

BOOK REVIEW

Defamation: Comparative Law and Practice by Andrew T Kenyon (Oxford: UCL Press, 2006) pages v–xlv, 1–431. Price A\$131.00 (softcover). ISBN10: 1 84472 021 7.

THE HON JUSTICE MICHAEL KIRBY AC CMG*

Most textbooks on legal topics accept a *verbal* approach to their task. They set out the relevant legislation. They collect the applicable cases. They engage in discussion about the consistency of judicial decisions. They analyse the coherence of the body of law according to doctrinal categories. If one is lucky, they might add some references concerning the policy choices that lie behind the words and offer a few comments on future directions that the law might take to repair revealed defects.

There is another approach. This new book by Associate Professor Andrew T Kenyon, Director of the Centre for Media and Communications Law at the University of Melbourne, shows what can be done. With the support of the Centre and the Faculty of Law of the University of Melbourne, as well as the Australian Research Council, the author embarked on a project of *empirical* research concerning how the law of defamation is viewed as operating in practice. He presents the results in this instructive and interesting study. It is inherently valuable in the chosen field of law and practice. Moreover, the approach may give a boost to empiricism in legal writing more generally. If it does, that will be no bad thing.

The law is an intensely practical discipline for most of the people who get caught up in a legal problem (and especially if it results in litigation). Yet many legal scholars are content to analyse words. By and large, verbalists and legal empiricists share a healthy contempt for each other.

Empiricists accuse the verbalists of indulging in unrealistic word games and creating cut and paste textbooks comprising little more than the language of legislation and the elaborations written about it by judges and others concerning what this or that word means.¹ For empiricists, this approach is completely inadequate. It is also, ultimately, unrealistic. It tends to ignore the way the law operates in reality. It pays a premium for purely verbal dexterity and cleverness. It overlooks the realities of life as they exist in the real world.

* BA, LL.M., B.Ec (Syd), Hon DLitt (Newc), Hon LLD (Macq), Hon LLD (Syd), Hon LLD (Nat Law Sch, India), Hon DLitt (Ulster), Hon LLD (Buckingham), Hon DUniv (SA), Hon DLitt (James Cook), Hon LLD (ANU), Hon DUniv (Stn Cross), Hon FASSA, Hon FAAH; Justice of the High Court of Australia.

¹ For a general critique of pure textualism: see, eg, Michael Coper, 'Concern about Judicial Method' (2006) 30 *Melbourne University Law Review* 554, 561, 573–4; Justice Michael Kirby, 'Judicial Activism: Power without Responsibility? No, Appropriate Activism Conforming to Duty' (2006) 30 *Melbourne University Law Review* 576, 582–4.

Verbalists are prone to treat empiricists as people from a different planet. In effect, they are not lawyers at all. They are social scientists. Their enquiries are regarded as unnecessarily expensive. If they are not interested in the tasks of verbal analysis proper to lawyers, they should join a law reform body, law foundation, political research unit or parliamentary library, not go around pretending that they are lawyers with the analytical skills essential to that vocation.

Thirty years ago, when the Law Reform Commission (as it was originally named) was established, I witnessed this drama being played out amongst its early Commissioners and staff. Having myself been trained as a verbalist, I had at first little patience with the empirical method. However, my ignorance in this regard was soon dispelled by Professor David St L Kelly who came to the Commission from the Adelaide Law School. In a major review of debt recovery and insolvency law and practice,² he taught the need to go beyond verbal analysis of the applicable federal and state legislation and case decisions. He took the Commission's enquiries into the offices of bankruptcy officials, debt recovery agents, church organisations helping small debtors, modest legal firms, trade unions and others.

