AUSTRALIAN SUBURBAN NEWSPAPERS' ASSOCIATION

SEMINAR, MELBOURNE, 13 MARCH 1981

WHATEVER HAPPENED TO DEFAMATION LAW REFORM?

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A BLIGHT ON A FREE SOCIETY

Reform of defamation laws is a matter that should concern every publisher in Australia. Indeed, it should concern everyone dedicated to a more open society, in which information of public concern is readily available and in which the law reserves its relevant operation to a minimal area necessary to defend individual honour, dignity and privacy.

Australia's defamation laws are defective in respects that will be well known to this audience. In 1979 the Australian Law Reform Commission produced a report proposing the reform of defamation laws in Australia. Attached to the report was a draft Bill for a Uniform Defamation Act. It proposed new laws and new procedures, more apt to deal with defamation complaints, and more appropriate to the technological age in which we live.

At the close of 1980, the 'Australian' newspaper, in a lead editorial titled 'the price of freedom is still eternal vigilance', quoted a report of the International Press Institute which examined the threats to press freedom in Australia. Many problems were referred to. According to the Australian, one of the first was:

> the failure of Federal Governments to carry out the recommendations of the Australian Law Reform Commission and simplify Australia's complex defamation laws — which in their present form, often protect villainy and sharp practice'.[1]

The Law Reform Commission's report has now been before the Government and the Australian community for two years. Meanwhile, we struggle on with disparate, clumsy,

inapt and unjust defamation laws. They are a sad blight upon a society professing to be open and free. In this little talk, I propose to say something about the report, how it was devised, its principal recommendations and how it was received. I will then say something about the general problems of implementing law reform reports in Australia. Finally, I propose to refer to a few other issues of the law which will be of concern to the Australian media.

PREPARING THE DEFAMATION REPORT

The project on defamation reform was not something dreamed up by the Law Reform Commission itself. As with all tasks upon which we are engaged, it was specifically referred to us by the Federal Attorney-General, in this case Mr. Ellicott. The reference required the Commission to report 'on desirable changes to the existing law, practice and procedure relating to defamation and actions for defamation'. It called our attention to the desirability of uniformity of laws. It required us to note the need to 'strike a balance between the right to freedom of expression and the right of a person not to be exposed to unjustifiable attacks on his honour and reputation'.

The Commission was led in the project by one of Sydney's leading barristers, Mr. Murray Wilcox Q.C. Mr. Wilcox accepted a tour of duty as a full-time Commissioner, precisely to lead the project. Amongst the commissioners who worked upon the reference in its early stages were some of the most distinguished lawyers of our country. Sir Zelman Cowen, until the announcement of his appointment as Governor-General, took a keen and active part as a part-time Commissioner. For years, he has spoken and written about the importance of the media to the quality of freedom. Mr. Justice Brennan, recently elevated to the High Court of Australia, was also actively involved in the enterprise. Another Commissioner was Professor Alex Castles, now a Member of the Dix Committee inquiring into the A.B.C. He had begun his career as a journalist. He has always been interested in the law and the media. So we had, working on the project, some of the best and most relevant lawyers in the country. But we did not confine our team to lawyers. As in all of our tasks, we collected about us a group of consultants who could ensure that we were armed with every viewpoint of critical relevance. Our consultants ranged from specialist lawyers and academics to representatives of the different interests of the media in this country: print and electronic; city and country; practical and academic management and operators. Discussion papers were published setting out our tentative thinking. Ultimately a draft Bill was circulated nationally for comment and criticism. Television programmes and radio talk-back discussions took the issues involved to the four corners of the nation. Never before has there been such a thorough-going debate of a reform measure before so many people both within the media industry and beyond, amongst the citizenry.

Because of the frankly poor history of Australia in the achievement in uniform laws, the Commission also secured the participation of colleagues appointed by the State attorneys-general. These State officers sat at our table and took part in the discussions leading up to the final proposals. Discussion papers, seminars, public hearings, written comments, consultants' views, public and private debate: no-one can say that this project was not thoroughly ventilated in the most open and public way.

When the report was produced, it canvassed the competing views and identified the policy issues to be addressed. In a controversial matter such as defamation law reform is bound to be, it is inevitable that differences of view will exist about specific proposals. The right to disagree is central to a free and democratic society. In the end, it is for the elected representatives to decide. But, if I can be permitted to say so, it is important that they should face the obligation of decision. Otherwise, a great deal of public and professional energy will have been squandered and hopes for reform will have been raised, needlessly.

