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MEDIA LAW REFORM

The Australian media needs to do more than thunder "angry frustrated editorials" to defend freedom of speech. It needs to contribute to the fullest examination of the impact of laws on the media — for without such information, how can we tell how freedom is faring?

"Might we not run the risk that it is eroded before our distracted eyes?", Mr Justice Kirby, Chairman of the Australian Law Reform Commission asked recently.

Mr Justice Kirby looked at recent developments in Defamation Reform, Consumer Actions, Privacy Law, Contempt of Court and Official Secrecy in his June 15 address to the N.S.W. Institute of Technology's course in Legal Aspects of Communication.

Mr. Justice Kirby said more attention should be paid to the training of journalists in the law; and the media of Australia, in defence of free speech and the free press, should be contributing more to the empirical and analytical examination of the impact of Australia's laws on the media.

"As it is, they content themselves with a thundering editorial from time to time, fiery cris de coeur at the occasional convention and grumbling in the back room.

Yet the most superficial examination of the directions of media law in Australia would suggest the need for a more coherent examination of media law. There is no Institute of Media Law in Australia, specifically established for journalists, lawyers and others to review the way things are developing.

For all the talk of the wealth of the 'barons of the press', there is not a single endowed chair of media law in this country.

There is absolutely no collection of the statistics of defamation actions, contempt proceedings and other legal process that inhibits the free press. Yet without such information, how can we tell how freedom is faring? Might we not run the risk that it is eroded before our distracted eyes?"

Mr. Justice Kirby continued:

"In order to illustrate the need for a more coherent and empirical approach to the impact of Australia's developing law on the media, I want, briefly, to illustrate the way in which laws governing the media are changing."

[Editor: For an earlier review of future directions in Australia's media law see **(1981) 1 CLB 25]**.

What have been the main developments in the past twelve months?

DEFAMATION REFORM

The 1979 report of the Law Reform Commission on defamation and privacy was sent to the Standing Commission of Attorneys-General that year.

The Law Reform Commission's report urged a uniform defamation law, new speedier procedures for defamation actions to combat 'stop writs'; new procedures of correction and reply, to reduce the emphasis on money damages, wider defences and a small, defined zone of privacy protection.

The new Federal Attorney-General, Senator Gareth Evans has announced that a uniform law on defamation for the whole of Australia should be finally agreed upon by July 1983. [See **(1983) 3 CLB-7**].

Media reaction to this announcement was uncertain. The Melbourne *Age*, in an editorial 'On the road to reform', reflected on the slow pace at which the 'wheels of law reform turn'.

The *Age* was dubious about the proposal to reject the Law Reform Commission's approach that truth should be a complete defence and to substitute 'truth and public benefit' as the justification requirement.

The *Australian* also emphasised that uniformity would be a considerable achievement but only if the new law was a good one.

New attention to defamation law came with the issue by the NSW Premier of defamation proceedings following the Four Corners program.

Attention was also attracted to defamation law by enquiries into alleged abuse of parliamentary privilege.

An enquiry by the Joint Committee of Parliamentary Privilege by the NSW Parliament confronted complaints both by citizens and parliamentarians. The citizens complained that they had been attacked under

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parliamentary privilege without adequate means of address.

In the Law Reform Commission's report, the qualified privilege attaching to a fair report of a parliamentary defamation would be conditional upon the media giving the person defamed a prompt right of reply.

But parliamentarians themselves also complained of problems arising from the scope of the absolute privilege of Parliament. Were letters written on behalf of a constituent to a Minister covered by the absolute privilege?

One case during the year past also illustrated the importance of journalists' double checking press releases issued by parliamentarians and others enjoying privilege. In May 1983, the Federal Court held that a newspaper was unable to claim privilege over the publication of an inaccurate extract from a public register, even though the material had been supplied in an official press release, prepared by the authority which kept the register.

The Court dismissed with costs an appeal by the publishers *Canberra Times* against an award of $7,500 damages (Hook v. John Fairfax & Sons Ltd.). Once again the absolute nature of defamation laws and the minefield through which even careful journalists walk, was illustrated vividly.

