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Note on the Paper by the Rt. Hon.
Sir Frank Kitto, K.B.E.

DEFAMATION AND PRIVACY PROTECTION

The Hon. Mr. Justice M.D. Kirby

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NOTE ON SIR FRANK KITTO'S PAPER "THE PRESS COUNCIL AND THE LAW"

Criticisms of the A.L.R.C. Proposals

Sir Frank Kitto's paper on the work of the Australian Press Council includes an important section on proposals for legislation advanced by the Law Reform Commission. The paper is critical of some of these proposals. I hope I may be permitted to put forward one or two observations that will explain, in general terms, the way in which the Law Reform Commission is moving on the subject of privacy protection. The Commission has published three discussion papers and a working paper that are relevant. The discussion papers have been widely distributed and are as follows :

#1 *Defamation - Options for Reform*

#2 *Privacy and Publication - Proposals for Protection*

#3 *Defamation and Publication Privacy - A Draft Uniform Bill*

The Commission has had useful discussions with Sir Frank Kitto and other members of the Press Council. We have also had numerous and lengthy conferences with a wide range of Consultants from all parts of the publishing industry in Australia (printed and electronic). There have also been lengthy conferences with representatives nominated by State Attorneys-General. The principal aim of the Commission's effort is to secure an acceptable and just, uniform defamation law in Australia that strikes the right balance between freedom of the press and freedom of speech (upon which Sir Frank rightly lays much emphasis) on the one hand and the individual's right to reputation, honour and privacy, on the other. Striking the balance is, of course, not easy. It is made no easier by the differing approaches adopted for the better part of a century in different parts of Australia towards defamation law. The arguments for a uniform law have been recounted frequently and do not require repetition.[1] Most submissions received by the Law Reform

1. Australian Law Reform Commission, Disc.P. #1. *Defamation - Options for Reform* 1977, 4-5.

Commission, notably from the media industry itself, strongly favour a single law, uniform throughout Australia. The very existence of differing systems, in an age of national distribution of publications, inevitably results in a tendency to opt for the lowest common denominator in free speech. The Commission has been informed that material is regularly omitted from newspapers principally distributed in one State, because of the possibility of liability to a plaintiff, according to the more rigorous rules of other States. An editor faced with the confusion and doubt of eight different systems will generally opt for a policy of caution.

Reconciling Differing Approaches to Defamation

2. There are, of course, many difficulties facing any attempt to reconcile the eight different systems of defamation law (nine if the Commonwealth's *Broadcasting and Television Act* is counted) extant in Australia. It is not to the point here to recount these. One illustration is, however, apt. In Victoria, South Australia and the Northern Territory the defence of justification is established by the proof by the defendant of the truth of the matters complained of. In other jurisdictions an additional element is required of the defendant. In Queensland, Tasmania and the Capital Territory (and in criminal matters in Western Australia) an additional element of "public benefit" must be established to the satisfaction of the tribunal of fact, judge or jury. In New South Wales, since 1974, the defendant must establish that the imputation complained of is a matter of "substantial truth" and that it either relates to a matter of "public interest" or is published under qualified privilege.[2] The existence of the additional component "public benefit" or "public interest" has represented, for more than a century, in some of the jurisdictions of Australia, a protection of sorts against invasions of privacy. The very historical origins of the introduction of the "public benefit" component into the law of

2. *Defamation Act*, 1974 (N.S.W.) s.15. This variation was based on the recommendation of the N.S.W. Law Reform Commission *Report on Defamation* (L.R.C.11), 1971.

N.S.W. demonstrates that this was the intention. Some matters, though affecting a person's reputation and though true were such it was deemed inappropriate for the law to permit their publication. Accordingly, a form of legal redress, namely "defamation" was provided in the knowledge that the publisher might be restrained from publication by the existence of this additional component in the defence of justification. Alternatively, if he published, he would be liable in defamation, even though the matter complained of was held to be true.

