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Audiovisual Copyright

The Federal Attorney-General is responsible for the policy and administration of the Copyright Act 1968. For the past two years the Attorney-General's Department has been reviewing audiovisual copying provisions of that Act. This article, prepared by officers of the Department, reports on the progress of the Review to date.

The commencement of the Review was announced by the then Attorney-General, Senator Peter Durack, Q.C., on 12 July 1981.

Senator Durack said that recent technological changes had introduced faster, cheaper and simpler methods of audiovisual copying in respect of which the Copyright Act made inadequate provision regarding copyright owners' rights.

He noted that a report published in 1981 by a non-government specialist committee convened by the Australian Copyright Council had isolated problems and proposed solutions but had also revealed substantial differences of approach among various interests.

Particular problem areas mentioned in that report included domestic audio and video copying, (i.e. home taping), the needs of schools, colleges, universities and libraries for access to audiovisual productions, and the difficulties of ensuring appropriate remuneration for copyright owners.

Senator Durack said that the then Government was not committed to any views which had been expressed and that the aim of the review was to recommend proposals which would provide a fair balance between the interest of copyright owners and those of users of audiovisual materials.

Interested persons and organisations were invited to make their views known to the Attorney-General's Department by 30 November 1981. That date was subsequently extended to 31 December 1981.

The Department received 193 submissions, some well after the closing date, together with the results of an extensive survey by recording and music interests of domestic audio copying in Australia. Copies of all these were deposited with the National, State and ABC Reference Libraries for public inspection.

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Contempt of Court inquiry

On 4 August 1983, Mr Justice Hope, the Royal Commissioner into Intelligence and Security matters involving Mr David Combe, gave a strongly worded warning to newspaper, radio and television journalists about the law of contempt as it affects Royal Commissions.

This warning draws attention to an important inquiry which the Commonwealth Attorney-General, Senator Evans, has asked the Law Reform Commission (Cth) to undertake.

The Commission is to prepare a report on the law on contempt of Federal and Territory courts, tribunals and commissions.

Work on the project began in earnest in July 1983 when Professor Michael Chesterman, a Professor of Law in the University of New South Wales, commenced his term as a full-time Member of the Commission.

The terms of reference given to the Commission are wide. It has been asked to consider the legal principles relating to all forms of contempt, as applied by Federal and Territory courts, State courts exercising Federal jurisdiction and tribunals and commissions created by or under Commonwealth laws.

The Attorney-General also instructed the Commission to have regard to the provisions of Article 14

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In the press release accompanying the reference, he expressed the view that the reference raised "important issues concerning the proper administration of justice, the right to free speech and the need to protect the integrity of the legal process".

There are a number of reasons why a review of contempt of court is appropriate at the present time, quite apart from Mr Justice Hope's reminder.

The issue received a lot of publicity, following the imprisonment of Mr Norm Gallagher, the secretary of the Builders' Labourers' Federation, after a conviction for contempt for having asserted that the Federal Court had acceded to union pressure in acquitting him of an earlier charge of contempt.

The High Court dismissed Mr Gallagher's appeal (**Gallagher v Durack** (1983) 57 ALJR 191). However, in the course of his dissenting judgment, Murphy J expressed serious concern about the state of the law of contempt in this area. He said (at p 194): "As stated by this court, the law of criminal contempt in scandalising courts is so vague and general that it is an oppressive limitation on free speech. No free society should accept such censorship".

Another recent High Court decision on contempt brought forth a similar degree of disagreement within the Court as to the proper scope of contempt law.

In **State of Victoria v Australian Building Construction Employees' and Builders' Labourers Federation** (1982) 56 ALJR 506, it was argued by the Federation that proceedings being taken for its deregistration under the Conciliation and Arbitration Act 1904 were prejudiced by the continuance of a Royal Commission into its activities. The High Court held that there was no evidence of prejudice of this nature, but the Court was divided four to two.

The issues raised in these two recent authorities on contempt, along with many others, have been discussed in important law reform reports in England and Canada.

In England, the Phillimore Committee published a lengthy and thorough report in 1974, and several of its recommendations were adopted in 1981 in the Contempt of Court Act. A shorter report by the Law Reform Commission of Canada on **Contempt of Court** (CLRC 17, 1981) traverses much the same ground as the Phillimore Committee.

The inquiry by the Law Reform Commission (Cth) is not likely to be an easy one.

In commenting on the reference when it was first announced, the **Sydney Morning Herald**, in an editorial on 9 April, remarked: "Given the history of past reviews, the exercise will be carried out with thoroughness and intellectual rigour. But whether this will be enough to solve the problems inherent in the nature of the law remains to be seen. It will be something of a miracle of jurisprudence if this is achieved. At the heart of the law of contempt two fundamental rights in a free society are in conflict: the right to the due process of law and the right to free expression. .... The law on contempt is a legal thicket that does not easily lend itself to simplification. If the ALRC can put forward a doctrine that is modern, relevant and judicious to the competing interests involved, it will have done the community a service".

It is not difficult to predict some of the issues which will give rise to controversy.

Arguments are likely to be put to the Commission, that the **sub judice** rule is not necessary in modern society.

It has been suggested in the USA, where very limited versions of the rule apply, that there is no clear evidence that jurors, or, for that matter, judges, are significantly influenced by pre-trial publicity in the media when they are faced with the task of deciding particular issues in the courtroom.

