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THE JOURNALISTS' CLUB

SYDNEY, MONDAY 7 NOVEMBER 1983

LAW REFORM AND THE MEDIA

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

DEFAMATION

The Australian Law Reform Commission's program has brought it into constant contact with the media. Not only have we sought the assistance of the media in discussing the projects under study by us. A number of those projects have actually involved examination of the law as it affects the media itself. 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.

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.[1] 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 private 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.

'...: 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. Contempt law problems continue to arise in recent media reports:

- In the United States, the showing of a film allegedly showing the car mogul de Lorean receiving cocaine from FBI agents caused the defendant, just before his criminal trial, to seek an order restraining the TV stations involved. He failed.
- In Britain, the Recorder of the City of London sought to suppress the name of Mr Edward Heath cited in a criminal trial. The Times pointed out that Heath could not even deny his part in the alleged sexual activity without running the risk of contempt of the trial court.
- In Australia, Justice Neasey in the Supreme Court of Tasmania, last week reaffirmed the prohibition on the publication of film or photographs of persons facing criminal trials. By happy chance, the judge is a Commissioner of the Australian Law Reform Commission and will be helping us in our review of the law of contempt.
- Those of you who watched the dramatic film of the Unamerican Activities Committee of the US Congress on Saturday night will have seen examples of abuse of the law of contempt — in this case of Congress. 'I cannot complain of conviction for contempt', said one victim. 'I did have contempt for the Committee'. Perhaps he also had contempt for the law.

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 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. The Australian Law Reform Commission, Unfair Publication : Defamation and Privacy (ALRC 11), 1979.

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.