

NEW SOUTH WALES INSTITUTE OF TECHNOLOGY
FACULTY OF HUMANITIES AND SOCIAL SCIENCES
LEGAL ASPECTS OF COMMUNICATION COURSE
MEDIA LAW REFORM AND THE PUBLIC INTEREST

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The Hon Mr Justice MD Kirby, CMG
Chairman of the Australian Law Reform Commission

MEDIA LAW REFORM

In this morning's edition of the Bulletin, editor Trevor Kennedy, newly honoured with membership of the Order of Australia, wrote in mellow mood. The title of his piece: 'Trial by Journalism'. The story concerns the Royal Commission currently investigating allegations about aspects of justice in New South Wales, made on the Australian Broadcasting Commission's current affairs program Four Corners. Mr. Kennedy, sitting in the public gallery of the Banco Court where the Royal Commission is unfolding, confessed that he 'found it hard not to feel some sympathy for the NSW Premier Neville Wran'.¹ He conceded the Four Corners program had undoubtedly behaved in the best traditions of 'great investigative journalism'. Its staff poured 'enormous energy, zeal and money into tracking down what it believed to be a story which not only informed but also performed a great community service'. The motives were 'admirable'.² However, he then expressed a reservation:

Like a lot of investigative journalism since the trail blazing days of the Washington Post at Watergate...it is just possible that too little attention was paid to side effects. It's to some extent like a wonder drug which cures one terrible disease but kills or maims along the way. There is no doubt that Four Corners was 100% correct in drawing public attention to legitimate fears of reputable people about the administration of justice in some of the lower courts of NSW. Whether, on the other hand, the program was justified in tossing in the Premier's name, on the basis of hearsay evidence, is another question.³

Mr. Kennedy asserted that because Mr. Wran had an unerring natural instinct for a good news story, some journalists felt that, in the interests of balance, they sometimes had to 'even things up a bit'.⁴

The danger is that the reporter can become either blase or punchdrunk. In both cases, subtleties and distinctions tend to be overlooked.⁵

During the weekend, in an emotional speech to the NSW State Labor Party Conference, Mr. Wran, the tough politician, was close to tears:

As you know, Balmain boys don't cry. We're too vulgar and too common for that and we usually vote Labor, anyway. But if you prick us with a pin, we bleed like anyone else. I can assure that the stress and anguish and indignity of the last few weeks has been an extraordinary and unique experience for me. Without the loyalty and support I have received, the perigatory I am presently enduring would not be worth the candle.⁶

Words can wound. No one who saw the television reports of Mr. Wran's speech can doubt that he has been deeply wounded by the allegations against him.

Now consider the other side of the picture. In an address to the Media Law Association Conference of Australian Lawyers held (for a reason never explained) in far-away London, Mr. Brian Hogben of News Limited put the busy journalist's point of view:

Journalists and newspapers are an unloved lot and deservedly so. When sensational news happens they treat it as sensational. When there is no sensational news, and even when there is, they sprinkle froth and frivolity through newspapers for no other reason than that it is entertaining. They are opinionated, they are sometimes inaccurate, they commit errors of judgment and of taste, and, of course, they publish libels. Altogether, they are too like the rest of humanity to be likeable.⁷

Warming to his theme, Mr. Hogben then took a swipe at the litigation industry:

I believe that it is proper to analyse the reasons why people institute action for defamation. If the great majority of suitors seek only redress for injury to reputation, there are still many other litigants who have baser reasons. There is

the plaintiff who issues a writ solely in the hope of frightening a newspaper out of making further disclosures of things the public should know. And, particularly in the jurisdiction in which I live, there is the suitor who cares not a fig about reputation but sees only the prospect of making some money out of a newspaper. This type has turned libel into a growth industry in the most populous State in Australia...Unfortunately those who study the relationship between the press and the law are being forced to the conclusion that the law is anything but supportive of the proper functions of the press. We see a tendency to use the law censoriously and not as an instrument for the protection of reputation. Further, we are tempted to think that often a defamation action becomes nothing more than a technical game played whilst justice waits on the sidelines.⁸