NEW CONSUMER ACTIONS

Perhaps the most dramatic development of recent months has been the decision of Mr Justice Toohey in the Federal Court sitting in Perth in a case brought against a newspaper not under defamation law but under the Federal Trade Practices Act. [See **(1983) 3 CLB-1**].

The judge dismissed an application that a statement of claim based on the Trade Practices Act failed to disclose a cause of action known to law.

West Australian Newspapers published reports and comments of passengers who had travelled on the cruise ship Dalmacija in 1980. As a consequence, other prospective passengers reportedly cancelled their tickets and tourist offices withdrew brochures.

The shipping line sued the newspaper under the Trade Practices Act claiming that its articles were 'misleading and deceptive' and therefore amongst the prohibited unfair trade practices proscribed by that Act.

The newspaper, whilst acknowledging that its trade was publishing and selling newspapers, claimed that the Federal statute was limited to such cases as publishing false circulation figures. It did not extend to the actual content of newspaper articles. Mr Justice Toohey said that this was too narrow an interpretation of the Act for it was 'unreal to divorce the paper from its contents'.

Perhaps the most interesting point in Mr Justice Toohey's judgment was the suggestion that the Federal Court might be able, under its expanded 'pendant' jurisdiction, to attract to the Federal hearing brought under the Trade Practices Act, an associated claim based on State defamation law. This would depend upon whether there was a "common substratum of facts relating to the cause of action in respect of which jurisdiction exists under the Trade Practices Act and to the cause of action sought to be attached".

Needless to say, the decision caused something of panic in media and other circles. The Australian Press Council expressed concern at this new line of limitations on the press. It said that development was particularly troublesome as it came at the very time that the Standing Committee were working towards a uniform Defamation Act. The Trade Practices Act, it declared, was not intended to provide a "backdoor entry to defamation actions".

The Federal Attorney-General, Senator Evans also expressed concern and said that an appropriate amendment of the Trade Practices Act was being considered.

Meanwhile, the newspapers appealed to the Full Federal Court. The case came before the Court sitting in Perth early in June 1983. However, it went off on a technicality, the Chief Judge, Sir Nigel Bowen, making it clear that the Court was not expressing any view about the correctness or otherwise of Mr Justice Toohey's decision.

PRIVACY LAW

The Law Reform Commission's recommendations on privacy appear to be stalled.

It will be recalled that the Commission recommended that a small and closely defined cause of action in privacy should be incorporated in uniform defamation laws.

One of the reasons for making this suggestion was the proposal that, in the Uniform Act, the dual defence of "truth and public benefit" or "truth and public interest" should be dropped in those States which presently express justification in that way. Until now, the obligation of the defendant to establish "public benefit" or "public interest" has constituted a de facto protection for privacy.

CONTEMPT OF COURT

The latest project given to the Australian Law Reform Commission involves review of the law of contempt of court.

The terms of reference followed immediately the release from prison of Mr Norm Gallagher, a trade union official who had been imprisoned as a result of comments made by him concerning the Federal Court. The comments were made in a press release and in subsequent statements made by Mr Gallagher during a media interview.

On the subject of the relevant law of contempt, however, the High Court of Australia was divided. The majority treated the case as one of a serious contempt by a union official asserting publicly that union pressure had forced the Federal Court in an earlier proceeding to reverse a contempt order against him. A strong dissent by Mr Justice Murphy asserted the right of people, rightly or wrongly, to criticise the courts.

The Law Reform Commission is not authorised to examine contempt of Parliament. Senator Button, whilst in Opposition, introduced a Bill to reform procedures for contempt of Parliament. It is not known whether that Bill will be proceeded with, but the Law Reform Commission will now be examining the law of contempt. And amongst the questions it is asked to answer are:

- who should hear and determine contempt cases?
- what non-judicial tribunals should have contempt powers and protections?
- what punishments should be imposed?
- how the balance should be struck between free speech and the protection of the integrity of the judicial process, particularly in relation to 'scandalising the court' (Press release G.J. Evans 7.4.83, 38/83,1).

Amongst the enquiries the Com-

by Mr Justice Kirby

mission will make will be enquiries directed at the actual operation of contempt law. Already it has been suggested to me that newspapers that have been subject to contempt orders and fines tend to be more profoundly affected by them than by defamation verdicts. The latter are sometimes seen as part and parcel of the costs of running a media operation. Contempt fines can be interpreted as just plain bad management. Yet it may not be so. And the stifling operation of contempt law, at the workface will have to be closely examined by the Law Reform Commission.

