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Defamation Law Reform

The effort to secure a uniform Australian law of defamation may have moved a step forward at the February meeting of the Standing Committee of Attorneys-General.

CLB reproduces the full text from the official Commonwealth Record:

"Standing Committee of Attorneys-General

15 February 1982 - Decisions made by the Standing Committee of Attorneys-General today substantially advanced progress towards uniform defamation law in Australia the Attorney-General, Senator the Hon Peter Durack, said today.

He said the Attorneys-General had now agreed on most of the major issues which would form the basis of a uniform defamation law.

Ministers are to give further consideration to whether it is practicable for the uniform law to take the form of a code or whether, in view of the time that this would involve, it would be preferable in the first instance to provide for uniform modification of the common law rule.

The position of Queensland and Tasmania, which already have codes, was recognised in this regard.

The meeting of the Standing Committee took place in Queenstown, New Zealand under the chairmanship of the New Zealand Attorney-General, Mr J. McLay.

Senator Durack said that before today's meeting, the Standing Committee had considered aspects of reform of the defamation law based on the reports of the Australian Law Reform Commission and Western Australian Law Reform Commission.

Ministers had today agreed that a person wishing to plead justification as a defence should establish that his statement was for the public benefit as well as the truth.

Further consideration is to be given to the circumstances in which privilege exists. However, Ministers had agreed that the absolute privilege which at present attaches to statements between husband and wife should remain unchanged.

IN THIS ISSUE

Defamation Law Reform	2 CLB-9
ACLA expands	2 CLB-12
CASE NOTE by Robyn Durie	2 CLB-13
ACLA Lunches	2 CLB-14
Changes in Department	2 CLB-15

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In order to establish qualified privilege, it will no longer be necessary that the person making the statement had a duty to do so; it will be sufficient that the statement was made to a person with an interest in receiving it.

There is to be a uniform list of proceedings, reports of which will be entitled to qualified privilege.

Ministers had agreed that defamation actions should be commenced within one year of the plaintiff becoming aware of the defamatory matter or three years from the date of publication, whichever is the sooner.

It had also been agreed that there should be a right to bring proceedings in respect of statements which are defamatory of deceased persons. In such proceedings the court would be able to grant an injunction or require the publication of a correction. Further consideration is to be given to whether damages should be recoverable in such proceedings and, if so, the extent of such damages.

The Attorney-General said that as a result of the consensus reached today, there was substantial material that could be included in the draft model legislation now being prepared.

Senator Durack said he was hopeful that the remaining issues could be disposed of at the next meeting of the Standing Committee."

The decision of the Standing Committee of Attorneys-General to add a requirement of 'public benefit' to the defence of truth in defamation proceedings was "a major set-back to the development of a credible and coherent national unfair publication code", the Shadow Attorney-General, Senator Gareth Evans, said the next day.

He continued:

"It sounds the death-knell for the attempt by the Law Reform Commission to rationalise and liberalise this area of the law by removing the vague and uncertain test of 'public benefit' from those States where it now exists (NSW, Queensland, Tasmania, ACT), and substituting for it in all jurisdictions a much narrower and more precisely defined test of unfair privacy invasion.

"There does need to be some protection against the malicious or sensational dredging up of what the Law Reform Commission described as 'sensitive private facts relating to home-life, private behaviour, health, and personal and family relationships'.

"There can be no over-riding public interest, for example, in revealing some public figure's minor but embarrassing conviction long ago forgotten.

"But it is infinitely preferable to deal with these situations by precisely tailored provisions, rather than the open-ended public benefit test - which requires a defendant to establish that the publication was of positive advantage to the community, and which has operated as a severe fetter on press freedom.

"Other aspects of the Attorneys' statement give cause for some alarm. It seems likely - although no details have yet been released - that the proposed new rules about privilege will significantly cut back the number of government and official matters which can now be freely reported.