For Professor Kelly, only in this way would the operation of the law 'on the ground' be revealed in all of its complexity. Tinkering with words over the language of statutes was an inadequate approach to the task of expounding the law, targeting its inadequacies and understanding its strengths. Thereafter, and to the present day, the Australian Law Reform Commission (as it was renamed in 1996) and other law reform bodies in Australia have usually followed the empirical approach. It is much less common to see it pursued by an accomplished scholar in a leading Australian law school. Surveys about the operation of the law in practice do not tend to feature in Australian legal texts.³

In this new book, Associate Professor Andrew T Kenyon has set out to break this mould. He is as skilled as the next academic lawyer in the verbal tricks. After all, he edits and regularly contributes to the *Media & Arts Law Review*, published by LexisNexis. His special interest is media law from a comparative perspective. Many of his books and articles are concerned with comparing the operation of the law across national and sub-national boundaries. His *New Dimensions in Privacy Law: International and Comparative Perspectives*,⁴ co-edited with Professor Megan Richardson, is but the latest illustration of this comparative approach. Nothing especially surprising in any of this. The very nature of the technology of modern media as a subject of law, relevant to his particular interests, demands a trans-border approach. This fact was vividly illustrated by the reasoning of the High Court of Australia in *Dow Jones & Co Inc v Gutnick*.⁵ Addressing the operation of Australian law as it affects the

² Law Reform Commission, *Insolvency: The Regular Payment of Debts*, Report No 6 (1976).

³ Cf Justice Kenneth M Hayne, "Concerning Judicial Method" — Fifty Years On' (2006) 32 *Monash University Law Review* 223, 230.

⁴ Andrew T Kenyon and Megan Richardson (eds), *New Dimensions in Privacy Law: International and Comparative Perspectives* (2006).

⁵ (2002) 210 CLR 575.

internet,⁶ it was essential to understand the features of the technology and the reasoning of courts in other comparable jurisdictions.⁷

It is the other theme of Associate Professor Kenyon's writing, however, that is most evident in this new work, *Defamation: Comparative Law and Practice*.⁸ The comparative studies are given a special edge by the way in which they are backed up by the author's empirical methodology. He has not just accepted what judges have said about the law of defamation and how it operates. He has, instead, gone on to investigate defamation law and practice using a socio-legal research methodology. It took him into a detailed examination of court files in defamation cases in court registries in Melbourne and Sydney. As well, he has conducted interviews with 130 defamation practitioners in England, New South Wales, Victoria and the United States. Each such interview lasted approximately an hour. Interviewees are not quoted directly but identified by their professional rank.

One of the objects of this process was to gather data and impressions on the impact on defamation proceedings of the two major decisions on qualified privilege defences in defamation actions as brought by politicians: *Reynolds v Times Newspapers* ('*Reynolds*')⁹ and *Lange v Australian Broadcasting Corporation* ('*Lange*').¹⁰ Putting it shortly, the *Reynolds* defence was seen by the interviewees as more helpful to media defendants in England than *Lange* is regarded as being in Australia.¹¹ These investigations are then contrasted with US defamation law and practice following the decision of the US Supreme Court in *New York Times v Sullivan*.¹² The ruling in that case, which extends to public figures, is regarded as 'crystal clear'.¹³ As Associate Professor Kenyon puts it: 'in the US, all public plaintiffs are subject to the requirements of actual malice.'¹⁴

Other empirical research examined by the same author has tended to bear out the assessments of Australian and American defamation practitioners. Scrutiny of 1400 articles in the media of both countries by Chris Dent and Andrew T Kenyon suggests the existence of considerably more print media imputations of fraud and corruption of political and corporate leaders in the US than in Australia; and especially in respect of corporate officers.¹⁵

The Australian media remains somewhat more cautious than that of the US. This does not necessarily mean that the balance struck in Australia is inferior to that of the US. Apart from self-interested publishers and journalists, many who watch these signs outside the land of the First Amendment consider that the US

⁶ Ibid 605–7 (Gleeson CJ, McHugh, Gummow and Hayne JJ), 625–35 (Kirby J).

⁷ Ibid 597–8 (Gleeson CJ, McHugh, Gummow and Hayne JJ), 615–19 (Kirby J).

⁸ Andrew T Kenyon, *Defamation: Comparative Law and Practice* (2006).

