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AUSTRALIAN DEFAMATION LAW REFORM : MAINTAINING THE MOMENTUM

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The Hon Mr Justice M D Kirby CMG
Chairman of the Australian Law Reform Commission

REPULSING A VERBAL EXOCET

Last week, more than a thousand lawyers gathered in Brisbane for the 22nd Australian Legal Convention. It was a friendly affair. The theme of the Convention, repeated thrice by the President at the Opening Ceremony, was 'back to basics'. Behind the genteel facade of civilised discussions about 'basic' topics of the law, disputes about certain major social issues hovered — and would not go away.

On Tuesday 5 July Mr Justice Hunt of the Supreme Court of New South Wales delivered a paper 'The Reform of Defamation'. Unfortunately I had to be in Sydney for a meeting of the Executive of the Australian National Commission for UNESCO. Accordingly I missed the oral presentation of the paper. This was unfortunate because the major thrust of the reform of defamation laws in Australia has come from a 1979 report of the Australian Law Reform Commission, Unfair Publication : Defamation and Privacy.[1] Resulting from that report, and a subsequent commentary on it by the Law Reform Commission of Western Australia, the Standing Committee of Attorneys-General has been considering Australia's defamation reforms for about five years. At the end of March 1983 the new Federal Attorney-General, Senator Evans, announced that the uniform law reform Bill would be completed by the Attorneys-General at their meeting in Brisbane in July 1983. Discussions about reform of defamation law at the Legal Convention at the beginning of July 1983 were therefore exquisitely timed.

Mr Justice Hunt's paper was, in several respects, critical of the report of the Australian Law Reform Commission. As perceived by the legal correspondent of one newspaper, his conclusion was that the 'proposals for a uniform defamation law were a near disaster'.[2] Indeed the judge said as much. These comments secured widespread publicity throughout the print and electronic media. There are few topics that so fascinate the media and cajole journalists into dipping their pens, as the law governing their own activities. In Australia, because these laws are in an uncertain and defective state, as pointed out by the Australian Law Reform Commission, this myopic fascination with media law is both understandable and desirable.

Let me say at the outset that I offer no complaint about criticism of consultative documents or reports of the Australian Law Reform Commission. Our whole methodology is designed to attract comments and criticisms. We practise before the bar of the whole Australian community and Australian public opinion. Lively criticism of our proposals is the best way to ensure that the final reforms of the law that result from our labours are likely to be successful and enduring. Mr Justice Hunt enjoys the highest reputation in the field of defamation law. Indeed, a pamphlet recently issued by the Law Institute of Victoria labelled him Australia's top defamation lawyer. The Chairman introducing him at the Legal Convention pointed out, so I am informed, that whereas other States could barely muster a handful of reported cases on defamation law, New South Wales law reports in recent times contain 47 reported judgments on points of defamation law. Mr Justice Hunt wrote 43 of the 47. The cognoscenti of the legal profession soon learned at the Bar to fear his encyclopaedic knowledge of this fascinating and complex area of defamation law. No exotic defamation case from Bermuda to Zambia seemed to escape his gaze. He had a computer-like system of reference to cases on the most obscure points of defamation law. Its endless fascination provides His Honour with the opportunity to display both his undoubted mastery of the subject and his gifts of intellectual dexterity.

Accordingly, when I read the newspaper reports of Mr Justice Hunt's criticisms of the ALRC report on defamation law reform, I obviously had to take the criticism seriously. I did not, and do not, complain of criticism. But I do believe that there are a few legitimate complaints that should be voiced:

* First, the organisers of this Australian Legal Convention did not follow the course that has been observed rigidly by all recent Conventions. They neither insisted upon the predistribution of papers; nor did they keep paper writers to a strict timetable to ensure that the papers could be circulated before the Convention for the critical study of the audience.

