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REGIONAL DAILIES OF AUSTRALIA

EDITORIAL SEMINAR

SYDNEY, 22 OCTOBER 1983

ROLE OF NEWSPAPERS IN THE LAW

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

NEWSPAPERS REPORTING THE LAW

I intend, in this talk, to review, with necessary brevity, the relationship between newspapers and the law. I propose to turn, in due course, to three topics that have been or are of interest to the Australian Law Reform Commission and relevant to the print media. I refer to:

* our report on defamation, which proposed a uniform defamation law — but one somewhat different to the law now being suggested for adoption throughout Australia;
* our work on evidence law reform, which requires us to address, amongst many other things, the vexed question of the privilege of journalists to decline to reveale to courts the identity of their informers; and
* our most recent relevant reference, which deals with the law of contempt.

It is hard to believe that it is nearly a quarter of a century since President Kennedy made that notable Inaugural Address. In it he told the American people to ask not what their country could do for them, but what they could do for their country. Consistent with this theme, I want to start my address by asking not what the law can do for daily newspapers — but what daily newspapers can do for the law.

Living in a relatively free society and enjoying a largely free press, it is appropriate for us to consider from time to time our obligations. Those who take the advantages of a free society should be vigilant to defend and uphold it. Lord Hailsham, the Lord Chancellor of England, has suggested that the great centrepoint of our form of

society is the principle of the rule of law. This means that everyone, high and low, is subject not to the whim of petty dictators (whether found in a presidential palace or in the bureaucracy). Instead, we are subject to a government of rules and laws — not a government of men. Be you never so high, it is said, the law is still above you.

This principle of the rule of law does not rest on armies to enforce it. There is a well known tale of the meeting in the 1930s between Mussolini and Sir John Latham — later to be Chief Justice of Australia. Mussolini, perplexed by our form of generally law-abiding society, asked Sir John Latham how many battalions the High Court of Australia had to enforce its rules. Of course, it has none. The courts of our country have no armies, not even a vast array of sheriffs' officers, to enforce their judgments and orders. Those judgments and orders depend for their respect and observance, very much upon the consensus of the community. Newspapers, including regional dailies as great moulders of community opinion, are therefore very important in the way they influence the community's attitude to the courts, judgments and to the rule of law itself.

An ordinary citizen looking at most of our newspapers could be forgiven for believing that the law is exclusively the business of criminal rules and punishment. There is relatively little discussion of the civil law. Sometimes it can be found tucked away in the business pages of the major metropolitan dailies.

But lately things are beginning to change. The message has reached the metropolitan news media that the law is intensely fascinating and worthy of closer attention. The print media have an advantage here. They are not under the obligation to sum up the wisdom of the world in 60 seconds. For this reason, an increasing number of articles are appearing in the metropolitan dailies written by legal correspondents, whose full-time job is one of reporting, with accuracy and perceptiveness, the major developments in the law. If the rule of law is central to our society, it is entirely healthy that this new focus of attention should be given. Happily, it is also an interesting subject for the readers. The law deals, after all, with the problems of citizens in the community and the rules by which they live together. It is therefore not at all difficult to strike a responsive chord in the community by reviewing legal developments.

Within the past five years or so, most of the major journals of Australia have appointed permanent legal correspondents. It would be invidious to name them. But I do not see why one should not be invidious from time to time. Certainly worthy of naming are John Slee, the Legal Correspondent of the Sydney Morning Herald and Verge Blunden, observer of the High Court scene. The Age boasts Garry Sturgess, a particularly

thoughtful journalist. The West Australian has Margo Lang. The Canberra Times has Crispin Hull. The Australian Financial Review has the services of David Solomon. The modest, retiring Bulletin does not disclose the name of its 'Officious Bystander'. And there are many others. Most of those I have named themselves have legal qualifications. There is a natural affinity between lawyers and journalists. Each lives in the realm of words. In a sense, each is paid by his verbal output. Each works, with varying success, often to severe deadlines. It is a thoroughly good thing to see the development of permanent legal correspondents in our metropolitan newspapers. Thought might be given to the implications of this development in the major regional dailies.