Tabling the report in Federal Parliament on 7 June 1979, the Commonwealth Attorney-General, Senator Durack, said:

> The Law Reform Commission should be commended for the way it went about its reference. It has sought out the views not only of those involved in the legal aspects, but through seminars and public hearings it has sought to involve as many people from the community as possible.

Subsequently it is understood that a decision was taken to commend the report to the Standing Committee of Commonwealth and State Attorneys-General. That Committee has referred it to a group of officers: hard-pressed public servants of the Commonwealth and States, with busy local obligations of their own, finding such time as they can to fit in to already over-burdened programmes, consideration of a complex, intricate, sensitive package of reform. Progress may be being made. We simply do not know. The history of uniform law reform in Australia gives little cause for optimism. Proposals for uniform credit legislation (in many ways less controversial than a Uniform Defamation Act) were first recommended by the Rogerson Commitee in 1969. Subsequently, a Law Council Committee reported on that Committee report. Later still, the Standing Committee of Attorneys-General reported on the Law Council report on the Rogerson Report. The net result is that 11 years later, we are still waiting for the uniform credit laws. Indeed the passage of time has led one State unilaterally to enact its own credit legislation. Another State has foreshadowed unilateral action too. Sometimes reform, like a wave, must be taken at the flood or opportunities are lost indefinitely.

WHAT DID THE REPORT SAY?

The report of the Law Reform Commission proposed the adoption of a new concept of 'unfair publication'. Cases of unfair publication included:

- defamatory publications;
- publications which unfairly, and without public cause, invaded personal privacy; and
- publications which appropriated a person's name, identity or likeness, without permission.

The report sought to advance five objectives, which I suggest are in the interests of the media of Australia, but also of the community as a whole. These five objectives were:

- Provision of a single, uniform law applicable throughout Australia in place of the eight different and sometimes conflicting laws with which the media must currently comply in this country.

- Codification of the law, to avoid needless resort to the great bulk of earlier court decisions, so that journalists, management and citizen alike could have the code of defamation law clearly before them, expressing in a short document the basic rights and duties in this area so important to freedom.

- Simplification of current laws which between jurisdictions and even within a jurisdiction are diverse, unclear, complex and obscure: especially difficult for working journalists whose lives are controlled by copy deadlines and who must generally work under pressure and often in highly charged circumstances.

- Introduction of major reforms of procedures: particularly to provide much more speedy determination of defamation cases, both for the prompt correction of error and for the prompt removal of 'stop writs' and other unfair impediments to publication of the truth.

- Provision of new and more effective remedies, some of them borrowed from European legal systems. In place of the English law's obsession with money damages, it was proposed that new remedies should be provided, apt for the particular issue in contention, namely the reputation and dignity of the individual. For this reason, procedures were proposed for court-ordered corrections of facts found to be false and a facility for rights of reply to be afforded in certain

circumstances. In Europe corrections and rights of reply, much more than money damages, constitute the redress in defamation cases. When you think about it, they serve the public interest much better than the award, years later, of a sum of damages to a particular litigant, in a private action which may or may not be reported.

Undoubtedly, the most controversial provisions of the Law Reform Commission's report proved to be those which urged the giving of protection to a zone of 'sensitive private facts'. In the report, these were strictly defined. They were facts relating to the health, private behaviour, home life and the personal or family relationships of an individual which, if published, would, in all the circumstances, be likely to cause distress, annoyance or embarrassment. A number of defences were proposed for the publication of facts of this kind constituting the 'private zone' of the individual. Amongst the defences were consent and that the publication was on a topic of public interest. In essence, the Commission's view was that even public figures in Australia were entitled to a private life, unless publication was relevant to their public office or was on a topic of public interest. Generally, the better media in this country respect the rule already. But the fact that most people act properly has never been a reason for not providing a law for those few who act in an antisocial manner. The law's role is sensitively to reflect and enforce the minimum standards.

The most novel and imaginative provisions of the Commission's report undoubtedly lay in the proposed reforms of defamation procedure. The Commission's report asserted that the English law of defamation, which we have inherited in Australia, has been 'distorted' by its substantial reliance on the remedy of money damages, often awarded years after the event complained of. A more inapt procedure for dealing with the wrong complained of could scarcely be designed. The Commission urged the adoption of procedures which would remove the emphasis upon money damages and lay emphasis instead upon the public's right to know. The new procedures proposed were:

- Rapid return of a case before a judge who should have a duty to explore the possibilities of conciliation, not just confrontation. Sometimes conciliation could be secured by an appropriate right of reply or correction.