"Again, while it is defensible to introduce some limited forms of protection for the reputation of the recently deceased - as recommended by the Law Reform Commission - it would be a most unfortunate new inhibition on press freedom if, as is apparently being contemplated by the Attorneys, damages were to be payable in these circumstances.

"Overall, while some improvements in the present law have certainly emerged from the long drawn out deliberations so far, it seems likely that - if agreement on a uniform law is ever finally reached - the Attorneys' labours will produce not the carefully balanced structure recommended by the Law Reform Commission, but a ramshackle edifice lacking both principle and

certainty, whose only advantage over the present law will be its nationwide application", Senator Evans concluded.

Further reaction to the decision was summarised in REFORM, Journal of the Australian Law Reform Commission, April 1982.

The following extract from Reform has been abbreviated:

> I never give them hell. I just tell the truth and they think it's hell. President Harry S. Truman

The *Standing Committee of Federal* and State Attorneys-General agreed that a person wishing to plead justification as a defence to a defamation action should have to establish that his statement was 'for the public benefit as well as that it was the truth'.

Under Australian law at present, truth alone is a defence to civil actions for defamation in a number of jurisdictions, whilst in others, it is necessary for the defendant to establish truth and public benefit or truth and public interest.

The ALRC report, **Unfair Publication** (ALRC 11), upon which moves for a single national law of defamation are based, proposed a different compromise to that now suggested by the ministers.

The ALRC suggestion was that truth alone should be the defence of justification. But, to compensate for the deletion of the uncertain element of 'public benefit', the ALRC proposed a carefully designed privacy action, where it was established that the publication complained of, though true, invaded, without public justification, the private zone of the subject.

The Federal Attorney-General, Senator Durack, said that the Attorneys-General had 'now agreed on most of the major issues which would form the basis of a uniform defamation law'. Earlier decisions at a meeting of the Committee in Perth in November 1981 are recorded in [1982] **Reform** 29.

No sooner had the announcement been made from Queenstown than the criticisms started.

In the same mood as Senator Evans' criticisms were the criticisms of the Law Council of Australia, the Law Institute of Victoria and the Victorian Bar Council (**Age**, 18 February 1982).

The Chairman of the Victorian Bar Council, himself an ex-ALRC Commissioner, Mr Brian Shaw QC, criticised the rejection of the ALRC's proposals 'without equally careful examination of the new proposals and a detailed explanation of the reasons *for the change*'.

The Chairman of the Law Council of Australia Defamation Law Reform Committee, Mr Tony Smith, said that the decision would result in defamation trials becoming longer, more expensive and more uncertain. He also said that it would make more difficult for the Australian media the decision of whether to publish or not.

Doubts were also expressed about the proposed uniform law by the Australian Press Council and by the NSW Attorney-General, Mr Walker.

Mr Walker's comments were directed particularly at the proposed uniform list of privileged documents which he said could drastically cut the range of matters which have enjoyed absolute privilege in his State, and also severely limit the defence of qualified privilege for newspapers, radio and television.

In view of these reservations by one of the key members of the Standing *Committee of Attorneys-General*, it seems clear that the future of the uniform Bill, even after it is settled by the Standing Committee of Attorneys-General, is far from certain. The Bill will then have to be presented to State Parliaments throughout Australia. Recent experience in respect of uniform credit and companies legislation suggests that much water may flow under the bridge before a national defamation law is achieved.

ACLA is expanding

In late 1980 a group of people in Melbourne interested in the law relating to the media, formed an association called "The Media Law Association".

The representatives of this group held discussions with the Australasian Communications Law Association, based in Sydney.

The discussions culminated in a confravision between the two groups. At this confravision, the basic shape of a remodelled national organisation to be called "The Australian Communications Law Association" was determined. Groups are to be independent, but operating under the one constitutional scheme.

Details of an umbrella national organisation with representatives of each group and the attendant constitutional alterations were left to be decided later. Discussions on the constitutional amendments are nearly completed.

