CENSORSHIP BY REGULATION

P. P. McGUINNESS

It was a good start for the Australian Press Council seminar at Bond University last Friday when the new Premier of Queensland, Mr Cooper, announced that the days of Queensland Government-financed defamation actions by ministers were over. But we have yet to find out what the next premier of Queensland thinks about it.

There was not a great deal of consolation to be found in the speech by the NSW Attorney-General, either. For while there is little chance that he would countenance the abuses that used to be rife in Queensland, Mr Dowd came across as a thoroughly conservative politician of the old school. That is, he believes that the defamation law should remain available to politicians and other public figures in order to suppress the publication of uncomfortable truths and allegations.

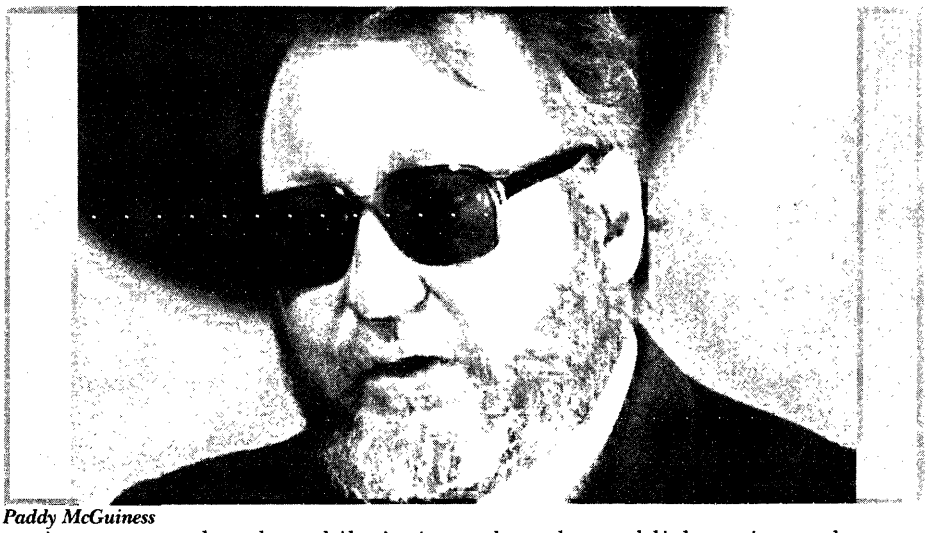
"Hath not a politician hands, organs, dimensions, senses, affections, passions?" he said, quoting Shylock. Quite. That is exactly why politicians should be held responsible for what their hands, organs, passions, etc, do; especially when their public duty is affected by them. Privacy is a fine thing, and for those who have a passion for it there is a simple answer – remain private citizens.

So it seems clear that the Greiner Government is not going to do any more to protect the community from the unexposed sins of its masters than did the Wran government, or the Bjelke-Petersen government.

But Mr Dowd is a sincere and honest man; conservative and oversensitive to the detractors of the powerful he may be, but he also realises that there is much wrong with the defamation law, and he foreshadowed some of the changes that he hopes to bring about.

One of these would be to remove the present licence for juries to award damages in defamation actions at a ridiculously high level.

His proposals would involve a cap on the awards for non-economic loss



Paddy McGuiness

and a system whereby, while juries could still decide that a publication was defamatory (not at all the same thing as that it was wrong), judges might be given the responsibility for deciding damages on a more rational basis, with perhaps a link to the scale of damages in cases dealing with compensation for physical injury.

A supposed injury to reputation looks a lot more trivial when directly compared with, say, losing a leg. (And Shakespeare, especially in *The Merchant of Venice*, is a lousy guide to the law in matters of defamation.)

Mr Dowd also suggested that the NSW government might review section 22 of the Defamation Act, which allows for a defence on the basis of the "reasonable behaviour" of the publisher of a defamation, "generally to emphasise the need for consideration of all the surrounding circumstances when determining reasonableness of publication", in the light of the recent path-breaking judgment of Justice Jane Mathews in the NSW Supreme Court.

This is of course still subject to appeal.

In a related area, Mr Dowd indicated that the NSW government was looking at "creating a new tort, committed where there is action which prejudices a trial to the extent that it has to be delayed or aborted". Unfortunately, he seemed to think that the publishers in such cases should bear the main responsibility, and should pay "damages reflecting the costs thrown away when the criminal proceedings were aborted".

Unless the police or the crooked lawyers who often bring about such results for their own purposes are equally culpable this will indeed be a matter of killing the messenger.

