1993 FULBRIGHT SYMPOSIUM SYDNEY 27-28 OCTOBER

The Media and the Law

A number of sessions of the Fulbright symposium looked at legal issues central to the question of news media responsibility and power, including disclosure of sources, defamation and freedom of speech.

The standard of papers on these topics varied considerably, as did their presentation. In fact the symposium served to underline how inadequate lawyers can be when it comes to reducing complex subjects into a form that can be understood by lay people, and offered some explanation for the attitude prevalent among journalists that the law is irrelevant to the day-to-day work of reporting.

David Bennett QC summarised the international position on disclosure of sources, noting that a number of countries protect journalists from disclosure, including Scandinavia, Austria and Japan. In the US, 28 States have shield laws, about half of which give journalists absolute privilege and the other half, qualified privilege.

Illustrating the widely divergent approaches that can be taken according to circumstances, he referred to a case in the United States where newspapers argued before the Supreme Court that the public interest in a matter lay in revealing the sources of a story. On the other hand, a UK journalist had appealed to the European Court of Human Rights against an order of the UK courts to disclose, and had won.

Bennett said there was an inherent conflict in the existing code of journalists' ethics in Australia between the obligation to put all the facts before the public and the requirement not to disclose sources. Perhaps this will be tackled by the code of ethics review panel, whose chairman Fr Frank Brennan outlined its plans to the symposium.

Defamation

Professor Michael Chesterman took as his starting point the recent NSW Law Reform Commission discussion paper which proposed two forms of remedy for defamation:

- Where the plaintiff proves factual defamation, the court should be empowered to order the defendant to publish an apology and pay full costs. Available defences would be truth, fair report.

- Remedy in damages, where damages would be much harder to get than is currently the case. The plaintiff would have to prove that the report was both defamatory and false, and also prove some form of fault eg that the publisher knew the report was false. Defence would be fair report, for example of official proceedings.

The primary objective of these reforms is to persuade the plaintiff to take the first course, which Professor Chesterman said would be simpler and faster and would direct the thrust of defamation law away from compensation towards truth. He did not believe that obligatory publication, where appropriate, would make unacceptable inroads into freedom of expression or of the press. Numerous proposals for reform have been put forward in the US in recent years, he said, and all have picked up the notion of retraction or judicial remedy.

He noted that the NSWLRC proposals do not distinguish between types of people, as is the case in the US where the public figure defence (NYT vs Sullivan) dominates - the public figure has to prove the publication was false and that the publisher knew it. Private individuals on the other hand do not have to prove fault. In practice, the Sullivan defence has been strongly criticised because it appears to put the defendant's conduct on trial rather than the plaintiff's reputation, and has resulted in enormously long, expensive and complex trials.

Commenting on Professor Chesterman's paper, Geoff McClellan of Freehills (a sponsor) said that having the courts, through the application of defamation law, play a role in establishing the truth is both 'dangerous and inefficient practice'. He believed that the Sullivan defence deserves serious consideration for adoption in Australia, and that the reform proposals would not necessarily speed up the process.

McClellan said we need to look at how efficient our whole court procedures are and whether we may need a system of 'rough justice', speeding matters up by, for example, dispensing with juries, and adopting practices like witness statements and document bundles - rather than by making substantive changes to the law. Better still, he said, keep defamation matters out of the courts and use processes like compulsory mediation.

Freedom of Speech

Justice Andrew Rogers opened a session on freedom of speech by saying that Australia's record in this area was very poor: shown for example by the 'dismal failure' of a proposed Bill of Rights, and the inability of various Parliaments to pass satisfactory and uniform defamation laws. Rogers said the real question was whether the courts were the appropriate forums to examine questions like freedom of speech.

Professor Sally Walker (Melbourne University) said that greater reliance

Continued on page 14 ...

... *Continued from page 13*

should be placed on remedial measures, such as adjourning defamation trials to allow controversies to die down and permit the possibility of rational decision making. The High Court decision on political advertising (ACTV c Cth), which has been widely seen as endorsing the principle of freedom of speech, leaves many questions unanswered, Walker said. The right to discuss matters of a political nature is not absolute, and permissible restrictions still need to be worked out.

Dr Peter Putnis (Bond University) said that the issue of the right to privacy was equally worthy of consideration. He gave instances of potential invasions of privacy in the electronic age such as the use of file tape in TV news and computerised tampering with photographs.

He said the public have a right to speak as well as a right to know, and public access to the new media is important. Public support for freedom of speech cannot be taken for granted. Many may see it as the freedom of the media to demand answers from an unwilling person.

Jim McClelland, speaking from the perspective of lawyer, former politician and now newspaper columnist, said that defamation law was the greatest inhibitor of freedom of speech in Australia. Politicians in particular had used it both to gag the media and to enrich themselves. He asked what possible harm had been done to the reputation of Bob Hawke, a politician who had won many lucrative awards for damages, when for many years polls showed him to be Australia's most consistently popular public figure and Prime Minister? McClelland said he himself had been demonstrably defamed some years earlier while a judge, but had taken no action since he considered that no reasonable person would believe him capable of the corrupt behaviour alleged against him. ❑

INTERNATIONAL BRIEFS

- The Chinese Government, in an attempt to stop encroachments from foreign-controlled satellite television services like Star TV, has outlawed the non-authorised sale of receivers and barred individuals from installing them. In a similar move, the Burmese Government has introduced a stiff impost in the form of a licence fee on equipment at a level which would be beyond the reach of almost all Burmese, plus huge fines for breaches.

- National public broadcasting is fighting back in Scandinavia, where public broadcasters in Sweden, Norway and Finland have joined up to establish a satellite pay TV channel which will deliver programs - films, news, sport, music and children's - with a strong emphasis on cultural relevance. If approved by their respective governments, the service will begin in '94-95.

- The Brits are moving towards pay per view services delivered over the telephone system using ADSL-copper-twisted-pair technology, and although the regulatory authority OFTEL has yet to consider this development, it appears that - as in Australia - there will be little possibility of regulating the services thus delivered.

- The proposed merger of two giants, cable company Tele-Communications Inc (TCI) and Bell Atlantic, has somewhat overshadowed another move with similar implications. BellSouth (the largest US Bell telephone company by 1992 revenue) will buy a 22.5 per cent stake in Prime Management, the 24th largest cable operator controlling systems with over 500,000 subscribers.

- Mexico's private cinema chains, representing about half the country's cinemas, have joined up to counter the threat of US dominance of Mexico's exhibition sector, and will screen more domestic product. ❑

(from Screen Digest 11/93)