Early this year, plans were made for a similar group to commence in Adelaide as part of the national scheme.

Adelaide people interested should contact Professor A. Castles, Law School, University of Adelaide, GPO Box 498, Adelaide, SA, 5001.

The Melbourne group has placed an emphasis on educational activities.

In May 1981, in conjunction with the Continuing Legal Education Department of the Faculty of Law at Monash University, a seminar was held at the Leo Cussen Institute for Continuing Legal Education in Melbourne on "The Legal Regulation of Media Control".

Mark Armstrong, Faculty of Law, University of New South Wales, spoke on "Competition and Group Control in Communications Law". Commentaries were given by Sally Walker, Faculty of Law, University of Melbourne, and Bill Gillard, QC.

Henry Von Bibra spoke on the "Legal Ramifications for Implementing Cable Television in Australia". A commentary was given by Bernard Teague.

In November 1981, a seminar on "Cables, Satellites and People" was held at the Leo Cussen Institute for Continuing Education. The speaker was Alex Curran, Assistant Deputy Minister, Space Program, Department of Communications, Ottawa, Ontario, Canada, who spoke on "Affordable Broadcasting". A commentary was given by Dr Robert Pepper from the University of Iowa. Responses were given by Senator John Button, Shadow Minister for Communications, and by Dr F. Gurry, Faculty of Law, University of Melbourne, in a paper titled "Opportunities for Diversification".

The Melbourne ACLA executive is:

Chairman: John Hockley, barrister
Secretary: Tony Summers, ABC
Treasurer: Lyle Tucker, Senior Lecturer in Journalism, RMIT

Sally Walker, University of Melbourne Law School
Bernard Teague, solicitor
Dirk Bakker, Justice in Broadcasting.

Melbourne people interested should contact one of the Executive members or the Secretary, Tony Summers, on (03) 609-8528 or C/o ABC, GPO Box 1686, Melbourne 3001.

* * * * *

A further step towards the national scheme was taken on 26 May this year when the Annual General Meeting of the Australasian Communications Law Association in Sydney resolved to modify its constitution to conform with the new national scheme and to change its name to "**Australian Communications Law Association (Sydney)**". Hence the new name on our masthead.

Case Note

by Robyn Durie

COPYRIGHT AGENCY LIMITED & ORS v HAINES & ANOR, a decision of McLelland J, delivered on 9 March 1982

This is the first judgment on the Copyright Amendment Act 1980. *

It arose out of the issue of three memoranda to principals of NSW Government schools by the Director-General of Education.

The defendants were the Director-General for Education and Mr Haines, the nominee for the NSW Attorney-General.

The plaintiffs were:

(a) Copyright Agency Limited (CAL), a collecting agency which acted either as an exclusive licensee for the owners of copyright in a number of works, or as a sole agent of such copyright owners in respect of reprographic copying.

(b) Four publishers (Angus & Robertson, McGraw-Hill Book Company of Australia Pty Limited, Heinemann Educational Australia Pty Ltd and Jacaranda Wiley Limited), each of which sold a large number of educational books; and

(c) Three authors, Donald Horne, Thomas Kenneally and Les Murray.

Each of the publishers had books on at least one of the Higher School Certificate prescribed lists. One of the authors had previously had books on the English syllabus.

The plaintiffs claimed that by the issue of the memoranda, and in particular Memoranda 81248, the defendants had infringed or threatened to infringe the copyright in works owned by or licensed to one or more of the plaintiffs, or alternatively, such action by the defendants consisted of a threat to vicariously infringe their rights. In addition by the issue of the memoranda the defendants had injured or threatened to injure the plaintiffs' businesses.

Memoranda No 81248 dealt with, inter alia:

(a) the relation between Section 40 of the Copyright Act 1968 (fair dealing for research and study) and Section 53B (multiple copying in Educational Institutions)

(b) Section 39A (notices in libraries), inserted in the Act following the decision of the High Court in **University of New South Wales v Moorhouse** 133 CLR 1; and

(c) Section 203E - inspection provisions.