There is, of course, a valid claim that publishers should take care not to impair the course of justice (which is not at all the same as supposed contempt of court).

Thus, tentative and unsatisfactory in a community that depends on free speech for the defence of its liberties and the exposure of the abuses and malpractices of the powerful as it is, the NSW government's agenda for reform in the area of the law of publication at least shows the influence of a genuine regard for balance and reasonableness.

It still falls far short of a recognition that while the rights of free speech and of privacy, of publication and of protection against unfair, embarrassing or inaccurate reports, are conflicting, the liberty of speech and publication is fundamental to the "long-term" political health of a community. We will have to wait for a Bill of Rights to establish that.

Mr Dowd argued that: "One sees too often in journalistic debate the

conflation of the ideas of public interest and media interest. Given the increasing frequency with which the media first constructs, and then claims to reflect, the public interest, I am naturally suspicious of how it will set about defining a person who is or has become a public figure."

Unhappily, this is often enough the reaction of reasonable people who have not read widely in the experiences of countries and times when public figures are protected.

But at least some reform is offered.

There are, of course, other kinds of censorship at large: these were amply represented in the other half of the conference on media regulation.

Perhaps the most dangerous form of censorship, like that so liberally proposed by Mr Dowd, is that proposed by the well-meaning who see the cure for the defects of humanity in more regulation.

Thus Ms Kate Harrison of the Media Law Centre in the University of NSW, put forward a logical and clear account of her case for regulation of the media, in particular of the broadcast media.

She made eight major points, of which the last three apply specifically to broadcast media.

The special features of the media which required its regulation (by the Australian Broadcasting Tribunal or some such other body; but Ms Harrison denied that she had in mind such a body to regulate the print media) were that it performed a critical information function; that the media exercised social power; that it had the capacity for impact on political discussion and political outcomes; that there had in modern times been a change in the ways in which media relates to government, and hence a change in its role as watchdog; that media proprietors had a vastly broader agenda than in the past; that there was a technical limitation on available broadcast frequencies and that as a result the media exercised a public trust; and that it had a special role in fostering and disseminating a uniquely Australian culture.

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This is like a media social worker's charter. First set up your list of defects and inadequacies. Second, argue that the only possible way to overcome abuses is to put in charge of the system those who are naive enough to think either that this list indeed represents the predominant inadequacies or faults that actually exist, or who believe that there is any possible system in which they would not exist to some extent.

It is, for example, interesting to consider how each of the special features that allegedly require the regulation of the media (and only the commercial media was intended) could be handled without giving immense social and political power into the hands of the regulators.

It is also worth noting that all of these reasons for regulation apply equally to the Australian Broadcasting Commission, which is not subject to systematic regulation. ●

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HINCH GETS SPEEDY HEARING

The Melbourne Supreme Court has granted a speedy hearing of a libel action by the radio talk-back host, the Rev Alex Kenworthy, over sex allegations made by his former colleague at Melbourne radio station 3AW, Derryn Hinch.

Rev Kenworthy, who hosts the Nightline program on 3AW, is suing Mr Hinch and the owners of Channel 7, Herald-Sun Television Pty Ltd, for unspecified damages over allegations made on the Hinch at Seven program.

Hinch's counsel, Mr Jeremy Ruskin, told Master Gawne during the hearing of the application that Rev Kenworthy claimed the television report meant "the plaintiff was a hypocrite who breached his position of trust as a minister of religion by seducing countless women who went to him for help." He said Mr Hinch's defence was that the report was justified. Mr Hinch had obtained affidavits from 17 women who alleged Rev Kenworthy had seduced them, he said.

Master Gawne agreed to a speedy hearing – requested by Mr Hinch but opposed by Rev Kenworthy. A quick hearing of defamation writs also prevents "stop writs" from halting public discussion of the case.

Both parties return to court on 2 April next year to set a date for the hearing. ●

STUDENT THESIS COMPETITION CLOSES SOON

The Australian Press Council recently established a prize of $1000 for the best honours thesis or similar work by a student enrolled in an Australian university or College of Advanced Education on a topic relating to aspects of freedom of speech and of the press.

Examples of appropriate topics include, but are by no means restricted to, the legal restraints on news reporting, contempt of court in relation to the press and other media, and the constitutional protection of freedom of speech.

The recipient is to be chosen on the recommendations of a panel of judges, and the prize will be awarded at a reception by the Council. It is anticipated that the prize will be awarded annually but, as is customary in these matters, the Council reserves the right not to award a prize.

Entries close on 30 November, 1989.