⁹ [2001] 2 AC 127.

¹⁰ (1997) 189 CLR 520.

¹¹ Kenyon, above n 8, 236–7.

¹² 376 US 254 (1964).

¹³ Kenyon, above n 8, 244.

¹⁴ Ibid.

¹⁵ See Chris Dent and Andrew T Kenyon, 'Defamation Law's Chilling Effect: A Comparative Content Analysis of Australian and US Newspapers' (2004) 9 *Media & Arts Law Review* 89, 89, 110–11.

balance lacks proportion and respect for other fundamental human rights that compete with free speech and free press.¹⁶ The competing values include (as expressed in the *International Covenant on Civil and Political Rights*) rights to protection for honour, reputation, privacy and family life.¹⁷ The value of this book is that it reveals practitioner and other opinions on the state of the present law and assessments of the impact of recent judicial authority affecting the balance.

In a recent address celebrating the 80th Anniversary of the *Australian Law Journal*, Justice David Ipp of the New South Wales Court of Appeal described defamation law and practice as the ‘Galapagos Islands’ division of the law of torts.¹⁸ One can find cases, especially in New South Wales, some of them examined by Associate Professor Kenyon, that definitely seem somewhat detached from reality and occasionally cut off from the legal mainland.¹⁹ A good part of this book describes the operation of the peculiar trial procedure adopted in New South Wales by the amendments introduced by s 7A of the *Defamation Act 1974* (NSW). Put briefly, that provision laid down a strictly limited function for a jury. Instead of the jury determining all questions of fact relevant to a claim of defamation — the cause of action, defences and any damages — the jury was confined to deciding whether the matter complained of was reasonably capable of carrying the imputation pleaded and, if so, whether the imputation was reasonably capable of bearing a pleaded defamatory meaning.

The disjointed procedures in New South Wales which s 7A instituted are described by the practitioners consulted in the book, with some justification, as “wrongheaded”, “ludicrous”, a “disaster” and “garbage”, “absurd” and one of the “silliest efforts” at ... law reform²⁰ attempted in Australia. As I expressed similar but more seemly criticism in early decisions about the section,²¹ I am scarcely surprised.

The value of this book is that it confirms the unwieldy nature of law reform when it is ostensibly designed to cut back the jury’s role to the bare minimum. The recent enactment throughout Australia of the uniform state and territory laws

¹⁶ See, eg, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 283 (Kirby J); *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57, 94–5 (Kirby J).

¹⁷ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 17 (entered into force 23 March 1976).

¹⁸ Justice David Ipp, ‘Themes in the Law of Torts’ (Speech delivered at the Conference Celebrating 80 Years of the *Australian Law Journal*, Sydney, 16 March 2007).

¹⁹ See, eg, Kenyon, above n 8, 148–52, highlighting how the meaning of ‘the word “shyster”, which the plaintiff introduced into the pleadings ... [became] a major and repeated point of dispute’ in the *Murphy v Nationwide News Pty Ltd* litigation: Transcript of Proceedings, *Murphy v Nationwide News Pty Ltd* (Supreme Court of NSW, Levine J, 11 June 1998) 4, 8 (B R McClintock SC and G Reynolds); *Murphy v Nationwide News Pty Ltd* (Unreported, Supreme Court of NSW, Levine J, 10 July 1998) 2–3, 6; *Nationwide News Pty Ltd v Murphy* [1999] Aust Torts Reports ¶81-506; *Murphy v Nationwide News Pty Ltd* [2000] NSWSC 72 (Unreported, James J, 16 February 2000); Transcript of Proceedings, *Murphy v Nationwide News Pty Ltd* (Supreme Court of NSW, James J, 16 February 2000) 6–7 (B R McClintock SC).

²⁰ Kenyon, above n 8, 159.