OFFICIAL SECRECY

The whole law of secrecy has come under scrutiny as a result of the proceedings in the High Court involving the *National Times*.

The Press Council has criticised the use of injunctions by the Federal Government to block publications by the media of sensitive documents.

In relation to the proceedings in the High Court, fear was expressed that Mr Brian Toohey, editor of the *National Times* would be forced to disclose the sources of the copies of classified documents his journal had procured. In the event, Mr Toohey was never pressed.

In this case, as in most others, governments and courts are loathe to insist upon the disclosure of journalistic sources and the breach of confidences that would be involved. This is an issue that is being examined by the Law Reform Commission in its project on evidence law reform.

Close attention is being paid by us to the recent developments in England.

The Police and Criminal Evidence Bill 1982, which lapsed with the dissolution of the United Kingdom Parliament, provided that if a journalist [or a doctor] refused to part with confidentially held documents, a judge would have the power to issue a search warrant. Following an outburst concerning this legislative proposal, significant concessions were made by the Government (The Age, 23.4.83, p.3.).

Clearly, careful thought will have to be given to these developments in the context of Australia's laws of evidence.

Until now the law of privilege has been very closely confined. It has attached to the client of a lawyer and, in some States, the doctors' patients and priests' penitents.

There is an important question as to the extent to which we should limit the courts in gaining access to relevant evidence. There is an equally important question of the public interest in the effective operation of a vigorous media and the public interest in the protection of confidential communication. As in so many matters of law reform, a balance must be struck. The task of the Law Reform Commission will be to suggest that balance and the rules and procedures to secure it.

CONCLUSIONS

A review of Australia's legal scene over the past year demonstrates a continuing challenge to free speech and free press in Australia.

The challenge may come from the closure of the courts.

It may come from the unexpected operation of consumer protection laws.

It may come from the effort of anti-discrimination laws to discourage stereotyping, racism and sexism.

It may come from our ramshackle defamation laws.

It may come from the law of contempt; for though Mr Gallagher was imprisoned, journalists may equally be at risk.

It may come from the uncertain laws of secrecy, from injunctions to prevent publication of secrets and from a threatened obligation to force journalists to disclose their sources.

The media itself is generally content to bleat from the sidelines about the state of the law.

The powerful media interests of our country do very little, institutionally, to promote continuing attention to the law of the media in Australia. They continue to labour within the present rules, accepting them with a touching resignation. They do virtually nothing to fund independent empirical research about the adverse effects of the present rules and about the way in which those rules could be improved.

Lord Scarman once said that the genius of English speaking people lay in their ability to reduce difficult problems to a routine. What we clearly need is routine, orderly attention to the whole mosaic of media law in Australia.

I am afraid that this means gathering more information about the operation of the law at the workface, the collection of statistics and impressions, the better training of journalists in what the law actually says and coherent, interdisciplinary attention to its improvement.

It means properly funded and independent institutes of media law.

It means independently endowed chairs of media law.

It means more than angry frustrated editorials.

The danger to free speech in our country does not lie in some legislative assault. Rather it lies in erosion by the slow attrition of the law and by community attitudes cynicism and indifference. I hope that what I have said will encourage those in a position to do so, to expend more than words upon the renewal and reform of Australia's media laws," Mr Justice Kirby concluded.

COMING EVENTS

September 1-2	Copyright Law and Practice symposium (Boulevarde Hotel, Sydney) - Copyright Society of Australia Inc. and Australian Copyright Council.
September 7	"Data Networks" luncheon (12.30 Masonic Centre, Sydney) - Australian Society for Computers & Law.
September 28	Australian Communications Law Association annual general meeting and dinner (venue to be announced).
October 26	Contempt of Court, Mr Justice Samuels A.C.L.A. luncheon (Sydney venue to be announced).
November 11	Defamation and Copyright, Federal Attorney-General, Senator Gareth Evans, A.C.L.A. and Copyright Society luncheon (Sydney venue to be announced).

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