3. The attempt to reconcile these two quite different approaches to defamation law is not at all easy. Needless to say views are strongly held in the respective States that *their* approach is right and ought to prevail. Although the Law Reform Commission in its discussion papers came to the view that the defence of justification should be truth alone, it was not inclined to abandon the privacy protective element which had endured for so long in the laws of those States which had for such a long time adopted the requirement that the defendant should prove an additional element of public concern in the matters publishe

4. In the course of its public hearings and receipt of public submissions, the Commission has had a number of complaints about alleged invasions of privacy by the press. One case involved a Melbourne newspaper. In 1970 a man suffered criminal convictions for offences of dishonesty. He had subsequently rehabilitated himself, was married, with children, living in a Melbourne suburb. He had been continuously employed for five years. He was active in a branch of a political party. He was not currently a candidate for any public office. The man became involved in a dispute on policy issues with another member of the party branch. Apparently that person reported his record to a newspaper. The man found out that the report was to be printed. He saw the editor, begging him not to print the record as "it could only be damaging both to myself and to my family". The editor of the newspaper allegedly replied that this was of no concern to him. following day, the newspaper ran a front page story about the dispute, detailing the person's name, address, occupation and information about his wife and family. Full details of his criminal

record were included. Near the report was an editorial commenting : "Leave this man alone. Get off his back and give him a good old-fashioned Australian fair go". On the following day, the man was dismissed on the ground of possible customer reaction. His wife and children suffered great embarrassment in their local community. The report was defamatory. But it was true and, according to advice he had received, the newspaper had a complete defence to its publication. He appeared before the Commission and asked that legal remedies should be provided against invasions of privacy of this type. In a number of the States and in the Capital Territory, the obligation to prove "public interest" or "public benefit" may have amounted to a *de facto* protection of this man's privacy. Abolition of this additional component, in the name of uniformity and the substitution of nothing else would mean that cases of this kind could occur with no legal redress whatsoever.

Legal Protections of Privacy

5. Faced with instances of this kind, and with a legal situation where some degree of protection has been provided in the past, in some parts of Australia at least, we are not presently minded to retreat entirely from providing legal protection against the unreasonable publication of private facts. Our conclusion is not a startling one. Nor is it one which in any way negatives the potential of the Press Council to do useful work, on an informal plane, resolving those disputes which people are prepared to submit to arbitration in its efficient and informal way. Of course, it is of the nature of complaints against invasions of privacy that many people will do nothing. Others will prefer the informal dispute settlement offered by the Press Council to the more inhibiting and formal venue of a courtroom. Mr. Justice Wells has rightly drawn attention to this. But the real question is whether, because some people wish to resolve this asserted "wrong" in an informal way, there should be no legal redress provided for those who prefer to have the matter dealt with in a court of law. In other words, is the law to opt out entirely from this area of disputation, leaving it, whatever the parties involved prefer, to an informal body such as the Press Council? Sir Frank Kitto in paragraph 13 himself demonstrates why this cannot be so.

> "A method of voluntary self-regulation, even with the persuasive influence of a

> Press Council to help it, is of course *not in any sense a substitute for the creation of legal duties and liabilities.* Their aims are different."

It is one thing to say that people can have a complaint made against a solicitor or a policeman determined in some form of impartial tribur It is another to say that, in the name of the administration of justice or the prevention of crime, no redress by the general law shou be afforded to the complainant, where there is an acknowledged wrong.

6. Nor ought the provision of a statutory cause of action for invasions of privacy to be seen as a revolutionary step. It is not. The International Covenant on Civil and Political Rights, which Australia has signed and which successive Commonwealth Governments have declared an intention to ratify, contains in Article 17 a statement of the agreed rights of the international community on this subject :

> "17(1). No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence nor to unlawful attacks on his honour and reputation.
>
> (2). Everyone has a right to the protection of the law against such interference or attacks".

That Covenant was settled in negotiations in which Australia took a leading part, in a delegation led by Attorney-General Bowen. With the deposit of sufficient ratifications, the Covenant has now come into force as part of international law. It is not yet part of domestic Australian law. However, it does indicate the agreed standard of the international community, bracketing protections against unlawful interference with privacy, on the one hand, with protections against unlawful attacks on honour and reputation, on the other. Privacy protection is bracketed with protection against defamation.