Having offered these bouquets, I have to say that we still have a long way to go. No newspaper in Australia has a regular 'law report' section. The London Times, the London Financial Times and, I think, the Guardian, contain, virtually daily, an accurate transcription and summary of major decisions of the courts. Not only is this a boon for lawyers. It is also a way of emphasising the service of the law to the whole community. Not every reader will tarry to consider the reasoned judgments of the courts. Many would find the reasoning obscure and even perplexing. But the notion that law reports are the possession of lawyers only, and that the major decisions of the courts can be left safely to the legal profession, is an unhealthy one. I realise that there is often quite detailed news coverage of important legal cases, especially in the print media. The detail has grown since the recruitment of specialised legal correspondents. This recruitment has also enhanced the accuracy and succinctness of the summaries of important judgments. All of this is thoroughly desirable. But in the metropolitan dailies, the coverage of a major case depends very much on competing news, available space in times of shrinking advertising revenue and the need generally to show a human interest or 'newsy' aspect of the case, if space is to be won.

The facility in England of a regular service column, in which major court decisions — particularly of the Appeal Courts — are epitomised, is a notion of service in the highest traditions of the print media. Somehow it is not a service which the print media in Australia have lately felt obliged to supply. I ask whether fresh consideration should not be given to a facility of this kind? Sadly, there are now large numbers of highly talented young lawyers out of work. I do not suggest that the charitable media industry is likely to provide a ready solution to lawyerly unemployment, by expanding the coverage of court decisions. But I do say that the pool of highly talented lawyers unable to find orthodox work in the legal profession might provide imaginative newspapers, and other media interests, with a rare opportunity of recruitment that would not have presented a decade ago.

Now, I fully appreciate that it is just not feasible for a regional newspaper (or at least the most of them) to engage a full-time qualified legal correspondent. However important the law may be in the regions, with judges (pursuing the tradition of King Henry II) and travelling to solve the problems of the people in all parts of the country — strictly limited resources and competition with the national and metropolitan dailies requires a different and much more economic approach. And this is where, I feel, the courts themselves are falling down. It is just not feasible for a small regional journal to engage a legal correspondent. Yet, unless news of legal developments is to be left entirely to the metropolitan dailies or confined to scandalous and human interest criminal cases in the district, some help is needed for the smaller journals, if they are to bring to their readers, news of relevant legal developments.

I have always thought, with Sir John Latham, that the law is obeyed in Australia not so much for fear of punishment or armies of bailiffs as because good citizens accept that it is the aggregate community interest, including their own, to live under the rule of law. This means that it is vitally important that the educative function of the law should be encouraged and facilitated. You do not educate the people in the law by keeping its major rules a secret for the legal profession and a few others. A realisation of this fact has led to the enormously popular development of legal education now going on in Australian schools. In Victoria, Legal Studies is now the third most popular subject in the secondary school curriculum. This growth of legal studies comes just in time. Our parliaments in Australia are turning out more than a thousand statutes each year. It is vital that more should be done to inform the community about those laws and particularly where new rules are imposed upon ordinary citizens.

New rules are imposed by court decisions. This is where, I believe, the courts themselves could do more than they are doing. If it is impossible for any but the largest media interests to have full-time expert legal correspondents, it seems sensible to me that the courts, defensive of their educative functions, should consider seriously the obligation that falls upon them to communicate their decisions accurately to a broader community. Until now, in quieter times and with a less educated and informed community and less law, the courts tended to concentrate on writing judgments for distribution very much within the Club — to other judges and to lawyers. Of course, this distribution is vital. The judges, magistrates and lawyers are among the chief actors in the legal dramas of our society. But I fail to see why the highest courts at least should not engage properly trained journalists — preferably themselves with legal qualifications — to encapsulate, in a brief and interesting way, the major decisions as they are handed down. If such a person

were an officer of the court, he could be trusted with a prior copy of the court's decision. He could then prepare a succinct, accurate summary — indicating the main legal and social points in the judgment of the court. Not for a minute am I contemplating a dry and tedious, technical and long-winded presentation. Much of the law is not boring. A little bit of flair and experience can soon reduce cases to an interesting and readable form. But at the moment virtually nothing is done in this regard anywhere in Australia. The judges labour over their judgments. As in the Tasmanian Dams case, they often touch the most fundamental political issues of our society. They are generally available to journalists at very short notice, usually at 10.15 in the morning the judgments are delivered. Is it any wonder that hurried, sometimes inaccurate and muddled and often sensational reports of leading case decisions are the result?