- Provision of a power for the judge to order, as one of the remedies for a successful plaintiff, publication of correction of facts which have been found to be false.

- Provision of a right of reply, encouraged by a defence granted to publishers who have afforded a prompt and fair opportunity to put the other point of view.

Running through the Commission's defamation reform report was the philosophy of increasing public access to information and the need to safeguard the public's 'right to know' true facts and to be informed when facts published about a person are subsequently found to be false.

About the detail of the reform package there can be legitimate difference of view. But about the general lines of reform and above all the need for reform itself, there can be little informed dispute. I repeat, this is not simply a matter for the large media groups, the great television networks and the metropolitan press. Everyone concerned in publication in Australia: printers and booksellers, libraries and citizen radio, the ordinary citizen in his conversation and the suburban press: all should be concerned to ensure a more modern defamation law with rules and procedures appropriate for our time. There has already been more than enough debate.

REACTIONS TO THE REPORT

What of reactions to the Commission's report? The Federal Attorney-General has invited comments on the report. Speaking to the Australasian Communications Law Association, he reported:

> While not wanting to sound like someone under a constant state of siege by the media, the response to the report from the media was fairly predictable. The changes to the defamation law were generally greeted as a momentous step forward while the privacy recommendations recommended an insidious intrusion into the traditional freedom of the Press.[2]

Certainly, Senator Durack's summary reflects the judgment of the Sydney Morning Herald. In an editorial, the S.M.H. had this to say:

> The proposed code ... deserves a broad welcome. There are details that give rise for concern but most of these ... do not need to be canvassed again. ... The Commission has not established a case for [the new privacy tort] ... The difficulty with privacy is that it is neither a clear nor a fixed concept.[3]

The Melbourne Age, on the other hand, was much more positive:

> If adopted its proposals would bring about the most comprehensive and important changes yet made in this vexed area of legal and civil rights and duties in this country. ... It would be a shame if the Commission's efforts, the result of several years' critical analysis, careful deliberation and community

> consultation were to remain no more than of academic interest. ... In spite of the reservations we have mentioned [about privacy] and our natural inclination towards freedom of expression and public access to information, we believe the final draft legislation to be an improvement on the present unsatisfactory confusion of the law. It deserves the prompt attention of Federal and State Attorneys-General and their Governments.

A similar call to action was contained in the West Australian:

> By and large, the libel laws do little to stop newspapers from conducting themselves badly and providing the public with a junk diet of trivia. But they grossly inhibit newspapers from doing the job the community has a right to demand. ... The right of a press to carry out its public duty — to throw light in dark places — would be ensured by the proposals put forward in Canberra this week [by the Law Reform Commission]. ... All in all, the proposals are a long overdue assertion of the public's right to be informed.

The Adelaide Advertiser, whilst reserving its position on 'invasion of privacy' commends the provision for swift hearing of cases and the publication of corrections where appropriate:

> The complexity and uncertainty of the present law on this subject and the many problems arising from the fact that it differs from State to State make this one of the areas of the law most in need of reform. It is to be hoped, now that the Commission has completed such a full investigation of the subject, that the Commonwealth and the States will join forces to ensure that changes are made.

The Melbourne Herald described the report as:

> The most important attempt yet made to restore order and reasonableness to a vital area of Australian law. ... It is unquestionable that one national law should replace the eight that exist. What the one law should say, however, remains the problem.

Subsequently the Law Reform Commission of Western Australia delivered its report with commentary on the Federal Commission's effort. On most of the proposed reforms the two commissions were in substantial agreement:

- The distinction between libel and slander should be removed.
- The death of a person defamed in his lifetime should not extinguish his cause of action.

- An action to prevent defamation of a deceased person should exist within three years of his death.
- Truth should be the defence to a defamation action not, as at present in some Australian jurisdictions, 'truth and public benefit' or 'truth and public interest'.
- Defences such as fair comment, limited privilege and fair report should be clarified and widened to allow more scope for publication of matters of public interest.