Those who study the relationship between the press and the law. Who are they? Mark Armstrong has cornered something of a market. David Jones, chairman of the Australian Broadcasting Tribunal, must do it as part of his daily job. A few specialist, highly paid lawyers must do it in the daily grind of responding to defamation actions throughout the country. But there is very little coherent examination in Australia of the impact of the law on the media. There is very little scrutiny of the actual way in which the law of defamation, of contempt, of official secrets, of obscenity and so on operates in the newsroom. There is little consideration of the actual impact of the big verdict, the large contempt fine or the threatening 'phone call, as it affects the news that is sent out daily to the Australian population. If I have learned one thing in eight years in my post as Chairman of the Law Reform Commission, it is that all is not as it seems in the law. The law in the books is not always the same as the law in operation. Myths grow up about the law. Misunderstanding and misapprehension exist concerning what the law says. Mr. Justice Hunt drew to public attention the misunderstandings of many media people in Australia concerning the law of contempt.⁹ Journalists simply pass on, from one generation to another, the encrusted 'bush law' of the news desk. Even major reforms of the law may not operate as expected. Indeed, they may not operate at all - for a time. When the laws of evidence were unified and reformed in the Federal Courts of the United States, commentators dispaired that judges and legal practitioners would get to know and apply them. Five years after they came into operation, commentators were asserting they had succeeded - but only because everyone was continuing to apply the rudiments of the laws of evidence they had learned, perhaps thirty years before.

The thesis of this little talk is that we should be doing better. Not only should more attention be paid to the training of journalists in the law; but 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?

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. Not all of the changes are favourable to freedom of speech and the free press. In the United States, the great bulwark of the First Amendment stands between busy legislatures and the erosion of these important facets of freedom. In Australia, we have no First Amendment. We therefore depend upon tradition and community consensus. But as Mr. Hogben concedes, journalists are 'cordially detested' by large numbers of people in the community, most significantly politicians who make the laws.¹⁰ Furthermore the hurts to many people, including powerful people, are real, deep, memorable and sometimes cruelly unjustified.

THE LAW REFORM COMMISSION'S ROLE

The Australian Law Reform Commission has, or has had, a number of projects relevant to the developing law of the media in this country:

- * Defamation: In 1979 the Commission produced a report proposing reform and uniform defamation law for Australia.
- * Privacy: The same report proposed the introduction of a defined and limited right of action to protect privacy interests where these were not of legitimate public concern.
- * Journalists' Privilege: In the course of another major project on the reform of the law of evidence in Federal Courts, the Commission has been examining the issue of privilege. The rules of privilege excuse certain persons from giving confidential information to courts because protection of the confidences is considered to have an even higher social value than courts' securing all relevant evidence. Obviously, in this connection, the issue of journalists' privilege is being examined.

* Contempt: The first project assigned to the Commission by the new Labor Government requires it to examine the law of contempt in Australia. That law has sometimes been an impediment to free speech and the free press in relation to matters before courts and tribunals.

In addition to these topics, numerous other cases recently have shown the impact of the law on the media. Secrecy laws have been illustrated in the recent proceedings of the High Court involving the National Times. Anti-discrimination laws have been brought into play to govern the way in which certain matters involving sex and race are presented in the media. The Broadcasting Tribunal continues to perform its statutory functions. The statutory constitution of the Australian Broadcasting Commission has been changed amidst much public discussion. New technology will present many new problems, particularly with the satellite and cable television. Old problems of censorship, of the laws of obscenity and indecency remain and are occasionally dusted off and brought into play, often to the amazement of those prosecuted. We talk of a free press and we pride ourselves on free speech. By world standards, both claims are true. However, the International Press Institute report of December 1982 described 'the tendency to close lower courts, the apparent increase in libel writs and inaction on reform of Australia's restrictive defamation laws' as 'worrying'.¹¹

About a year ago, I reviewed 'future directions' in Australia's media law. The review has been published.¹² 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. I have been unkind to that body in the past; though only out of a sense of frustration. But I left it to others to assert that over the entrance to the meeting of the Standing Committee, like Dante's Inferno, is emblazoned the dictum 'Abandon hope all ye who enter here'.