The notion of court media officers is not new. Many years ago it was suggested by Sir Ninian Stephen when he was a Justice of the High Court of Australia. In the United States, the Supreme Court at least has a permanent media liaison officer. His duty is to capture the main points in Supreme Court decisions and to feed them to the news media throughout the United States. His existence and his work has meant that the decisions of that great court can be swiftly and accurately epitomised in the smallest regional daily newspaper in the Union, as well as in the large metropolitan journals with their own legal research staff.[1] A short and accurate summary of major decisions can itself become the basis for the comments of local lawyers and indeed other citizens. It is all part of the process of communicating and explaining the lessons of the law. It has never seemed satisfactory to me to boast that we live by the rule of law and that we have the independent courts handing down authoritative decisions about the law but to do very little, in a systematic way to bring these decisions to the attention of a broad community — or even to the attention of the specialised communities most significantly affected. There is now a great deal of law making in our country, whether by parliaments, turning up hundreds of statutes or by the courts developing the common law and interpreting those statutes. True it is there have been improvements:

* The major journals have appointed specialist legal correspondents.
* There is much more coverage of legal issues in the major dailies.
* In the schools, Legal Studies is increasingly being adopted as a popular course for young Australians and as a preparation for informed citizenship.

But I am convinced that more needs to be done. I have mentioned three ideas for your consideration:

* the greater recruitment, including in the regional dailies, of qualified lawyers as journalists;
* the adoption of regular law report items, as appear daily in the British press; and
* the acceptance by the courts themselves of an obligation to communicate to the general public their major decisions and rulings. This lastmentioned proposal has specific relevance to regional dailies, many of which could not afford specific legal correspondents but would be perfectly prepared to publish copy supplied in an interesting and readable way by a skilled expert able to reduce the chaos and technicality of the law to an attractive and simple form.

THE LAW REFORM COMMISSION & THE PRESS

In a sense, the Australian Law Reform Commission practises what I have just been preaching. From the very outset, under the stimulus of one of our initial Commissioners, Gareth Evans, now Federal Attorney-General, we laid emphasis upon the process of community consultation. In all of the tasks that have been assigned to us, by Labor and non-Labor Governments, we have made it standard practice to seek out media discussion of issues and thereby to promote community response. I believe we have been partly successful in this endeavour. Two weeks ago, when I was in London, I was invited to a round-table conference in the Lord Chancellor's Office precisely to discuss the way in which, with the aid of the media (especially the print media) we have been able in Australia to make law reform a matter of topical interest and community concern. In England, law reform is still very much a matter for lawyers, behind closed doors. The Lord Chancellor's Office was keen to know how we, in Australia, had managed to make the subjects of law reform matters of general community discussion.

I was quite candid with my inquisitors. You cannot make complex issues of the law matters for community discussion unless you are prepared to 'play the game' in which the media operates in a free society. The basic lesson that outsiders must learn is that journalists often work to desperately severe deadlines, within severe constraints of space and constantly concerned about the legal minefield through which they walk. Those who want to promote community discussion, whether of the law or other topics, must face up to these cruel realities. It is no good complaining that the media inaccurately reports judgments of the courts or concentrates on the scandalous and salacious, if the courts themselves do little to facilitate a better approach. It is asking a great deal of a lay journalist, working to a three-hour deadline, to reduce a complex and often technically

written legal judgment of 50 pages to an accurate, interesting and brief analysis of five-column inches. The lay journalist will start by being slightly intimidated by this strange realm of professional expertise — the law : with its jargon, its courtesies and its somewhat intimidating dress, furniture and personnel. Then he will be distinctly concerned about the laws of defamation, of contempt of court, of judicial rebukes for inaccuracy or confusion — which rebukes can upset editors and retard his promotion and advancement. Then he will, with increasing neuroticism, look at the clock ticking inexorably away as he turns the pages of the judgment wondering where the main point is — searching for the central reasons sometimes amongst a welter of verbiage. Perhaps he will see his colleagues on the sports desk or the local government section slipping off for a languid, even liquid, lunch. The net result of all this is a tremendous temptation to put the legal judgment to one side, to neglect the instruction of the judges and to pick up an easier story, especially if professionally presented in a media handout by a person or organisation who has played the game and recognises the time and other constraints facing the working journalist.