* The consequence of this was that papers, if available at all, were not available for prior scrutiny and for searching, questioning commentary, rebuttal, criticism and the contemporaneous presentation of alternative points of view. In fact, the rapid presentation to the delegates of no fewer than 68 papers on diverse legal subjects meant that even the cream of the Australian legal profession faced a challenge that was daunting and oppressive.

* Although I was not present, I was informed that at the session at which Mr Justice Hunt presented his paper, there was virtually no time for comment or criticism from the floor, or even for questions. The time was expended on the oral presentation of His Honour's paper and a commentary by another leading Sydney defamation lawyer, Mr Hendrik Nicholas QC.

* It seems unreasonable, even unjust, to me, to conduct a session at the national Legal Convention on defamation law reform and to invite as paper writer and commentator two lawyers critical of the vehicle for reform; yet to exclude those who are advancing the reform. The first lesson a lawyer should learn in his first week at Law School is the ancient principle of fair procedure : audi alterem partem : hear the other side. Yet by its organisation, the Australian Legal Convention in Brisbane excluded the 'other side'. The result was a one-sided criticism of the proposals for reform. And no real opportunity for a response to be offered and for a real debate to be joined upon which the delegates could form their views.

* It should also be said that I received no advance copy of Mr Justice Hunt's paper. I have still not even seen Mr Nicholas' commentary. Perhaps His Honour's paper was not sent to me because most of the points raised in it are a repetition of the comments made during the run-up to the Australian Law Reform Commission's report. Mr Justice Hunt was a consultant to the Law Reform Commission. He pressed many of the points of view he expressed at the Legal Convention upon the Law Reform Commissioners. All of his submissions were, as you will expect, given the most careful and deferential attention. The fact that they were not all accepted is simply part and parcel of the decision-making process that is inherent in the procedure of law development and law reform. Consensus is not always possible. Nor is it desirable to turn any area of the law over to the 'experts'. They can get too close to the old law and to old ways of doing things. They can sometimes fall in love with established procedures. Their minds may become set by years of adherence to settled ways of doing things. In the business of reform, as in the business of the law itself at its highest levels, it is essential to submit established rules and institutions to fresh scrutiny from time to

time. This is the approach that was taken by the Australian Law Reform Commission. We offer no apology for that approach. It is the approach contemplated by the Law Reform Commission Act, passed by Parliament and followed by law reforming agencies throughout Australia and indeed throughout the world.

The truly worrying aspect of the one-sided debate at the Australian Legal Convention is that the views expressed by a commentator as distinguished as Mr Justice Hunt may have a disproportionate effect. Although those views are entitled to every attention, including by the Standing Committee of Attorneys-General, they should not, I think, stay the momentum that has built up towards a single and uniform defamation law for Australia. With one exception, which I will elaborate, I do not believe that His Honour's comments deserve acceptance. In one particular respect the comments are based upon a misunderstanding or misreading of the Law Reform Commission's report. At this critical point in the moves towards Australia's uniform defamation laws, it is vital that the verbal Exocet fired by Mr Justice Hunt should be repulsed. That is the purpose of my talk to you tonight.

CRITICISMS ANSWERED

Lack of Uniformity. The first part of Mr Justice Hunt's paper argues cogently for the need for a uniform law of defamation applying throughout Australia. Indeed, he says that such a need 'cannot be disputed'.[3] Certainly, the major thrust of the Australian Law Reform Commission report was to secure a uniform law. It is ridiculous and unacceptable that defamation law and practice should vary significantly from one part of Australia to another. This might have been acceptable at Federation when defamation was an insult hurled over the back fence or contained in a journal distributed locally. It is perfectly unacceptable, as a matter of principle, in today's world. Newspapers and other journals are distributed rapidly throughout the nation. Telefacsimile is being used in the print media to secure simultaneous text in different parts of the country and indeed different parts of the world. Radio broadcasts and television transmissions take the same message to different parts of the nation. Technology of communication is changing so rapidly : whether in the form of citizen band radio, satellite transmission or computers chattering away to computers in different jurisdictions.