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, was at one time a foundation Commissioner of the Australian Law Reform Commission. His general support for the work of the Commission is most encouraging. At the first meeting of the Standing Committee of Attorneys-General, which he attended as Federal Law Minister, he announced that a uniform law on defamation for the whole of Australia should be finally agreed upon by July 1983.¹³

The model Bill for a uniform law is now at an advanced stage. With decisions taken by the Ministers at the meeting and with further work to be done before the next meeting in July, it is hoped that the Bill could be in a form in which Attorneys-General could present it to their Governments after the next meeting. It now seems that one defamation law for Australia is close to reality. The benefits to potential litigants and to the electronic and print media should be immediately apparent. The impetus for the new law comes from the recommendations of the Australian Law Reform Commission. The new law will provide workable, and above all, uniform legislation in an area which has been historically fragmented. It will mean the end of the spectacle of the publisher being liable in some States but not in others for publications of the same material.¹⁴

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'.

In a country where broadcast and published material cannot be confined easily to a single State or Territory, a single defamation law is commonsense. Eight separate sets of defamation law are not. Together they form an intellectual thicket, penetrable only to the most specialised lawyers and beyond the reach of laymen.¹⁵

Just the same, 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.

Unfortunately, at this stage, there are no guarantees that it would be any better than the law it would replace. In fact there are some indications to the contrary...Precious as reputation is to individuals, the right to speak freely and without oppressive restrictions is just as precious to the community as a whole.¹⁶

The Shadow Attorney-General, Senator Peter Durack, Q.C., was not terribly impressed with the performance of the Standing Committee. In a press release 'Slow Start by new Law Reformers' he dealt a blow at the 'allegedly "reformist" Labor Attorneys' pointing out that they were, in his view, merely 'scratching the surface of already well-ploughed land'. Senator Durack pointed out that he had referred the defamation report of the Law Reform Commission to the Standing Committee four years ago in July 1969.

I share [Senator Evans'] strong commitment to the implementation of the Law Reform Commission recommendations on this subject and am disappointed that no agreement had been achieved to so do.¹⁷

Concurrently with the announcement by the Attorney-General, came comments in favour of uniformity. For example, the Executive Director of the Victorian Law Institute made widely publicised comments in favour of the 'urgent need' for uniform defamation laws in Australia.

Particularly with the electronic media it has been an incongruous situation that you have had people making utterances that were legal in, say, Victoria and South Australia but which were defamatory in New South Wales. Uniformity is years and years overdue. We have had journalists risking themselves again and again. We have had people speaking in good faith in one State and risking an action in another State.¹⁸

New attention to defamation law came with the issue by the NSW Premier, Mr. Wran, 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 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 of the Canberra Times against an award of \$7,500 damages.¹⁹ 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.²⁰ The judge dismissed an application that a statement of claim based on the Trade Practices Act failed to disclose a cause of actions 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':

The sale of a newspaper is a sale of goods to a consumer. The buyer is a consumer not only of the object he buys, but actually or potentially, of products or services it describes. If the product or service is described in terms that are false, the buyer is thereby misled or deceived or is likely to be misled or deceived, by what he has read.²¹

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'.²²

To the lament that all of the defences that would be available in a defamation action might not be available to the proceedings under the Trade Practices Act, Mr. Justice Toohey used a colloquial expression: 'So what?':

They are different causes of action. What has to be established in one case is different and the defences available are different.²³

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.²⁴ 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.

It would indeed be unfortunate if the decision impeded the uniform defamation exercise.²⁵

Senator Evans 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.²⁶ The issue remains before the community. And we have obviously not heard the end of it.

Professor Geoffrey Sawyer, who is also Chairman of the Australian Press Council, wrote a piece in the Canberra Times on the 'New twist in the tangled maze of defamation law':

It is doubly untimely that the possible new development should come when, after years of negotiation and devoted study...a uniform national defamation law, by parallel Federal and State action, based on a reasonable and detailed compromise of the competing interests is within reach...Leaving aside the 'pendant jurisdiction' question, the defamation possibilities of Section 52 are self-evident and always have been; the plaintiff was fully entitled to test the possibility and the opinion of Judge Toohey was not only a possible, but the most probable interpretation of the language.²⁷

Professor Sawyer examined, with painstaking care, the differences that could exist in proceedings under the Trade Practices Act and under defamation law:

- * the onus would be different, and heavier on the plaintiff;
- * the plaintiff may be limited to recovering only actual losses or special damage;
- * trial in the Federal Court would be by judge alone, without a jury;
- * some of the common law defences available in defamation might, by statutory interpretation, be capable of importation to trade practices suits of this kind.²⁸

Obviously, these matters will have to await further elaboration when the parties in the Perth case line up once again for the Court'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.