We in the Law Reform Commission soon came to learn these lessons. Without the slightest embarrassment, we have sought to reduce our complex topics to brief and, I hope, readable media releases. This ensures:

* accuracy in the presentation of our themes;
* greater likelihood of journalistic attention;
* concentration on the issues which are most important in the work of the Law Reform Commission; and
* by achieving coverage in the media, a proper amount of pressure on the political process, so strongly tempted otherwise to ignore the necessities and obligations of law reform.

Of course, we are in no way complacent. We have had a series of extremely interesting and relevant projects that have not been difficult to bring to the notice of the media:

* how do you handle complaints against the police?
* should we have tape recording of confessions to police?
* how do you deal with the problem of debt in a disrupted economy?
* what laws should we have on human tissue transplantation?
* how do we reform Australia's defamation laws?
* what laws should govern the sentencing of Federal offenders?
* how do we improve insurance laws in Australia?
* should we recognise Aboriginal tribal laws?

All of these topics can be presented in an interesting, brief and newsworthy way. But it requires more than wishful thinking on the part of those involved. It requires a frank recognition of the constraints within which the media work. Often those constraints are desperate.

You will gather that I am rather critical of the arrogant approach of some disciplines — including, I am afraid, the law — that would disdain the merest assistance to busy journalists, working to deadlines. But if we are serious about bringing the law to the general community, it behoves lawyers, law makers and even judges, to pay attention to the mechanics of communication in the world of the modern media. I, for one, do not believe that judgments of the courts are written only for the intellectual satisfaction of the judge concerned, the evaluation of the judicial peer group, the instruction of the legal profession or even the edification of the litigants before the court. The judgments of our courts, as symbolised by their delivery in open court, are for the instruction also of the whole community. But this general instruction cannot be achieved, without the co-operation of the media, particularly the print media. That is why, with increasing urgency, I feel our courts and especially the High Court of Australia, should be looking to the machinery of communication and the necessities of deadlines. Leaving it to a small number of talented legal correspondents may effectively leave the coverage of the courts exclusively to the metropolitan journals. There are at least 35 daily newspapers in Australia distributed outside the capital cities of this country. They have a combined circulation of nearly 560,000 a day. If each journal, on average, has two readers, that means more than a million Australians are dependent on the regional daily newspapers for their information about national affairs, including the law. We can turn these problems over to syndicated news stories and a tiny group of talented legal journalists. But I conceive it to be an obligation of the courts themselves to adapt their methodology to the facilities that are now available for the instruction of the community. The idea has been around for some time. It is not a particularly costly idea. I hope that before long attention will be given to it. Far from diminishing the authority and standing of the courts, it would in my view enhance their educative function, contribute to knowledge of their fine work and promote the reality, as distinct from the myth, of a community living knowingly under the rule of law.

THE LAW AND NEWSPAPERS

I now turn to the subject of the law as it affects the media. What the law can do for you or pershaps to you. Fortunately I can be brief on this topic. I see that the distinguished and brilliant Tom Hughes will be talking to you about defamation.

I also see that attention is to be given to the social responsibility of journalists and the training of journalists. I welcome the range of your discussions and the outstanding ability of your speakers.

The Australian Law Reform Commission's program has brought it into constant contact with the media. This is not the occasion for me to review at length our various projects. But I do want to say something about three topics which are current and important and to which you should be alerted.

Defamation. The first item relates to defamation law reform. In 1976 Attorney-General Ellicott asked the Law Reform Commission to prepare a report on defamation law reform. A report was duly delivered in 1979. It was prepared under the leadership of Mr Murray Wilcox QC. The Commissioners who worked on the project included some of the most distinguished lawyers in our country, notably Sir Zelman Cowen and Sir Gerard Brennan, before their appointments respectively as Governor-General and as a High Court Justice.