The need for a single defamation law in force throughout Australia is clear. The Australian Law Reform Commission offered the Commonwealth Government the choice. Either it could proceed, through discussion, to a uniform defamation law by concurrent action with the States. Or it could proceed, by the use of available heads of Commonwealth power, to enact a Federal defamation law which would cover the

great part (but not all) of defamation actions. The Fraser Administration chose the former course. Senator Evans is persisting with that course. However, it should be said that on the very eve of the Australian Legal Convention, a decision of great potential relevance to this debate was handed down by the High Court of Australia. I refer, of course, to the Tasmanian Dams decision.[4] In that decision, the majority clarified the power of the Commonwealth Parliament to enact laws under its 'external affairs' remit. It is relevant to remember that Article 17 of the International Covenant on Civil and Political Rights, which Australia has signed and ratified, provides:

> 17.1 No-one shall be subjected to arbitrary or unlawful interference with his privacy ... nor to unlawful attacks on his honour and reputation.
>
> 17.2 Everyone has the right to the protection of the law against such interference or attacks.

In the Law Reform Commission's report, there is a brief discussion of the possible use of the provisions of the International Covenant to ground a Commonwealth law. That discussion proceed without the assistance of the reasoning of the majority in the Koowarta[5] and Tasmanian Dams decisions. Senator Evans announced at the Legal Convention his intention to introduce Federal human rights legislation based upon the International Covenant. Its form will be disclosed later in the year. The sole point that I wish to make is that, if a uniform law is considered desirable, there may be less need, since the recent decisions of the High Court, for the Commonwealth to compromise with differing opinion about the shape of such a law. By that I mean there may be less legal need. The political need may remain. That is a question for politicians. I simply call to notice the relevance, in this connection, of the recent High Court decisions. I agree with Mr Justice Hunt that a uniform defamation law is desirable and needed. It can be achieved either by agreement with the States or by unilateral Commonwealth action. Decisions of the High Court of Australia since the Australian Law Reform Commission's report was delivered, make far clearer the amplitude of the power of the Commonwealth Parliament to enact a comprehensive and valid single defamation law.

Codification. The next section of Mr Justice Hunt's paper is devoted to arguments against the suggestion made by the Commission that defamation law should be codified. His Honour's objection to codification was voiced in writing and orally at meetings held by the Law Reform Commissioners with the consultants. It is not an objection that found favour with the Commissioners. Nor, I believe, is it an objection that was favoured by a majority of the media consultants.

The criticisms of codification are dealt with in the Law Reform Commission's report with prefect adequacy.[6] As to the contention that codes stultify the development of the law, the Commission's response was that it depends entirely on how the code is written. The Defamation Code offered by the Law Reform Commission is one relying on concepts and principle broadly stated, not narrowly worded legislative efforts in the hopeless effort to cover every instance in the infinite variety of human affairs. If we had taken the latter course in our approach and in our draft Bill, I could understand Mr Justice Hunt's criticism. But the effort of the Law Reform Commission was to simplify defamation law by reducing it to important basic principles and getting those principles into a single statute : available for journalist and citizen alike. If we leave it to the common law (as appears to be Mr Justice Hunt's appeal) either in whole or in part, the result would be a continuation of uncertainty in an area of the law where clear guidance is plainly desirable. It is notable that the statute drafted by the Law Reform Commission covers 20 pages. The latest statement of the common law of defamation in the standard text on that subject (Gatley) covers 700 pages. Although it is likely and indeed desirable that a body of law will grow up around the codified statement of Australian defamation law, that body of law will constantly be taken back to the statements of general principle contained in the Australian statute. Adapting what Lord Devlin said in another context, it is not much use insisting that journalists obey the law if it takes a day's research to find out what the law is.

