"Current progress on the reform of defamation: Opening remarks"

Centre for Media and Telecommunications Law and Policy

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CURRENT PROGRESS ON THE REFORM OF DEFAMATION: OPENING REMARKS

The Hon. Justice Michael Kirby AC CMG
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This session today relates to the right to investigate and report. We have a wonderful series of speakers. My job is to introduce the day and, in particular, the first session.

As I look at the topic of the first session, current progress on reform, my mind goes back through the years to the work of the Australian Law Reform Commission in the project on defamation law reform and privacy. The Commission was led by Murray Wilcox now of the Federal Court. It is fair to say that the Commission Report, though not implemented, has continued to stimulate the debate in our country about the directions for reform of the law of defamation.

Justice Samuels, who sat for so long beside me in the Court of Appeal in New South Wales and, who is now Chairman of the New South Wales Law Reform Commission, will be explaining the new initiatives of that Commission.

Senator Barney Cooney will be telling us about the work of the Senate Standing Committee on Legal and Constitutional Affairs relating to the media.

In the discussion paper of the New South Wales Law Reform Commission, there is the melancholy history of the attempts in our country to reform the law of defamation. It is melancholy because, anybody who knows the slightest thing about the law of defamation and how it operates in Australia, realises the importance and urgency of changing it and of improving it. Above all of improving the procedures. I believe this was the strength of the report of the Australian Law Reform Commission, published 16 years ago. However the Report still remains unimplemented.The present system is extremely costly. It is extremely slow. It is also unpredictable. The system of rights of correction and rights of reply, which were at the core of the ALRC proposals for reform of defamation law, are self-evidently proposals in the right direction. I suggest that they should pass into law without further delay.

The difficulty of getting reform to the law of procedure was brought home to me within the last fortnight.. About a year ago, the Court of Appeal of New South Wales in the case of *Radio 2UE Sydney Pty Ltd v. Parker*[1] suggested the adoption of a new procedure in the conduct of defamation trials following the earlier decision of *Morosi v. Mirror Newspapers Ltd*[2]. The purpose of this new procedure was to ensure that, after the matter complained of had passed through the initial pre-trialling as to which of the imputations were capable of bearing the meanings alleged by the plaintiff, the jury should have an early opportunity in the defamation trial to determine their impressions of whether the matter complained of (that is, the imputations) did bear the meanings which the plaintiff alleged. In *Parker* [3] Justice Clarke, (with the concurrence of Justices Cripps and Handley) said that, the trial judge should adopt a procedure, in the trial, of allowing this matter to be determined as a separate question. Thereafter, if the jury's answer is 'no', then that is the end of the trial. If the jury's answer is 'yes', then the matter would have to go on to questions of defence and proof of damage. The availability of this suggested procedure came up before a trial judge in the Supreme Court of

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1 (1992) 29 NSWLR 448 (CA), 472.

2 [1977] 2 NSWLR 749 (CA).

3 (1992) 29 NSWLR 448 (CA).

New South Wales (Justice Sully) who declined to follow the *Parker* procedure[4]. The case was then heard in the New South Wales Supreme Court, (Court of Appeal). We all decided that the procedure in *Parker*[5] was open to the judge. If he considered it appropriate to take the separate verdict, that he should proceed to do so[6]. The matter was returned to him and he adopted the *Parker*[7] procedure.

I believe that it is in the interstices of procedure that we will find the reform of defamation law. It is by improving procedures, both in terms of publications and in terms of the conduct of the trial, that we will find the way forward for reform of the law of defamation.

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4 See *TCN Channel 9 Pty Ltd and Ors v. Mahony* (1993) 32 NSWLR 394 (CA).

5 (1992) 29 NSWLR 448 (CA).

6 *TCN Channel 9 Pty Ltd and Ors v. Mahony* (1993) 32 NSWLR 394 (CA), 400f.

7 (1992) 29 NSWLR 448 (CA).