The Commission addressed the basic problem of disuniformity in defamation laws in Australia. It also considered the urgent need for greater clarification of defamation law and the provision of new and improved remedies, such as the right of correction and the right of reply. Until now we have been obsessed with money damages. The Commission was keen to get away from that obsession and to provide new and more relevant remedies.

After the most exhaustive consultation with the media industry, community groups and indeed the general community, we delivered our report. This report was then sent to the Standing Committee of Attorneys-General. In meetings over three years, stretching from Perth in Western Australia to Mackay in Queensland and Queenstown in New Zealand, the Attorneys laboured over the proposals for reform.

In July this year, Senator Evans brought the debate to a close. He announced general agreement on a uniform defamation law. But the agreement has provoked a great deal of concern in media and legal circles. The concern has been addressed especially at the proposal to change the recommendation of the Law Reform Commission on the justification defence of truth and to substitute instead a defence of 'truth and public benefit'. That defence obtains in the law of Queensland, Tasmania and the Australian Capital Territory, and was for a long time the law in New South Wales, where there is now a similar dual requirement (truth and 'public interest').

A statement made by Senator Evans on 16 October 1983 indicates that the Federal Government, in the light of the reaction to the proposals, is now reconsidering the uniform defamation law. The Attorney-General said that there was a 'very strong chance' that the contentious proposals on the defence of justification 'would be changed'. He said that it was his belief that various State Attorneys-General were also in favour of amending the proposed legislation:

> There is a very strong chance that that particular aspect of the Bill will be changed. It is my personal preference that it be changed and I discern a very strong movement that way among my colleagues in the respective States. The particular model we are working on here is one where the defence of truth would apply without the necessity for proving public benefit. We are groping towards a compromise proposal here which I think will prove generally acceptable.[2]

I can well understand the concern in the Australian media about the suggestion that the justification defence should be expressed in terms of 'truth and public benefit'. That approach was urged upon the Law Reform Commission. It was rejected by it. The reasons for its rejection are set out in our report. Central to the reasons was the uncertainty and unpredictability of the content of 'public benefit'. What one jury or judge would consider for the 'public benefit' might be quite different from what another jury or judge would consider. What was for the 'public benefit' at one time might later be considered not to be so. In the uncertainty of language, there are many dangers here for the journalist, working, as I have said, under great pressure and severe deadlines.

For this reason, I am pleased to see the statement made by the Attorney-General. By the same token, I would point out that the Law Reform Commission did not consider that a justification defence of 'truth' alone would be adequate to strike the right balance acceptable for Australian society. Until now, the provision in a majority of Australia's jurisdictions of an additional requirement of 'public benefit' or 'public interest' has served to emphasise protection for the legitimate <u>private</u> zone of individuals. In other words, though a matter might be true, the absence of a public element of public benefit or public interest ensured that some true facts of a purely private nature would not be published.

I realise that in the United States, and in a number of Australian States, the defence of 'truth' alone is considered adequate. That was, after all, the approach of the common law. But we live today in a world of mass media where privacy is under constant threat of assault. It was for that reason that the Australian Law Reform Commission's proposal sought a different compromise. The compromise sought to avoid the uncertainties and obscurities of 'public benefit' and 'public interest'. But it also sought to provide a closely defined yet narrow defence of the legitimate private zone of individuals.

The Law Reform Commission's way of doing this was to suggest that an individual should be able to sue in respect of the publication of certain 'sensitive private facts', whether they be true or false. We did not leave the 'private facts' undefined. That would have been just as serious a mistake as the nebulous language 'public benefit' and 'public interest'. Instead, we proposed that sensitive private facts should be defined to mean information relating to the health, private behaviour, home life, personal or family relationships of the individual which, in all the circumstances, if published, would be likely to cause distress, annoyance or embarrassment.

We proposed a number of defences to the publication of private facts including the consent of the person affected, the inclusion of the facts in a public record, accidental publication, the authority of law, absolute privilege and the reasonable protection by a person of his own personal property. We also suggested that where the publication even of private facts was relevant to a topic of public interest, that publication should be excused. We defined 'public interest' to include public, commercial or professional activities, public office or facts relating to law enforcement and public administration. The object of this was to get away from the vagaries of the test of 'public benefit' or 'public interest'. Instead, the test would be much more closely defined and specifically directed to protecting the legitimate private zone of individuals in society.