The common law of defamation may be a source of endless satisfaction (not to say remuneration) for the legal profession. But in an area of activity so important to liberty, where decisions must be made, often in highly charged and dramatic circumstances and usually at desperate speed, it is just unacceptable to urge the return to the common law. It is specially unacceptable when we are seeking to develop the uniform law, conceded by Mr Justice Hunt to be needed. If we are to get a uniform law it cannot be by the common law. It must be a statement of principles set out in an Australian statute. If we leave the door open, even partly, to the common law, it will be a constant inducement to lawyers, dazzled by its intricacies, to go back to the old ways. That is why the Law Reform Commission insisted on a code. Mr Justice Hunt put his point of view persuasively and vigorously before the Law Commissioners. It was a point of view we simply could not share. If every journalist, indeed every citizen, had at his elbow a defamation lawyer of His Honour's talents and sophistication, there would be no need for a code. But whilst ever the common law of defamation remains so complex and puzzling, the value of a codified statement for journalist and citizen alike is indisputable.

Definitions. The next section of Mr Justice Hunt's paper takes up a point of distinction between the definition of 'defamatory matter' adopted in different parts of Australia and the compromise suggested by the Law Reform Commission. Criticism is made of the fact that the Commission proposed a wide definition of defamatory matter. I do not regard this criticism as one of great moment. Furthermore, it is a criticism which totally ignores the new remedies proposed by the Law Reform Commission. Indeed, Mr Justice Hunt's paper completely overlooks, or fails to mention, the emphasis placed by the Law Reform Commission on the remedy of correction orders.

He complains that an airline whose business could tend to be injured by a statement, though it suffered no damage, could sue for defamation. He says that the airline would be entitled to damages because it was defamed. But this statement ignores the scheme offered by the Law Reform Commission, viz remedies of a wider variety, including the rights to correction. The endless fascination of the common law of England with money damages arose out of the way the common law courts developed. It required the development of an entirely different stream of courts, the Chancery courts, to provide more direct remedies such as injunctions and declarations. This fascination with money damages has distorted the laws and procedures of defamation in our country. An important innovation suggested by the Law Reform Commission (and apparently accepted by the Standing Committee of Attorneys-General) is the incorporation into Australian law of the right to secure a correction order. In fact, the Law Reform Commission placed the order for correction as the first of the remedies to be available in cases of defamation. In this way, we drew upon the legal systems of Europe where correction orders are a commonplace. This important reform is totally ignored both in Mr Justice Hunt's paper and in his specific comments on the definition offered by the Commission of 'defamatory matter'. This may not be a terribly important issue in the whole large debate about defamation reform. However, it illustrates the importance of reading the entire report of the Law Reform Commission and seeing the entire 'package' offered by it. That 'package' includes novel and beneficial remedies such as the right of correction. Money damages may salve the pain of a reputation that has been attacked. But money damages do nothing to protect the interests of the community in having false facts corrected.

Truth alone. The next section of Mr Justice Hunt's paper deals with the proposal that truth alone should be a defence to an action for defamation. It will be recalled that the Law Reform Commission suggested that this should be the case. In order to provide for the protection of privacy that would be lost by the removal of the requirement that a defendant should prove that the publication was for the public benefit or relates to a matter of public interest (as is the case in some Australian jurisdictions) the Commission

proposed a right of action for breach of privacy. Mr Justice Hunt described this as a 'careful and wholly commendable balance proposed by the Commission'.[7] Rightly he says, it is 'completely destroyed if there is to be no right of action for breach of privacy'.[8] He also rightly points to the difficulty inherent in the announcement of the Standing Committee of Attorneys-General that the uniform law will require the defence to establish that a statement was for the public benefit as well as the truth. Such a requirement will make the correction procedure contemplated by the Law Reform Commission difficult, if not impossible, to introduce. Certainly it would require major changes limiting corrections to that element of the defence which relates to truth or falsity. The point was well expressed by the present Attorney-General, Senator Evans, then in Opposition. His observations cited by Mr Justice Hunt are as true today as when they were first uttered.[9]