At the other extreme, it is likely to be asserted that a number of recent cases in Australia, in particular the Chamberlain case, have shown how dangerous it is to allow the media to give wide publicity to a case before its trial, and how important it is to tighten the safeguards against undesirable publicity in order to ensure that accused people receive a fair trial from an unbiased judge or jury.

Another area of potential controversy is that of the procedures applicable in the contempt case.

The view has been strongly put that it is wrong to allow judges to decide cases of contempt arising out of conduct in their own courtroom.

In these situations, they are likely to be not only the judge, but also the chief witness, the prosecutor and, in a sense, the victim.

The counter-argument is that to allow the judge to hear a contempt charge in this situation is a useful and important reinforcement of the court's authority and prevents any possible embarrassment arising from the hearing of the case by a fellow judge who may have very different views about the seriousness of the allegedly contemptuous conduct.

Gallagher v Durack itself raises issues on which a wide divergence of views can be found.

It has been asserted in a number of recent sources, notably a pamphlet by the United Kingdom National Council of Civil Liberties, titled *Changing Contempt of Court* (1981), that there is no longer a need for a separate offence of 'scandalising the court'.

Other offences and remedies dealing with the same subject matter, notably defamation in its criminal and civil forms, are alleged to be adequate to deal with remarks critical of the work of the courts, to be more precisely defined and to be governed by more appropriate procedures.

This argument may be contrasted with the approach of the majority of the High Court in the Gallagher case and there are, of course, numerous intermediate viewpoints which have to be taken into account.

Similarly controversial is the question of sentencing. Doubts were expressed, by Senator Evans, amongst others, as to whether the sentence of three months' imprisonment imposed on Mr Gallagher was not unduly severe.

Audiovisual Copyright — progress report

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On 27 July 1982 the Department published an Issues Paper which brought together all issues raised in submissions and summarised the main arguments presented for and against proposals for changes in the laws.

The paper classified issues under four headings: Private and Domestic Copying, Educational Copying, Library Copying and Miscellaneous Uses.

Private and Domestic Copying. The main questions raised were whether it should be lawful for a person to record broadcasts and copy pre-recorded audiovisual materials for his own private use, and if so whether remuneration should be payable to copyright owners.

Various suggested royalty schemes for payment for private and domestic copying were described in the Paper.

Educational Copying. Educational interests were concerned about who could copy broadcasts for educational purposes, what could be copied and what uses of such copies should be permitted.

Similar issues were raised concerning the copying of other audiovisual materials, as well as the circumstances in which such copies could be made, the material which could be copied and whether only part or all such material should be able to be copied.

Other educational issues included the performance of sound recordings and films for teaching purposes, the making of adaptations for use by students with learning disabilities, whether the fair dealing provisions of the Act should extend to audiovisual materials, the making of slides and overhead transparencies, the electronic storage, retrieval and transmission of copyright materials for educational purposes, and the special needs of isolated students and multi-campus institutions.

Various schemes for licensing educational copying, for payment of royalties and for facilitating voluntary arrangements for educational copying were also described.

Library Copying. Submissions covered copying of audiovisual materials for library users, copying for preservation of items of special historical or cultural interest, copying of unavailable materials for other libraries, copying of unpublished materials for research purposes and copying in order to change an item to a more convenient or useful material form.

Also raised were the needs of certain special groups: handicapped users, parliamentary libraries and educational resource centres.

Extension of the existing compulsory legal deposit provision to cover films and sound recordings was proposed, as were various schemes for licensing copying and for remunerating copyright owners.

Miscellaneous Uses. Those covered included broadcasts for the print handicapped, the needs of intellectually handicapped persons, cable television, acts done for judicial proceedings, closed circuit video in motels, the recording of church services and statutory provisions relating to evidence, offences and penalties.

The Issues Paper also contained invitations to interested parties to make supplementary submissions by 31 October 1982 and to register an interest in oral consultations with the Department.

Some 133 supplementary submissions commenting on material in the Issues Paper or in other submissions were received and copies of these were also deposited with the abovementioned libraries for public inspection.

Following the change of Government in March 1983, the new Attorney-General, Senator Evans, approved continuation of the Review and the holding of consultations with the forty organisations which had registered an interest in so doing.

At the time of writing (August 1983), the Department was well advanced with that series of discussions. It was likely that a second, shorter round of meetings with groups of opposing interests would be held in September to explore areas of consensus or compromise concerning possible amendments to the Copyright Act.

Following completion of these meetings it was expected that the Department would be in a position to formulate recommendations to Senator Evans, who is scheduled to make a major speech on the subject of the Review to a meeting of the Australian Communications Law Association and Copyright Society of Australia on 11 November 1983.

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and Article 19 of the International Covenant on Civil and Political Rights, which respectively guarantee the right to a fair trial in the determination of any judicial proceedings and the right to freedom of speech.

A final question which has attracted a wide range of views in recent years is whether there should be any liability under the **sub judice** rule for contempt in the absence of intention or negligence.

It is, for instance, a moot question whether it is desirable to punish editors of newspapers for the publication of comments which might prejudice the fair trial of a case, when they had no knowledge of the actual comments or their significance and could not have obtained such knowledge even with the exercise of reasonable care.

As well as conducting research into contempt law and related subject matters, the Law Reform Commission (Cwth) plans to consult a wide range of interested groups and individuals, notably judges, magistrates, members of tribunals and commissions, practising lawyers, the police, civil liberties groups and representatives of the press and broadcasting media. Following its now standard practice, it will publish a series of research papers and a discussion paper, before proceeding to prepare its final report.

MICHAEL CHESTERMAN