However, the Western Australian Commission preferred to postpone the provision of a privacy action pending the development of more general privacy laws. Encouraged by the publication of the Western Australian report, the editor of the West Australian reverted to the report of the Australian Law Reform Commission. He described the ALRC 'package deal' as:

> involving uniformity (to end the eight-headed jurisdictional morass of Australia's defamation laws), speedy dispute settlement (virtually on the spot remedies and an end to the stop-writ gag on free debate), speedy correction of published errors and finally a dash of privacy law. ... Sensibly, the WA Law Reform Commissioners want to delay the privacy law. They make a strong case for deferment. The privacy proposals added a complex dimension to an already vexed topic and the WA Commissioners, tuned to the factors that can impede law reform, fear that the privacy element may hamper progress.

The editor of the West Australian then called for action:

> All in all, the Federal Commission's proposals, as refined by the WA Commission, would go a long way towards meeting the need of the public to be informed on matters of concern to it without in any way conferring on the news media a licence to set about wantonly destroying reputations. Whatever the final view of our legislators, it is imperative that any new laws governing defamation ... provide more public right to information than now.

These passages, written in December 1979, represent the last editorial comment on defamation reform, save for the observations in The Australian, with which I opened this paper. Since then, there have been sporadic observations in the press. Mr. Ranald Macdonald of the Age has said on more than one occasion that, given the limited privacy protection suggested by the Law Reform Commission, the Age could endorse the 'package' of reform proposed. Until now, the defence of 'truth and public benefit' has provided a limited protection, in some Australian jurisdictions, for privacy. Unless publication was 'for the public benefit', it would not be published. Abolition of the 'public benefit' element

in the justification defence in some of the States was one of the reasons for proposing a small, closely defined zone of privacy which could, in turn, be lost where a legitimate public interest was involved.

Nearly two years have now passed since the presentation of the Commission's report. Hundred, indeed thousands, of busy Australians who took part in this endeavour have a legitimate right to question, as some do from time to time, whether anything will come of it. The willingness of busy people to take part in national efforts of law reform will obviously be diminished if there is a perceived lack of utility in their giving their time and energies.

Furthermore, the application of the current laws continues to work its daily injustice, uncertainty and timidity. In July 1980, the Supreme Court of South Australia had to deal with a defamation action. The plaintiff claimed that the 'fair report' of court proceedings, protected in the South Australian Wrongs Act, was confined to fair reports of South Australian courts. It was asserted that it did not extend in South Australia to a fair report of a trial in the Melbourne County Court. Mr. Justice Zelling pointed out that the argument would not be tenable if Parliament had seen fit to act upon proposals 'dated as long ago as November 1971' in a report of the South Australian Law Reform Committee, later picked up in the Australian Law Reform Commission report. 'One might hope', said Mr. Justice Zelling, 'that now the matter has come for decision that the attention of Parliament might be drawn again to this report'.[4] In October 1980, it was announced that the Standing Committee of Attorneys-General proposed to recommend the uniform extension of qualified privilege to fair reports of proceedings in all Australian parliaments and courts. Commenting on this small move forward, the West Australian said:

> The question of parliamentary privilege extending across State boundaries is just one aspect of the confusion and variation in Australia's eight sets of defamation laws. The slow piecemeal progress towards reform is all the more frustrating for the fact that the shortcomings of these eight sets of laws have been thoroughly examined and exposed by the Australian Law Reform Commission. The Commission presented last June draft legislation which would eliminate situations in which something said or written can be defensible in one State but not in another.

It is to be hoped that important but piecemeal progress towards defamation law reform will not delay concentration of national attention upon consideration of the 'total package' — a uniform, modern Australian law of defamation.

GETTING REFORMS ENACTED

The delay, uncertainty, piecemeal moves forward and apparent inactivity in comprehensive defamation law reform is merely a species of a general problem in Australia's law reforming institutions. The fact is that the needs for reform are coming more quickly and with greater complexity than our lawmaking intitutions are able to handle. It is precisely to overcome the impasse that bodies such as the Law Reform Commission are established to help Parliaments — Commonwealth and State — in the reform of the law. Though the issues involved are sensitive and complex, time for gestation, consideration and legitimate pressure is understandable and necessary. But the notion of securing detailed reports, with draft legislation, after unprecedented expert and public consultation and then committing it to extremely busy officers with limited time to attend to as the opportunity arises, condemns reform of an area such as this, if not to oblivion, then at least to the pace of the tardiest, most apathetic, indifferent or overworked public servant.