7. Apart from this statement of international standards, the notion of providing remedies against unreasonable invasions of a person's privacy by the media is not novel. On the contrary, most civil law systems provide a remedy. The United States has well developed principles for remedies against privacy invasion. Several of the Canadian Provinces have conferred rights of privacy

by statute. The High Court of Austrlia in rejecting a general right of privacy conceded that the provision of such a remedy might be desirable. Latham C.J. put it this way :

> "The claim ... has also been supported by an argument that the law recognises a right of privacy which has been infringed by the defendant. However desirable some limitation upon invasions of privacy might be, no authority was cited which shows that any general right of privacy exists". 3

The remedy was denied, not because there was no wrong, but because no cause of action had been shown to have been developed by the law. Developing a cause of action was left to the legislature. The Law Reform Commission has now suggested that the legislature should act. Any such action will not replace the valuable work of the Press Council. But it will ensure that, in the end, citizens can appeal, where a "wrong" is felt to have been done to them, not to an informal, extra-legal body, but to the law of the land administering the standards of the community through the courts of the land.

Why Not Leave it to the Press Council?

8. In considering the various models that were available to "right the wrong" of privacy invasion in the context of publication of private facts, a number of possibilities presented themselves to the Commission :

* Self-regulation through the Press Council, the Australian Broadcasting Tribunal or the Australian Journalists' Association.
* Supervision through a body such as the New South Wales Privacy Committee with persuasive powers only
* Enforcement through the courts using techniques of damages, declaratory orders, injunctions and so on.

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3. *Victoria Park Racing and Recreation Grounds Co. Ltd. v. Taylor* (1937) 58 C.L.R. 479 at 496.

It is not appropriate to deal with all of these possibilities. They will be reviewed at length in the Commission's report to Parliament. They have been debated at length during the past eighteen months. I should, however, welcome the opportunity to say why it really is not feasible simply to leave this area of social control to the Press Council. I wish to reiterate, as the Commission has said in its discussion paper[4] and I have said elsewhere[5] that none of this is intended as a criticism of the Australian Press Council. On the contrary, the Law Reform Commission respectfully welcomes the establishment of the Council. Its persuasive and educative effect on the Press generally will doubtless be felt and can only be for the good.

9. There are, however, a number of limitations which have to be mentioned. In the first place, the Press Council is limited to the printed media and by its constitution does not extend to the electronic media. So far as is known, there is no move afoot to establish an all-embracing Media Council which could discipline the whole of the media industry. Any national, uniform approach to wrongful publication must embrace the whole industry and cannot involve the delegation of discipline of one part of the industry to the Press Council, dealing with the electronic media in another way. Furthermore, some wrongful publications are made by individuals who are quite outside the media industry and would not be susceptible to the discipline of a Press Council or Media Council, if created.

10. Secondly, the Press Council is funded by the newspaper industry. However, it does not enjoy the unanimous support of the industry as Sir Frank's paper acknowledges. The most significant absentees are John Fairfax & Sons Limited, one of the three major publishers in Australia, which has, from its inception, refused to support the Council and Southdown Press Limited, publishers of the Melbourne *Truth* which withdrew support early in 1977. The

4. Australian Law Reform Commission, Discn.P. #2, *Privacy and Publication*, 1977, 13
5. "National Defamation Law Reform in Australia" (1977) 8 *Federal L.Rev.* 113,119f.

withdrawal apparently followed an adverse ruling given by the Press Council. The Council has stated, as Sir Frank indicates, that it will not feel inhibited in considering complaints made against non-members. However, it is a matter of speculation whether a non-member would be prepared to publish in full an adverse adjudication. Furthermore, access to material relevant to the publication could not be guaranteed. As publicity of an adverse adjudication is the principal sanction which the Press Council has at its disposal, the inability to *ensure* publication of its decision in the organ complained of is, arguably, a highly relevant consideration in judging whether the offered redress is adequate to the complainant. Some, but not all, of the adverse adjudications so far issued by the Australian Press Council have been published by the offending newspapers.