Most media in Australia respect that private zone. But the fact that most people comply with the law, or that there are alternative remedies (such as, here, the Press Council) has never been a reason for failing to provide laws for the guidance of the community and for redress where there is a breach. The very private nature of the matters involved would normally restrain a person from suing for privacy publication. But it was the view of the Law Reform Commission that some protection should be provided for the private zone and that a defence of 'truth' alone would not provide that protection.

It would simply ask whether the facts were true. The publication of true prurient, morbid and intrusive facts about individuals, having no legitimate public interest, would then be possible under the law. I do not believe that this is the standard of fair publication which the community in Australia would accept. Indeed, I am sure it is not the standard of publication generally followed by most media in this country.

I therefore express a word of caution about the perfectly legitimate campaign of criticism of the proposed Uniform Defamation Bill. In the first place, let us not lose momentum towards uniformity. It is important that uniform defamation laws should be achieved. For my own part I do not see how instruction of young journalists is possible in the laws of defamation when it takes a day's research to find what those laws state. For the good health of journalism and the instruction of future generations of journalists, we need to state the basic reforms in a simple and single statute applicable throughout the country.

Secondly, we should recognise that there are many good things in the proposed uniform defamation law, most of them taken from the report of the Law Reform Commission. In particular, the effort to introduce new and more relevant legal procedures is a distinct improvement and should certainly be encouraged.

Thirdly, it would be my hope that the compromise which the Attorney-General is planning will not merely succumb to the pressure of the media to remove the test of 'public benefit', however objectionable that test may be. The work done by the 'public benefit' element in the past has been the protection of the legitimate privacy zone. True it is, the expression is vague and too broad for that purpose. That is why the Law Reform Commission sought a narrower approach. But it is one thing to object to the test of 'public benefit' and it is quite another thing to reject entirely the legitimate protection of privacy in the law. I realise that the Federal Attorney-General is placed in a difficult position. He inherits three years of discussion and much painstaking negotiation. But it would be a mistake, in my view, to accept a defence of 'truth alone' without some additional protection for legitimate claims to individual privacy. It is natural that the media should lay emphasis upon the right of free speech and of the free press. But those rights, important though they are, are in competition with equally important values in Australian society. The competing values include respect for good reputation and respect for people's privacy where it is of no legitimate public concern. In dropping the 'public benefit' element, I hope that some attention will be given to the protection of privacy as recommended by the Law Reform Commission. Many voices have been raised in powerful media interests against the test of 'public benefit'. I again raise the voice of the Law Reform

Commission for the protection of the legitimate right to privacy of Australians. Respect for that right should not depend upon conventions or courteous editors. Once we get our uniform defamation law it is unlikely to be amended for some time. It is therefore important that it should state our standards as we now perceive them. Those standards include, in my judgment, respect for reputation and privacy as well as free speech and the free press.

Journalists' privilege. Another matter which the Australian Law Reform Commission is examining relevant to the media is the law of evidence. Amongst the rules of evidence are those which deal with privilege ie the privilege of certain witnesses to prevent evidence coming before the courts, by reason of deference to social values that are considered even more important that the provision to courts of all relevant testimony. The best known privilege that presently exists is that of a client in respect of confidences shared with his lawyer. In some parts of Australia there is a privilege between patients and their physicians and between penitents and a priest. But although a number of claims have been made in recent decades that news people should have a right to refuse to disclose in court proceedings the sources of their information, the courts in Australia have consistently refused to grant a journalist such a privilege. The position at common law remains as stated by Justice Starke in McGuinness v Attorney-General of Victoria[3]:

> [I] t was submitted that the source of the appellant's information upon which the newspaper articles were based was privileged and that he could not be compelled to disclose it. No such privilege exists according to law. Apart from statutory provisions the press, in courts of law, has no greater and no less privilege than every subject of the King.

