CMTLP Seminars

2. Right to Investigate and Report

The second day seminar concentrated on proposals for reform of the law of defamation, protection of journalists' sources and developments in the debate on human rights which may impact upon newsgathering activities.

Law Reform

Justice Michael Kirby, President of the New South Wales Court of Appeal and Gordon Samuels, QC, Chairman of the NSW Law Reform Commission, discussed the proposals for reform in the NSW LRC's Discussion Paper 32, *Defamation,* also discussed at the Fulbright symposium (see page13). Justice Kirby attributed the failure to achieve meaningful reform of the law of defamation, despite a plethora of reports and discussion papers on the subject, to a lack of political will on the part of our politicians. Both Kirby and Samuels argued that a right of reply provides a better opportunity to cure the social wrong of harm to reputation. Many plaintiffs would be satisfied by a reply, whether by way of apology, withdrawal or retraction, provided that it is made at a sufficiently early stage. Kirby argued that there should be procedural reform to allow juries the opportunity to determine quickly the impression left by the material complained of.

Mr Samuels rejected the assumption that the threat of large awards of damages restricts free speech and investigative journalism, arguing that most defamation cases relate to inaccurate, rather than investigative, reporting. The assumption that large damages awards must be retained in order to keep journalists honest is also of dubious validity.

Senator Barney Cooney is chairing the Inquiry into the Rights and Obligations of the Media. He acknowledged that reform of the law of defamation has not been high on politicians' agendas for reform and said that the issues of journalists' sources and ethics will be the focus of the committee's inquiry.

Journalists' Sources

Neil McPhee QC discussed the current law on disclosure of journalists' sources. There is no evidentiary privilege entitling journalists to refuse to disclose the identity of their sources, nor is there a general judicial discretion not to require a journalist to answer a question directed at the identity of her or his source where the evidence would be relevant and admissible. Mr McPhee said that judges strain to avoid the situation whereby the issue of disclosure of sources will arise, for example, by discouraging counsel from pursuing a line of questioning. Mr McPhee said that it is unlikely that the common law will develop a privilege for journalists. He considered the Law Reform Commission of Western Australia's report on professional privilege, which proposes the enactment of a general judicial discretion that is not aimed at journalists in particular. He argued that it would be an unusual case in which the judge would exercise this discretion, and recommended s10 of the Contempt of Court Act 1981 (UK) as a more appropriate model for legislative reform. He suggested that even if legislation reform is achieved, this will not dispel the journalist's dilemma if he or she is ordered to disclose a source.

Quentin Dempster said that the public perception of the media is shaped by the media's worst excesses, which are often the outcome of commercial imperatives. He said that there is strong judicial resentment towards the media, and that the judiciary gives little credence to the role that it plays in informing citizens. This explains in part the resistance from many quarters to shield laws for the protection of journalists' sources of information. Yet journalists and their sources are vital to the free flow of information in a society characterised by a culture of secrecy and information control.

Recognition of Media Rights

Professor Cheryl Saunders said the Australian constitution has little to say about the rights of citizens, and to date, Australians have generally denied the need for constitutional rights, preferring to rely on the democratic process as a safeguard for human rights. This approach is open to challenge now that most Commonwealth countries have protection for rights, whether enshrined in a constitution or in a quasi-constitutional document. Since Australia ratified the optional protocol of the International Covenant on Civil and Political Rights in 1991, Australians have the right to take complaints to the International Human Rights Committee once domestic remedies have been exhausted.

Professor Saunders said that the High Court decisions in Australian Capital Television Pty Ltd v Commonwealth (No 2) and Nationwide News Pty Ltd v Wills, which recognise an implied right of free speech, represent a new starting point for discussion of constitutional rights, though questions remain. For example, are the freedoms or rights

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that the High Court refers to restrictions on legislative power or rights in themselves? Can the rights apply to State governments? What other freedoms are inherent in the concept of representative democracy?