Mr Justice Hunt then proceeds to make a suggestion that certainly deserves careful consideration by the Standing Committee. This is his proposal that it might be a defence to the publication of defamatory matter if the matter were true and, where it consists of sensitive private facts, if a defence presently proposed as the defence to a privacy action would apply in relation to the publication of those facts. Mr Justice Hunt says that if such a defence were adopted by the Standing Committee 'the sensitive balance proposed by the Law Reform Commission would be maintained and all of the valid criticisms of the existing requirement of public benefit would be avoided'. Essentially his suggestion is the ingenious one of turning the cause of action for privacy into a specific and limited defence of 'private facts'. I believe that this is the most constructive, practical and important feature of His Honour's paper. If the Standing Committee of Attorneys-General is determined, in the uniform defamation law, to reject the Law Reform Commission's proposal for a privacy cause of action, it would be preferable to 'truth and public benefit' to adopt the more carefully defined defence suggested by Mr Justice Hunt.

Finally on this section of the judge's paper, I would only add that the Law Reform Commission is accused of ignoring a statutory modification to the defence of truth proposed by the New South Wales Law Reform Commission in 1974 to permit a defendant to rely upon truth of certain imputations even where the plaintiff did not complain of them and to succeed upon a defence of truth if the jury considered that by reason of the truth of those other imputations, the plaintiff's reputation was not further injured as a result of the unjustified imputation. The Law Reform Commission did not, as asserted, ignore this point. Indeed it is discussed in paragragraphs 121 and 122 of the Commission's report. We simply reached a different view. We are bold enough to think, contrary to Mr Justice Hunt's clear opinion, that we were right.

Fair report. Mr Justice Hunt clearly does not like the expanded defence of fair report proposed by the Law Reform Commission. Instead he wants to keep unreformed the mysteries of qualified privilege. In his paper he sets out the common law and the proposal of the Law Reform Commission. He says that the press 'does not appear to have been inhibited in publishing statements up to the present time'. He fears that by forcing the plaintiff to sue the authors of statements rather than the newspapers, the new defence could produce a 'chilling' effect. Conceding that it may occasionally chill the original maker of statements, that still seems to me to be preferable than diverting plaintiffs from suing those responsible for statements in the first place into suing media interests who faithfully record those statements but are then recipients of a writ mainly because they are seen as some kind of litigious 'milch cow'. Again, the approach taken in Mr Justice Hunt's paper ignores the correction procedure offered by the Law Reform Commission. An important policy aim is to get away from plaintiffs suing media interests for the salving balm of money damages. Instead, the objective is to concentrate the law's fire upon those who make the allegedly defamatory statements in the first place, rather than on the free media, who simply report them. If the statement is false, then an order for correction against the person who made the statement may often be the most usually appropriate remedy.

Qualified privilege. The next session of Mr Justice Hunt's paper deals with the issue of qualified privilege. He says that the Commission has proposed the abolition of the common law defence of qualified privilege in relation to non-media defendants. This is more apparent than real. In fact, in the Commission's report and in the draft legislation, the Commission expressly proposed a defence, called 'limited privilege', but in relation to the non-media defendant virtually the same as the present qualified privilege enjoyed by such defendants. The legislation proposed by the Commission on this subject is cast in general terms. It clearly provides protection in the instance Mr Justice Hunt mentions in his paper, namely the case where the publication is made 'simply to protect the interest of the defendant or someone else, such as his employer'. This is simply a misreading or misunderstanding of the Law Reform Commission's report. It totally ignores the Commission's reference to a 'duty to receive' information and the wide scope of the definition of 'duty' offered in subsection 15(2) of the draft Bill. These are technical matters but they illustrate the importance of paying close attention to the language of the draft legislation offered by the Commission.[10] It is my belief that in respect of non-media defendants, in his comments on qualified privilege, Mr Justice Hunt simply misunderstood the Law Reform Commission's proposals.