The same approach has been adopted in New South Wales in the case of Re Buchanan.[4] In that case a journalist was asked during cross-examination by counsel to disclose the identity of the person who had supplied him with information about which an article written by the journalist had been based. He refused to answer. He was directed to appear before the Full Court to show cause why he should not be dealt with for contempt of court. The Full Court held that the question was one which the journalist was obliged to answer. It held that he was guilty of contempt. The court indicated that in its view a judge had a discretion to decline to order that a journalist should answer a question, only to the extent that the question was irrelevant or improper.

The position in common law in England is similar to that in Australia. The most recent statement on the law appears in British Steel Corporation v Granada Television Limited.[5] That was the case where the Corporation sought an order that the television company disclose the name of a 'mole' who had offered certain documents. The House of Lords stressed that courts have an inherent wish to respect confidences whether they arise between a doctor and a patient, a priest and a penitent, a banker and customer or a journalist and his source. However, Lord Wilberforce pointed out:

> In all these cases the court may have to decide, in particular circumstances, that the interest in preserving the confidence is outweighed by other interests to which the law attaches importance.[6]

In various jurisdictions of the United States, statutes have been passed covering confidential sources. Five States, for example, have enacted statutes protecting journalists from forced disclosure of their sources of published information. In some cases, as in the Evidence Code of California, the approach is taken to make it clear that a journalist 'cannot be adjudged in contempt'.

In a recent Research Paper prepared for the Law Reform Commission, it was suggested that the creation of journalists' privilege would involve a significant alteration to the law and would act, at least to some extent, to exclude relevant evidence coming before the courts. Accordingly it was suggested that if such a privilege is to be created in the law, a clear need will have to be shown by journalists and indeed by the media generally. The onus is on you. Normally, the interest of the public in the effective conduct of litigation demands that as much relevant evidence as possible should be brought before the courts. Every new privilege denies the court valuable information upon which they can base their judgments. This may affect the acquittal of the innocent and also the conviction of the guilty. Whilst a privilege would be defensive of the public's right to know, the public also must defend the ability of courts to make decisions on the best possible data. The Research Paper of the Law Reform Commission[7], is not a final report, I would emphasise. It suggested that a discretionary approach should be adopted. This would be a guided discretion, aiming to ensure that the court weighs the advisability of compulsory disclosure against the maintenance of confidentiality on the merits of the individual case. I do no more at this stage than to call these proposals to your notice. It is important that newspapers and the media generally should be aware of the discussion of this technical but potentially controversial question.

Contempt of courts and tribunals. Finally, I would mention one of the most recent references received by the Law Reform Commission on the subject of contempt. The reference was received on the very day of the discharge of Mr Norman Gallagher from prison. You will recall that he was imprisoned for contempt of the Federal Court of Australia, following certain remarks he made to a television journalist after the outcome of an earlier case.

Contempt is a concept peculiar to the English common law tradition. It has no real equivalent in the civil law systems operating in the continent of Europe. Primarily, it describes conduct which impairs the due administration of justice by the courts. Punishment and coersive sanctions are attracted, ostensibly to protect the courts and the administration of justice in them. There are many amusing and not so amusing cases of contempt. A newspaper description of an English judge as 'an impudent little man in horsehair, a microchosm of conceit and empty-headedness' was the subject of a successful contempt committal in 1900.[8] So whatever you think about this speech of mine, I suggest you make no such reference to me!

Nowadays, the scope of the law of contempt is being clarified by court decisions and, sometimes, statutory provisions. It includes:

* improper behaviour in court;
* insulting a judge in a way such as to undermine public confidence in him;
* indulging in conduct intended to prevent a case from being fairly tried; and
* intentionally disobeying a court order.

Efforts have been made for many years to reform the law of contempt under which we live. In fact, as long ago as 1791 the use of summary procedure to punish scandalising remarks was heavily criticised in England. Bills to reform this aspect of the law were introduced in the United Kingdom five times between 1883 and 1908. Some reform of contempt law was achieved in England in 1981 following the Phillimore Committee report. The law in Australia remains unreformed. It is very much alive and well as shown by the Gallagher case and by the observations made by Justice Hope in the Royal Commission on ASIO concerning press commentary on the Royal Commission.