Last year, the Standing Committee of Attorneys-General decided that they would not proceed with this proposal. It is not clear whether that is the intention of the present Federal Attorney-General and the new faces of the table of the Standing Committee. However, in the press release following the Adelaide meeting of the Standing Committee in late March, Senator Evans said this:

There still remains the important question of privacy protection and I for one am strongly committed to seeing the ultimate implementation of the Law Reform Commission's recommendations here.²⁹

Meantime, the Law Reform Commission is about to produce a further major report on privacy protection outside the field of publication law. The report will shortly go to the printer and should be tabled in the Budget sittings of Federal Parliament. There is, already, a Privacy Committee in New South Wales to which complaints can be made, including about the media. The Committee has no powers of enforcement but can

conciliate and negotiate, including for corrections. A Privacy Committee is about to be established in Queensland. And a report in late May 1983 indicated that consideration was being given to such a Committee for South Australia by the South Australian Attorney-General, Mr. Sumner. Indeed, the report suggested that Mr. Sumner might be intending to resuscitate the earlier proposal for a tort or civil wrong of invasion of privacy, proposed in 1974 but withdrawn under a barrage of press and other criticisms.³⁰

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. Mr. Justice Murphy's assertion picked up the contention in the Phillimore report in Britain that judges had to become more robust in the acceptance of criticism. Defenders of the majority viewpoint drew a distinction between the criticism of the courts and bald statements that public pressure had influenced the court decisions. Whilst the former were entirely acceptable, the latter, it was said, scandalised the courts and undermined community confidence in their independence and integrity.

The law of contempt in Australia has been largely inherited from Britain. But the British law of contempt came in for criticism in the European Court of Human Rights in language that prompted the Lord Chancellor, Lord Hailsham, to introduce legislative reforms. The Contempt of Court Act 1981 (GB) is a cautious measure of reform. Its exact design was greatly influenced by a number of celebrated cases which occurred during the course of parliamentary debates about the Bill. Most notorious of these was the case involving the Yorkshire Ripper, Peter Sutcliffe. Such was the media coverage of Mr. Sutcliffe's arrest and prosecution that real concerns arose as to whether it would be possible for him to get a fair trial before an impartial jury. Similar concerns were raised in 1982 by the publicity surrounding the arrest of Mr. Michael Fagan, the intruder into the Queen's bedroom in Buckingham Palace. Striking the right balance between the right to a fair trial and the community's right to vigorous and informative news media is by no means an easy task. Commenting on the terms of reference to the Law Reform Commission, the Sydney Morning Herald concluded:

At the heart of the law of contempt two fundamental rights in a free society are in conflict: the right to the due process of law and the right to free expression. The second right is encumbered with certain restraints which are expressed in the laws of libel for example. But in general the health of a democracy can be tested by the extent to which citizens can say what they want to say. As the [Gallagher] case suggests, the law on contempt is a legal thicket that does not easily lend itself to simplification. If the ALRC can put forward a doctrine that is modern, relevant and judicious to the competing interests involved, it will have done the community a service.³¹

There seems to be general concurrence that there is a need for some reform. Speaking at the same Australian Media Law Association Conference in London, Mr. Michael McHugh, QC, had his say:

The law of contempt consists of a set of rules which are designed to protect Parliament and the courts from a critical examination of their activities. But surely the authority of courts and the Parliament ought to depend on a surer footing than the Draconian rules which punish the foolish and false statements of men...What is worse, is that Parliament and the courts, the very institutions supposedly affected by these statements are themselves sitting in judgment upon the contemners.³²

The Law Reform Commission is not authorised to examine contempt of Parliament. Interestingly enough, 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'?³³

Amongst the enquiries the Commission 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 workplace will have to be closely examined by the Law Reform Commission.