The plaintiffs claimed that by the issue of the memoranda, and, in particular memoranda No 81248, the defendant had infringed or threatened to infringe the copyright in works owned by or licensed to one or more of the plaintiffs, or alternatively, such action by the defendants consisted of a threat to vicariously infringe their rights and by the issue of memoranda the defendants had injured or threatened to injure the plaintiffs' businesses.

The Judge held that:

(a) Section 40 of the Copyright Act did not permit the same amount and type of photocopying as did Section 53B. In this regard he said that:

> "the availability to schools of the right to make copies under section 53B upon compliance with conditions designed to provide 'equitable remuneration' to owners of copyright, must necessarily have an influence upon what amount and type of copying done in the school could properly be regarded as 'fair dealing' under Section 40."

The existence of Section 53B affected the value of the work within the meaning of Section 40(2)(d). Memoranda No 81248 had postulated a teacher acting as an agent for his students and using Section 40. The

Judge indicated that even if the teacher was appointed as the agent of all his students, a truly artificial situation, the copying of *substantially the whole of certain* works would not constitute fair dealing, whereas it could legitimately be carried out under Section 53B.

(b) There was no actual infringement of copyright, as no actual infringement was proved as required by decision of Kearney J in **RCA Corporation v John Fairfax & Son Limited** (1981) 1 NSWLR 251.

(c) There was no significant risk of copyright infringement in relation to Section 39A.

(d) There was no threatened injury to the business of the plaintiffs by unlawful means, as there was no intention of inflicting injury on the plaintiffs. (The argument on this point was based on the tort revealed in the decisions of **Carlin Music Corporation v Collins** 5 FSR 548 and **Beaudesert Shire Council v Smith** 120 CLR 145.) The Judge did not deny that there may be some generalised tort which in certain circumstances will provide relief against unlawful interference with economic activity. But, the unlawful means had to be a means forbidden by law and not merely invalid or ultra vires.

(e) Section 203E conferred the right of inspection of a library collection on copyright owners or their agents regardless of whether there were any records of copying under Section 50 or 51A in that library.

Copyright owners are able to investigate whether the library had made copies of their works in addition to inspecting any declarations made in relation to such copies.

(f) In respect of records of copying kept in educational institutions, a copyright owner or his agent was entitled *to inspect all the records* kept by that educational institution, and not just those relating to works of which he was the copyright owner, or the agent of the copyright owner, and the right of inspection carried with it an incidental right to copy all such records.

The Judge granted two quia timet mandatory injunctions.

The first was in relation to the Section 40/Section 53B issue, on the basis that there was a significant prospect that the rights of a number of the plaintiffs might be infringed by the defendants or their employees if the relevant part of the memorandum was not withdrawn.

The second was in relation to Section 203E. The injunctions required the Attorney-General to issue a corrective memorandum. Declarations were made in relation to the meaning of Section 203E. The injunctions have been stayed pending the outcome of an Appeal, although the Director-General of Education is to write a letter to the recipients of Memorandum No 81248 giving notice of the judgment in relation to Section 53B/Section 40.

*** An Appeal was heard in June by the Full Federal Court. The Notice of Appeal canvasses practically all the copyright related points in McLelland J's judgment.**

ACLA Lunches

Two of the key figures in Australian communications today are the Hon. Neil Brown QC, MP, the new Minister for Communications, and Mr Bill Mansfield, Federal Secretary of the ATEA. Both will be guest speakers at forthcoming ACLA lunches.

Bill Mansfield will speak on "The role of the national telecommunications carrier in the coming information age" on **Wednesday 28 July.**

Neil Brown will speak on his new portfolio and "Communications in the 1980's" on **Thursday 2 September.**

ACLA members and visitors are welcome to attend both lunches. They will be held in the Menzies Hotel, Carrington St, Wynyard 2000. Members will receive a circular with details of the lunches. Non-members should contact Ms Elizabeth Lucas on (02) 406 5464 to arrange bookings.