The law of contempt has been criticised as ill-defined in its content and unjust in its procedures. One judge recently told me of a case where a litigant, angered by a decision, threw water over him from a glass at the Bar table. The judge would have been

entitled to deal with the litigant for contempt. In the case, he declined to do so. He just found it objectionable that he should be at once the victim, the prosecutor and the judge. It is this feature that has led to suggestions of the need, at the very least, for contempt procedures, to ensure that where a judge is offended, he is not the person who decides the punishment.

Clearly, in the past, the media have been affected by the law of contempt. The unlimited sentencing power, the inadequate system of appeals, the significant award of legal costs that can follow, and the inhibition that the law of contempt can cause to freedom of expression and the principle of open justice, make it timely that the Law Reform Commission should examine this area of the law.

Within the Law Reform Commission, the project on contempt law is under the leadership of Professor Michael Chesterman. Professor Chesterman has already written to all media interests throughout Australia seeking positive advice on cases of contempt involving the media. He is seeking instances of real circumstances where a journalist has been affected in the discharge of his professional responsibilities by contempt law and practice. I hope that this request for assistance will have the full co-operation of the media. It is again not much good grumbling about the state of the law, if we do not arm bodies such as the Law Reform Commission and through them the Parliament, with the information upon which to proceed to legal reform.

Within the next few weeks, the Law Reform Commission will be distributing an issues paper.[9] This will outline the basic questions which are raised by the inquiry into contempt law. The inquiry is not confined to contempt of court. It is also addressed to contempt of the hundreds of tribunals and commissions which have now been established with equivalent contempt protection. I hope that the issues paper will be given wide coverage. I also hope that it will provoke thoughtful responses which are alert to the need to advance the interests of the media but also the interests of the administration of justice. It is important that we should have a free press. But it is equally important that we should have courts that can get on with their difficult and sometimes painful work, without harassment, interference or that denigration which illegitimately undermines the social functions the courts have to perform.

CONCLUSIONS

That brings me to my concluding remarks. We live in a time of great change, including technological change that will affect your industry. Social changes affect our attitudes to the law. The Law Reform Commission exists as one instrument to help our parliaments reform and modernise the law.

I have made a number of suggestions concerning the responsibilities of newspapers to promote an active knowledge and discussion of legal issues in the community. The courts themselves should be doing more to facilitate this public knowledge and discussion. In this regard I believe that the Law Reform Commission has given a lead that will in time be followed by the courts. There should be no shame or embarrassment in seeking to involve our democracy in the awareness of the law and a sense of responsibility for its ongoing improvement.

I have mentioned the three projects of the Law Reform Commission relevant to your industry. We are on the brink of uniform defamation laws. It is important that we get them right. Getting them right involves something more than getting them right for the media. It involves striking the right balance between the free press and legitimate claims to reputation and privacy.

Our examination of journalists' privilege is now reaching a critical phase upon which the assitance of the media is needed. Our inquiry into contempt law is just beginning. But in this too we need assistance : not just grumbling from the sidelines in thundering editorials. Real cases of the unjust operation of the law is what persuades law commissioners and ultimately legislatures to reform and modernise the law.

I hope I have said enough to indicate the importance which the Law Reform Commission attaches to the media and to the improvement of the law by which the media is governed. I also hope I have said enough to secure your good opinion of the efforts of the Law Reform Commission and your assistance to ensure that those efforts are rewarded with public and political attention.

FOOTNOTES

1. For a note on recent United States developments, see 'Seminar provides forum for strengthening court/press relations in 10 National Center for State Courts, Report, No 8, 1 (August 1983).

2. Senator Gareth Evans, as quoted in the Australian, 17 October 1983, p.3.

3. (1940) 63 CLR 73, 91.

4. [1964-5] NSWR 1379.

5. [1981] 1 All ER 417.

6. ibid, 456.

7. Australian Law Reform Commission, Evidence Research Paper 16, Privilege (I Freckelton and T H Smith), 1983.

8. R v Gray [1900] 2 QB 36.

9. Australian Law Reform Commission, Issues Paper 3, Contempt of Courts, Tribunals and Commissions, forthcoming, 1983.