Mr Justice Hunt suggests that a basic problem of journalists in Australia is that they fail to get the facts right. No law of defamation can cure that problem. Even at common law, it is relatively rare, in practice, for media defendants to rely on the defence of truth alone. This is because of the rule that the defendant must prove truth and because of the difficulties sometimes posed in doing that : by the onus of proof, the rules of evidence and the standard of proof. Unless the defendant has direct, available evidence it may not be able to prove the truth, even though the facts asserted are almost certainly true. It is for that reason that the mass media in Australia rely so heavily on defences, independent of truth. The Bill proposed by the Australian Law Reform Commission gives a wider range of defences to the media and a wider range of remedies that lay emphasis upon the community's right to know as well as the interests of the parties in the litigation.

CONCLUSIONS

I have taken this occasion to respond in this talk to comments made by a distinguished judge about a matter of great importance. The debate should not be seen as acrimonious or unseemly. It is a debate about an important attribute of freedom. It is therefore only right that it should be vigorous and well informed.

Of Mr Justice Hunt's specific comment on the possible redesign of the defence of justification, I have only praise. For the vigour of his other criticisms I have respect, even though I disagree. But it is important that the momentum towards a uniform defamation law throughout Australia should be maintained. That does not mean uniformity at any price. Nor does it mean that we should simply accept the lowest common denominator of agreement amongst the States for the sake of uniformity. But we should be willing to pay a price, even a significant price, for the benefit of uniformity and simplification of defamation laws. Especially should we be willing to pay that price for the adoption of new and more imaginative defamation procedures, such as rights of correction and rights of reply written into the law. The notion of going back to the ancient common law of England, with all of its flexibility, strengths but its uncertainty and detail, is unrealistic. It is especially unrealistic in the context of the search for a single statement of Australia's defamation law. In fact, the very suggestion strikes me as unworldly and one that would only be made by that very rare bird : a top lawyer who has mastered the intricacies of the common law of defamation. What we need in Australia is a single uniform Act. We need a code so that we will not constantly be looking over our shoulder to centuries of judicial pronouncements which imprison us in the approaches of the past. We need new procedures adapted from the legal systems of Europe. We have been too long in the thrall of a complacent acceptance of

everything English in the law and a refusal to look beyond the myopia of our own legal traditions. We need a single statute so that journalists and citizens in doubt can quickly find at least the general principles of the law that governs them. We need speedy procedures to defeat the stop writ and bring matters quickly before the courts. We need reform of contempt law, a new matter under consideration by the Australian Law Reform Commission. We need a general review of media law in Australia. But we have to start somewhere. And it will be a tragedy if the debate at the Legal Convention in Brisbane, so unexpected, unwarned and one-sided, were to halt the momentum towards a national defamation law. If that momentum were lost, the only alternative might be the later enactment of a single Federal statute by the reliance of the Commonwealth Parliament upon its newly clarified external affairs power as elaborated by Article 17 of the International Covenant on Civil and Political Rights. It would seem more appropriate, after so many years of work, to give the uniform approach an opportunity to succeed. I hope that this speech of mine will be viewed as a constructive encouragement to the continuance of the effort towards a national defamation law.

FOOTNOTES

1. ALRC 11, 1979 (AGPS, Canberra).

2. Sydney Morning Herald, 6 July 1983.

3. D Hunt, 'The Reform of Defamation', An address presented to the 22nd Australian Legal Convention, Brisbane, 5 July 1983, 3.

4. The Commonwealth v Tasmania, unreported decision of the High Court of Australia, 1 July 1983.

5. Koowarta v Bjelke-Petersen (1982) 39 ALR417.

6. See ALRC 11, para. 67-70.

7. Hunt, 21.

8. ibid.

9. G J Evans, cited Hunt, 21.

10. Hunt, 35. It might be possible to argue for expanding the defence slightly in view of the comments of Hunt J.