11. Nor is the composition of the Press Council satisfactory in the opinion of all observers. Of the twelve members, other than the Chairman, six are nominated by newspaper publishers, three by the Australian Journalists' Association and three are appointed as "public representatives". The Council's Complaints Committee comprises five members of whom three are publisher representatives, one is a journalist and one is a "public representative." The Complaints Committee has the jurisdiction to determine any complaints without reference to the full Council. In practice, I understand, it habitually does so. In these circumstances, and given the funding of the Council, it may not be considered an answer to the criticism of the Press Council that no tendency has been observed "to be tender towards any newspaper that merited criticism". But when it is being suggested that legal redress should not be provided for a wrongful invasion of privacy because of the availability of alternative informal bodies, it is at least relevant to consider whether the suggested alternative had a due appearance of impartiality. The United Kingdom Press Council, on which the Australian Council is modelled, is now twenty four years old. The first Royal Commission on the Press which reported in 1949 in the United Kingdom recommended the establishment of a General Council of the Press with an independent Chairman and some outside members to enforce proper standards.[6] Parliament commended

6. Report of the Royal Commission on the Press, 1949, Cmnd. 7700.

the proposal but nothing eventuated until a Bill was introduced to establish a statutory council. The press then established, on 1 July 1953, a non-statutory council composed entirely of press representatives. The parallel to the Australian development mentioned in Sir Frank's paper is worthy of note.[7] History repeated itself. The second Royal Commission on the Press in the United Kingdom reported in 1961. It condemned the structure of the Council and recommended that unless the Council was reconstituted with an independent Chairman and some lay members, a statutory body should take its place.[8] The threat of legislation had the desired effect. On 1 July 1963 the General Council of the Press was replaced by a Press Council with an independent Chairman, five lay members and twenty press members. This structure was also criticised. The Younger Committee on Privacy in 1972, condemned both the failure of the Press Council to enforce proper standards and the imbalance of its membership :

> "We do not ... see how the Council can expect to command public confidence in its ability to take account of the reactions of the public, unless it has at least an equal membership of persons who are qualified to speak for the public at large". [9]

12. The Younger committee on Privacy went on to recommend that one half of the members of the British Press Council should be drawn from outside the press. They should be appointed by an independent Appointments Committee. The recommendation of the Younger Committee was not fully implemented. In 1973, however, the number of lay members was increased to ten out of the thirty. This remains the current position in the United Kingdom. The Complaints Committee is chaired by the Council Chairman. It comprises four lay members and six press representatives. The 1973 increase in lay membership did not allay all criticism. The third Royal Commission on the Press in the United Kingdom reported in 1977. It

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7. Para. 10.
8. Report of the Royal Commission on the Press, 1962, Cmnd. 1811.
9. Report of the Committee on Privacy, 1972, Cmnd. 5012, para. 189.

noted a widespread lack of confidence in the United Kingdom Press Council in these terms :

> "We believe that this lack of confidence stems in the main from the standards which the Council has applied, from the way in which its decisions have been promulgated, and from lack of understanding, on the part of the public. Our recommendations will deal with each of these matters, but we believe that changes in the size and the method of appointment of the lay membership of the Press Council are needed as a first step". 10

The Commission went on to recommend an equal number of press and lay representatives under an independent Chairman.

13. It would not be fair to judge the Australian Press Council on the record of the United Kingdom Press Council or the criticisms made of the latter in Royal Commissions in the United Kingdom. It is, however, relevant to consider the repeated calls by British inquiries for a greater appearance of impartiality in the composition of the Press Council.

14. It is interesting to contrast the position of the Swedish Press Council to that of its British and Australian counterparts. The Swedish Council was the first to be established in the world (1916). It has power to levy a fine and this fine is used to defray the expenses of the Council. The Swedish Council has only three press representatives of the six appointed. It does not require a complainant to waive legal action before the hearing of a complaint. Furthermore it is supplemented by the work of a Press Ombudsman, a professional judge, who is empowered actively to assist in complaints resolution by achieving redress and by adjudicating in some cases of departures from proper journalistic standards.