In Britain recently, the first report of the new Home Affairs Committee castigated roundly the inaction upon numerous British law reform reports presented to governments in that country:

> We are concerned at the lack of urgency shown by the Home Office in initiating action pressed upon them by committees, many of which had been set up by the government itself. ... Clearly where detailed recommendations are made on major policy issues, time has to be allowed for consultations to take place with the various interests involved. ... Such consultations, however, should not be indefinitely protracted and, if legislation is found to be desirable, it should be introduced within a reasonable time-scale and before the facts which gave rise to the recommendations are out of date. ... We are tempted to ask what is the purpose of holding a live inquiry and taking live evidence and then holding a postal post-mortem upon the results. Apart from the length of the consultations in process, the witnesses [from the Home Office] were notably unforthcoming about the nature of the representations they had received from interested parties subsequent to the publication of these Reports and the extent of support for (or dissent from) particular recommendations. ... The various reports to which we referred all dealt with matters of considerable importance. A great deal of time and effort, as well as public money, was devoted to the inquiries on which they were based and to their preparation. Though we had no means of judging whether the delay in implementing so many of their recommendations can be attributed primarily to the reluctance of Ministers to take the necessary decisions or the failure of civil servants to urge

> action upon Ministers, we are not satisfied from the evidence we received that the Home Office had treated the work of these Committees with the seriousness which the time and expertise of so many eminent people deserve. Finally we note that none of these reports have been the subject of debate in [Parliament]. We consider that, in cases where an early departmental response does not prove possible and further consultation is necessary (incidentally it often seems, with everyone and anyone other than Parliament) the House should be afforded an early opportunity to debate the various policy options open to Ministers and to express its own views on legislative priorities.[5]

In Australia, where there is division of constitutional powers, the opportunities for delay and inaction in matters of law reform are almost limitless. The comments of the English Home Affairs Committee led by Sir Graham Page, could sometimes be repeated eight times over. Those who are concerned with the state of the law in Australia, with the importance of its modernisation and with the critical importance to the rule of law of having a legal system that is fair and up to date, will spare no effort to ensure that our lawmaking institutions, Federal and State, can adapt themselves to dealing even with complex, sensitive and technical areas of reform, such as defamation law. After all, law reform bodies, combining distinguished lawyers with interdisciplinary expertise, now exist to help in the process. We must all find the way that maximises the use made by Parliaments and by the Executive of these law reforming institutions. The alternative is a legal system increasingly out of touch and general disillusionment with the brave idea of orderly, systematic reform and modernisation of the law.

CONCLUSIONS

I have said nothing in this speech of the many other important developments that are occurring in the law today relevant to your discipline. One can list the developments that are with us or just around the corner:

- Freedom of information legislation is promised federally and in some States.
- Reform of the law of contempt is being attempted in Britain, though the need for a contempt law seems to be proved by the Yorkshire Ripper case and the way it has been covered by some sections of the media.
- Official secrets legislation has been the subject of recent reports in Canada and New Zealand. Mr. Justice Mason's decision in December 1980 clarified some aspects of the Australian law but now a departmental committee has been 'revived' to look at the relevant sections of the Commonwealth Crimes Act.

. Privilege for journalists against disclosure of their sources has been denied, at least in absolute terms, by a recent decision of the House of Lords. The issue remains before the Law Reform Commission in its inquiry into evidence laws.

We are living in times of great change. The changes will affect your profession as they will mine. I fully realise that the concerns of suburban newspapers are in many ways different from those of other branches of the media. But suburban newspapers are a vital part of the free press. They diversify the outlets of information. They promote the flow of ideas at a local level and are specially close to the concerns of individual citizens. In many ways, they are more vulnerable to the vagaries and uncertainties of Australia's current defamation laws. A single mistake and a large money verdict could destroy many a suburban newspaper. It is therefore important that you should consider the matters I have mentioned to you today. They affect you in your professional life. More important, they affect you as citizens in a free society.

FOOTNOTES

1. The Australian, 22 December 1980, 6.

2. P.D. Durack, Address to the Australasian Communications Law Association, (1979) 4 Commonwealth Record, 832, 833.

3. Sydney Morning Herald, 9 June 1979, 6.

4. Zelling J. in Bunker v. James and Downland Publications Ltd, Supreme Court of South Australia, unreported, 16 July 1980, mimeo, 4.

5. England, House of Commons, Home Affairs Committee, First Report (Session 1980-81), Home Office Reports, 24 November 1980, viii-ix.