It is hoped that the two cases currently before the High Court (Stephens v West Australian Newspapers Ltd and Theophanous v The Herald and Weekly Times Limited) will provide some answers to these questions. Professor Saunders said that the implied right of free speech could be made explicit in the Constitution, or it could be left as an implication, in which case its ambit will be relatively confined.

Professor Mark Armstrong and Vanessa Holliday suggested that the Commonwealth could enact a specific freedom of speech statute, shield and whistleblower protection laws and privacy laws and reform the law of defamation, at least in relation to the areas in which the Commonwealth already intervenes.

Defamation Law

Jeremy Ruskin, a member of the Melbourne Bar, spoke on an issue of practical significance, that of the meaning of the words complained of in a defamation action. Where a plaintiff seeks to restrict the proceedings to part of the material published, the issue arises whether the defendant can broaden the trial by bringing the whole of the material so that it can plead justification of those other matters. Mr Justice Gobbo of the Supreme Court of Victoria held in Curran v The Herald and Weekly Times Limited, that where the material has a common sting, the defendant can broaden its defence so that the words complained of are considered in the context of the whole article. The plaintiff has sought leave to appeal.

Stuart Littlemore prefaced his discussion of the reform proposals of the NSWLRC with the remark that the voice of potential plaintiffs is never heard in the defamation law reform debate because they cannot be identified as a single group, whereas media organisations constitute a permanent bloc of potential defendants which participates actively in the defamation law reform debate.

He argued that the law of defamation is over complex and that it must be made comprehensive for all citizens, not just the mass media. Mr Littlemore argued that the defence of qualified privilege should be simplified and that juries and the privacy element of the defence of justification should be retained.

Truth and Privacy

The focus of Professor Sally Walker's Hearn lecture was criticism of the tendency of law reform bodies to assume that defamation law can be modified so that it can regulate virtually all aspects of the content of material published by the media.

Professor Walker said that any law that imposes a restraint on free speech should be based on a public interest that outweighs the public interest in freedom of speech; it should go no further than is necessary to achieve its aim; and it should be sufficiently clear to those who are affected by it.

A major shortcoming of the current proposals for reform of the law of defamation is that they fail to address the policy objectives and the role of the law of defamation, and in particular the meaning of 'reputation' and the test of what is defamatory.

By way of example, Professor Walker discussed two proposals for reform which aim to use the law of defamation to encourage the reporting of accurate information or truth and to protect privacy - the NSWLRC Discussion Paper and the proposal of the Attorneys General of NSW, Queensland and Victoria in 1990 that the defence of truth should be one of 'truth plus privacy'.

Professor Walker criticised the dual regime proposed by the NSWLRC on the grounds that truth is not a vital element of the action for defamation. It is more appropriate that it be accommodated in the defence of justification. The rationale of the defence of justification is that it is not appropriate to penalise a person for saying the truth. However, it is not the case that material that is false is always defamatory; the material must satisfy one or more of the tests of what is defamatory. If the plaintiff seeks a declaration only, she or he will still have to prove that the material is defamatory and that it is of and concerning her or him. The defendant could still raise most of the standard defences. It is thus unlikely that this proposal would achieve a result any faster than the present system.

Professor Walker argued that the Attorneys General proposal is also flawed due to the failure to consider the rationale of the law of defamation. The protection of privacy is foreign to the concept of protection of reputation. The privacy component of the defence of justification would do little to protect privacy, as a defendant could rely on other defences.

In addition, many invasions of privacy do not arise in the context of defamation, thus the defence would only protect privacy in a piecemeal fashion. While there are sound arguments in favour of protecting privacy, it is inappropriate to expect the law of defamation to do so.

Professor Walker said that while defamation law is too complex and uncertain, the two reform proposals aimed at truth and privacy would do little to ameliorate this situation. The fatal flaw of these proposals is their failure to consider the role of defamation law and the protection of reputation. ❑

Jennifer Mullaly