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10. Report of the Royal Commission on the Press, 1977, Cmnd. 6810, para. 20.17.

15. With every acknowledgment of the usefulness of the Press Council, we have not been persuaded that it offers a complete and entirely satisfactory answer to the complaints about invasions of privacy by the publication of private facts. Even the United Kingdom experience, with a more balanced, better supported, older and more experienced Press Council does not allay concern. The third Royal Commission on the Press in July 1977 reported, after examining the adjudications of the Press Council :

> "The standards they apply and the terms in which they are expressed fall short of what is desirable". 11

The Royal Commissioners reported widespread criticism and commented :

> "It is unhappily certain that the Council has so far failed to persuade the knowledgeable public that it deals satisfactorily with complaints against newspapers, notwithstanding that this has come to be seen as its main purpose". 12

The Royal Commission went on to cite various adjudications made and commented :

> "We have cited these cases to show the not uncommon instances of low standards which tend to colour the public reputation of the press. One reason why such instances continue is no doubt that newspapers will often run the risk that those involved in a story will not want to prolong the unpleasantness involved by complaining to the Press Council or even co-operating with the Council in an investigation. This must be an important consideration, which will often frustrate the efforts of the Press Council. But we consider that there is a strong case to be made for increasing the risk which newspapers run when they gamble on the likelihood that the parties involved in a story will take this attitude. Not only might an increase in sanctions make newspapers think twice before breaking Press Council standards; it might also persuade some people that it would be worth their while to accept the unpleasantness involved in co-operating with a Press Council enquiry. However true it is that

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11. *Ibid*, para. 20.56.
12. *Ibid*, para. 20.12.

> the individual journalist feels profoundly ashamed ... this is by no means clear to potential complainants. We are not suggesting that the Press Council should satisfy an appetite for revenge, but that it would be desirable if adjudication could become a more worthwhile remedy than it now is".[13]

The Royal Commission accepted "with reluctance" arguments against fines or suspensions. These would only be enforceable if given statutory backing and this "would represent a potentially dangerous weapon of control over the press".[14] Earlier the Commission had rejected a tort of privacy, adopting the view of the Younger Committee concerning the difficulties involved in a general tort of privacy.[15] It was left only with recommendations for a better system of adjudication of complaints and for procuring greater publicity for decisions. The Law Reform Commission is inclined to be less daunted by the difficulties and more sanguine about the ability of courts fairly to strike the balance between free speech and privacy that is at stake here.

16. There are several other considerations which need not be elaborated and which weigh against opting for the Press Council model in the proposed new uniform law of wrongful publication. If the law were to be a Commonwealth Act (a possibility open, at least in part) there may be constitutional difficulties which I need not discuss. The organisation of the publishing industry in Australia, both printed and electronic, may be a relevant consideration in designing appropriate laws. Unlike the United States, we do not have here a large number of competing outlets, setting high standards because of the pressures of competition. On the contrary, our media industry is in relatively few hands and in these circumstances, it is not unreasonable that those few who have the great power over publication should ultimately be susceptible to the community's standards, not in a body of their own choosing, whose balance, numbers and personnel are selected by them but in the independent judicial system according

13. *Ibid*, para. 20.68.
14. *Ibid*, para. 20.69.
15. *Ibid*, para. 19.18.

to law. In other areas of complaints resolution, as in the case of complaints against police or complaints against solicitors, worldwide trends are away from self-regulation and towards greater community regulation, including by the courts. Furthermore, it would seem to me that many of these arguments against a cause of action for wrongful invasions of privacy amount equally to arguments against the cause of action in defamation. Yet I doubt that anyone would seriously propose that Australia's press or media industry should be undisciplined by any law of defamation or that defamation proceedings should only be heard in a self-regulatory body such as the Press Council.

