who is a member of a group which has been defamed to sue on proof of the matters in the next paragraph. We do not think it right that there should be any statutory attempts to define a class or a group. Whether or not there has been a defamation of a group or a class can be determined on the facts of each case.

A plaintiff seeking to bring such an action should be required to prove:—

1. That he is a member of a class referred to in the statement.
2. That the words used are defamatory.
3. That the words are capable of being applied to him and have been understood by readers of the statement as actually applying to him notwithstanding that the words are general in their application.
4. That as a result his reputation has been adversely affected.

In this respect it should be sufficient to show that the words are capable of affecting the plaintiff in his profession, business or calling, even though they may also refer equally well to all or some other members of the group about whom the defamatory statement is published. Accordingly any such plaintiff will face the task of proving that he was a member of the class, that there really has been a defamation which touches him, and that there are solid facts entitling him to recover damages. We point out that all the defences available to a defendant in defamation actions other than the one now removed will still be available to the defendant.

We do not however think that the class or group itself should be able to sue. Although we recognize that the class or group may have a 'corporate' reputation, the difficulties of applying this concept to an unincorporated body or group to found an action seem to us to be substantial. As well as the difficulty of identifying the 'corporate' reputation, damages for its loss would seem to be inappropriate.

Further as the law of defamation is concerned with the protection of individual reputations, action as an individual will generally, but not necessarily, vindicate the group as a whole. Until the problem of the status of unincorporated associations is tackled we do not, at this stage, recommend that the law be amended to permit a class or group in its own name or in a representative action to sue for defamation of a class or group as such. We shall deal further with the status of unincorporated associations to sue when we report to you on that aspect of locus standi.

We think that this report is one of great importance in that if adopted and passed into law it will provide greater protection to members of the ethnic communities, who regrettably are too often the subject of gener-

alised defamation, which frequently affects the reputation and therefore the employment and other prospects of individual members of the defamed group.

The Committee would like to express its appreciation to Mr. Bollen Q.C. a member of the Committee who prepared the first draft of this report.

We have the honour to be

HOWARD ZELLING  
J. M. WHITE  
D. W. BOLLEN  
M. F. GRAY  
D. F. WICKS  
A. L. C. LIGERTWOOD

Law Reform Committee of South Australia.

28th November, 1981.

## APPENDIX

Similar instances are given in Rolle's Abridgment (1 Ro. Ab. 81, Action sur Case, H.). Thus, pl. 12: "Where the words are uncertain in themselves so that one cannot say that they were spoken of an identifiable person such an averment is not actionable, Michaelmas Term 3 James I King's Bench per Tanfeild. As if a man said "one of my brothers is, etc. No action lies on such an averment, Michaelmas Term 3 James I King's Bench per Tanfeild. So pl. 13 "In an action between A and B if three men severally before the Justices of Assize gave evidence to a jury against A and on this A said the them "There is one of you that is perjured in the giving of this evdience". Without naming any of them none of them can have an action on an averment that the words were spoken of him. Placitum 14 is stronger still and goes much beyond any doctrine necessary for the present plaintiffs in error. If a man should say "My enemy etc." charging him with scandalous matters on which he wishes (sic) to maintain an action nevertheless no action lies on this on an averment that the words were spoken of him and by an innuendo etc. Because the words in themselves are entirely uncertain. Adjudged in Trinity Term 39 Elizabeth I King's Bench between Jones and Daukes. So in this case the action would not lie on an averment that at the time he spoke the words he was the enemy of the defendant and that the defendant moreover had no enemy other than the plaintiff yet this is uncertain because it cannot be known if he had any enemy other than the plaintiff.