OTHER DEVELOPMENTS

There is no time to consider the other developments relevant to media law in Australia. A lengthier essay would examine the D notices which Senator Evans has said 'have apparently failed'.³⁴ 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.³⁵ An interesting article on this issue, written by John Slee, legal correspondent of the Sydney Morning Herald pointed to the abuse of secrecy classifications, but also to the dilemma for a government of protecting matters in which there was a legitimate national security interest.³⁹ President Richard Nixon, writing on the Pentagon Papers case - the publication by the New York Times of secret documents relating to the Vietnam War - wrote:

On consideration, we had only two choices: we could do nothing; or we could move for an injunction that would prevent the New York Times from continuing publication. Policy argued for moving against the Times; politics argued against it...It is the role of Government not the New York Times to judge the impact of a top secret document.³⁷

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. As I have said, 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. In that country, 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:

- * all records held by journalists on a confidential basis will enjoy exemption from the search and seizure powers established by the Bill, unless they are subject to seizure under present law, as for example where they have been stolen or forged;

- * even where the material is liable for seizure, or is not held in confidence and required by police as evidence, there will be new safeguards. Proceedings for access will only be available in the case of serious offences. The police will also have to seek a warrant from a judge rather than a magistrate (as at present);
- * the police will have to argue in open court their case on the need to produce the documents or records;
- * the police will also have to establish that there are 'reasonable grounds' to fear the disposal, concealment or loss of the material; and
- * the judge will have to be satisfied that it is in the public interest that the documents, held in confidence, should be produced to the police.³⁸

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. By the same token, 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

The point of this paper is a short one. 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 ramsackle 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 need for continuing vigilance is clear. So is the need to fashion accessible remedies that will be available to ordinary citizens and will redress wrongful attacks on reputation and privacy. The Chairman of the Australian Press Council has speculated on the possible need for more effective sanctions in that Council against abuses by the press.³⁹ But before this is achieved, one would hope that the Council will embrace (as it

does not yet) all media interests and groups, expanding perhaps to the electronic as well as the print media. Informal remedies are desirable. But the formal remedies of the law should also be clarified and refurbished.

The media itself is generally content to bleat from the sidelines about the state of the law. True it is, when the Law Reform Commission tackled defamation reform we had assistance from experienced journalists in all branches of the media. But they helped us as individuals. 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 workplace, 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.

FOOTNOTES

1. Bulletin, 21 May 1982, 13.
2. ibid.
3. ibid.
4. id, 24.
5. ibid.
6. As reported Canberra Times, 12 June 1983, 1.
7. B. Hogben, address to Australian Media Law Association meeting, London, May 1983, mimeo, 1.
8. ibid, 4.
9. D. Hunt, 'Why No First Amendment? The Role of the Press in Relationship to Justice', (1980) ALJ 458.
10. Hogben, 1.
11. IPI Report, 1982, 5.
12. M.D. Kirby, 'Australian Media Law: Future Directions' (1982) 3 Jl Media Law and Practice 215.
13. G.J. Evans, Press Release 33/82.
14. ibid, 2.
15. Age, 30 March 1983.
16. Australian, 29 March 1983, 8.
17. P.D. Durack, Press Release, 2/83, 2
18. Melbourne Herald, 28 March 1983, 6.
19. Sydney Morning Herald, 6 May 1983, 17. Hook v. John Fairfax & Sons Limited.
20. Australian Ocean Line Pty. Limited v. West Australian Newspapers Limited and Harvey, unreported judgment of Toohy J., Perth, 19 April 1983, mimeo.
21. ibid, 6-7.
22. ibid, 12.
23. id, 11-12.
24. Canberra Times, 1 June 1983, 13.
25. Australian Financial Review, 7 June 1983, 14.
26. As reported the Australian, 6 June 1983, 7.
27. Canberra Times, 1 June 1983.

28. *ibid.*,
29. G.J. Evans, Press Release, 27 March 1983, 2.
30. Australian, 21 May 1983, 9.
31. Sydney Morning Herald, 9 April 1983, 6
32. Canberra Times, 23 May 1983, 6.
33. G.J. Evans, Press Release, 7 April 1983, 38/83, 1.
34. Sydney Morning Herald, 3 June 1983, 11.
35. *ibid.*
36. *id.*
37. Cited Slee, n.35 *ibid.*
38. Age, 23 April 1983, 3.
39. Sawyer, reported Melbourne Age, 19 April 1983, 15.