17. Finally, it should be noted that the Australian Press Council has not escaped criticism in respect of some of its relevant decisions. The Law Reform Commission, of course, offers no comment on the merits of decisions of the Press Council, although some members respectfully disagree with its assessment in one case which is relevant to privacy protection and which the Commission has had the opportunity to examine in detail. In that case, a television journalist, separated from her husband, was the subject of an investigation into her personal life by a Melbourne newspaper. The aim was to determine whether there was "another man". This investigation involved camera surveillance of the woman, interviews with a male "suspect", in which he was questioned as to his relationship with the woman and asked to confirm a previously typed statement. There was also extended camera surveillance of his home and the photographing of some thirty or more guests entering a private party which was attended by the couple. The man declined to comment. He insisted that the matter was "private". Nevertheless, the newspaper carried stories on two separate occasions about the relationship. A complaint was made to the Australian Press Council. It was dismissed on the ground that "the woman concerned was a public figure". The Council did not indicate how the woman's capacity as a television journalist was affected by her alleged private life. Nor did the Press Council advert to the fact that the complainant, who was the man involved, had suffered an invasion of *his* privacy and was certainly not a public figure. The question is not so much the

rights or wrongs of this particular case. It is whether a person in this situation should not have recourse to the courts to prevent such invasions of his privacy; to correct false statements made in the course of such invasions and to give redress where the invasions have occurred. A court might well have reached a similar view to the Press Council. The notion that there should be no access to the courts or that somehow these issues are too sensitive for courts to handle, appears unpersuasive.

18. Two final comments. First, it should not be assumed that all of the media interests in Australia are opposed to the Law Reform Commission's suggestions. So far as we are aware, only the *Sydney Morning Herald* and the Melbourne *Herald* have expressed editorial opposition. Neither has alluded to the difference between a general and a specific right to privacy. Neither has made any criticism of the precise suggestions of the Commission. The *Sydney Morning Herald* contented itself with endorsing a statement of the United Kingdom Press Council which was made without reference to the possibility of a defined specific area of privacy. On the other hand, the Melbourne *Age* has editorially approved the whole of the principles contained in the draft uniform Bill.

> "It is no easy task to strike a fair balance between on the one side, the right to reputation and personal dignity and, on the other, the right to free expression and the right to be informed. The Australian Law Reform Commission has met this challenge admirably in drawing up a Bill for a uniform law of defamation and publication privacy ... It is in the interest not only of the Press but of the public that such a fair and rational code of defamation and privacy be adopted throughout Australia".

Nor is it fair to suggest (para 31) that the Commission is planning to "rush headlong" into privacy protection and reliance upon artificial and irrelevant tests. There must be few laws in Australia that have been so openly and carefully prepared, with as much public debate, public sittings in all States, public seminars in every national centre, innumerable working sessions with the

assistance of a large team of hard pressed consultants. That some newspapers have set their face against any legal redress for wrongful invasions of privacy by publication is entirely understandable. For example we can well understand that no-one liable to be adversely affected can be expected to welcome new legal redress and discipline, where none previously existed. True it is that the introduction of new legal regulation in such an area as this must be handled with great care. Its exercise must be put in the hands of people of great skill who have a clear understanding of our traditions. There is doubtless an important and increasing role for the Australian Press Council. However, we presently incline to the view that the existence of the Press Council, or bodies like it, is not a substitute for the provision of carefully drawn legal duties and liabilities to which citizens can have ultimate access, if they choose.

19. There are a number of other points in Sir Frank's paper, many of which I have had the advantage of discussion with him before. I should prefer not to comment here on matters of detail. However, I thought it would be of use if participants in this judicial conference were to know some of the reasons why the Law Reform Commission has adopted a different general approach to that urged upon us by Sir Frank and the Australian Press Council. The drafting of the Commission's report on this reference is in its last stages. Careful consideration will, however, be given to any comments that are passed to me. Copies of the draft uniform Bill and of earlier papers are still available for comment. The Commission is already very much indebted to the judiciary in Australia for the assistance it has received to date in this important reference.

M.D. KIRBY
9 January 1978