Changes in the Department

On 5 April this year, the then Minister for Communications, Mr Ian Sinclair, announced a major reorganisation of his Department, coinciding with its move to new quarters in Canberra.

He said the reorganisation was necessary to enable the Department to continue to carry out its duties efficiently in the rapidly changing and expanding field of communications.

Taken in the context of three inquiries then underway - into telecommunications, cable and subscription television and Australia Post - the Minister said the reorganisation would assist the Government in its considerations of technological change in communications and the social consequences of these for all Australians.

DEPARTMENT OF COMMUNICATIONS REORGANISATION

The new Department of Communications organisation consists of five Divisions. Brief descriptions of divisional duties and the names of the First Assistant Secretaries who head them are:

Broadcasting Division
Mr P.B. Westerway
Advise on development of broadcasting policies and the planning, operation and administration of the Australian broadcasting system; establish technical policies and planning proposals for the development of new broadcasting services.

Communications Development Division
Mr R.T. Lord
Develop and analyse policy options for the provision of future communications services; relate demand for services to potential means of supply; develop standards for the introduction of new technologies.

Corporate Policy and Projects Division
Mr A.E. Guster
Analyse policy issues affecting communications and undertake major projects where more than one communications system is involved; carry out the financial and administrative management of the Department.

Radio Frequency Management Division
Mr M.R. Ramsay
This Division's duties are unchanged. They include: advising on major policy issues affecting use of the radio frequency spectrum; developing policies, systems, equipment and resource plans to enable DOC to carry out its responsibilities in radiocommunications.

Space, Telecommunications and Postal Policy Division
Mr V.J. Kane
Advise on issues relating to the provision of postal, internal and overseas telecommunications and satellite communications services.

Responsibility for the Department's involvement in the National Communications Satellite System was, at the time of Mr Sinclair's announcement, to remain with Mr Guster who previously headed the Satellite Policy and Coordination Division.

This Division and the old Broadcasting Development Division, Broadcasting Planning and Operations Division and Policy Division have been abolished. Duties of the former Task Force on Broadcasting Development had been absorbed by the new Communications Development Division, the announcement said.

AUSTRALIAN COMMUNICATIONS LAW ASSOCIATION

ACLA is concerned to bring together those interested in areas of law affecting communications such as broadcasting law, defamation, copyright, advertising, contempt of court, freedom of information, entertainment, privacy and censorship. Our membership includes lawyers and others from commercial, national and public broadcasting, newspapers, private practice, law reform commissions, universities and elsewhere.

We recognise that ACLA's success depends on associating informally and freely with all those interested throughout Australia. We publish material from widely differing standpoints. The total independence of the Association, which includes people with a diversity of political and business connections, will continue to be jealously guarded.

We have no permanent secretariat and we do not maintain a routine of activities. Functions are organised to suit the needs of the community and the interests of members. Our activities have included seminars on overseas broadcasting law, commercial television licence renewals, defamation and copyright. We have held luncheons for the Commonwealth Attorney-General, the Minister for Post and Telecommunications, the Shadow Minister, the Chairman of Telecom, the Chief Film Censor and the ABT Chairman.

The **Communications Law Bulletin** is Australia's first and only journal in the area. Our membership directory provides a means of contact between those interested in particular areas of communications law and policy.

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Please tick appropriate box:

☐ I apply for membership of the Australian Communications Law Association and enclose $20 in payment of the annual fee (this includes one year's subscription to the *Communications Law Bulletin*).

☐ I apply for one year's subscription to the *CLB* and enclose $20 (individual) or $30 (firms, organisations).

☐ I apply for membership of the ACLA without the benefit of a *CLB* subscription, and enclose the annual fee of $5

....
(Signature)

The Secretary
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