²¹ See, eg, *Drummoyne Municipal Council v Australian Broadcasting Corporation* (1990) 21 NSWLR 135, 148–51 (Kirby P); *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77, 95–6 (Kirby J). For a recent restatement of this criticism and its supporting authorities: see *John Fairfax Publications Pty Ltd v Gacic* (2007) 235 ALR 402, 421 (Kirby J).

on defamation in 2005–06 may reduce the pleading contests to which s 7A gave rise. However, in one last gasp before the High Court in *John Fairfax Publications Pty Ltd v Gacic*,²² the parties ominously hinted that some of the old debates recounted in this book might survive into the new era of uniform legislation.²³ If they do, they will afford Associate Professor Kenyon a rich seam of future empirical research. Indeed, one can predict a whole minefield of opportunity in Australia as the nation's several, disparate defamation laws give way to the new uniform regime.

In conducting his empirical research on the new regime, Associate Professor Kenyon should investigate not only the opinions of judges and legal practitioners. He should also seek to interview news editors, other journalists, media owners, chiefs-of-staff and defamation plaintiffs — both those who win and those who lose. To the extent that the new defamation laws make the basic substantive and procedural law similar throughout Australia (save for respecting the long-established absence of a jury trial for defamation in some jurisdictions), the uniform laws will be a welcome move towards legal simplification. But the lesson of s 7A, and of its assessment by experienced lawyers recorded here by Associate Professor Kenyon, is that it will take some time for the mysteries of the 'law on the ground' to emerge from the sparkling, new 'law in the books'.

In his last chapter of the book, Associate Professor Kenyon anticipated the adoption of the uniform defamation laws. He suggests that those laws, and the enactment of new uniform civil procedure rules will not diminish the value of the research reported in this book.²⁴ Certainly, the empirical methodology and research sampling that he explains in the appendix afford a useful source of facts and opinions concerning defamation law and practice in England, New South Wales, Victoria and parts of the US at the time the book was written before mid-2005. Clearly, much of the material on English and American practice remains applicable. However, one gets a feeling that the author must have agonised over whether to wait for any progress on the uniform Australian defamation laws before publishing this book. He describes the earlier '[f]ailed efforts towards uniformity in Australian defamation law'²⁵ following the Law Reform Commission report *Unfair Publication: Defamation and Privacy*.²⁶ A gambler would probably have put money on the collapse of the latest effort at law reform. That may have been Associate Professor Kenyon's prognosis. However, now that the new uniform state and territory laws of defamation have been adopted,²⁷ the challenge before Associate Professor Kenyon is to build on his past research, enhance his empirical methodology and update this book for

²² (2007) 235 ALR 402. I firmly rejected any such argument by way of dicta: at 421 (Kirby J).

²³ *John Fairfax Publications Pty Ltd v Gacic* [2007] HCATrans 79 (T D Blackburn SC, 22 February 2007).

²⁴ Kenyon, above n 8, 389.

²⁵ *Ibid* 362.

²⁶ Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979).

²⁷ *Defamation Act 2005* (NSW); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA); *Civil Law (Wrongs) Act 2002* (ACT) ch 9; *Defamation Act 2006* (NT).

the even larger audience that will be interested in the operation of the new uniform Australian Acts.

In the past, many defamation actions were probably commenced in an attempt to frighten off media investigations of the plaintiff. Doubtless some politicians acquired home swimming pools as a result of unmeritorious defamation proceedings. But gradually, the noose has tightened on such cases. Yet a cohort remains where people have been wronged by false and unfair defamation, but are kept out of redress by the pig-headedness of sections of the media refusing to redress clear wrongs, the sheer complexity of defamation law and practice, and the obstacle course that, in recent years, interlocutory proceedings have put in the way of just, rapid and comprehensive finality to such claims.

There is no-one writing in Australia today who is in a better position to examine the new directions that Australian defamation law is taking than Associate Professor Kenyon. This book's account of comparative law and practice is excellent in presentation, methodology and content. The work, published in 2006 by University College London, is elegant in design, readable and especially interesting to those of us concerned with the law beyond the words in which the law is expressed. The adoption of the uniform defamation statutes ensures that there will be a second edition.