



New emphasis on falsity

Coinciding with the release of the NSW Law Reform Commission's report *Defamation*, the Communications Law Centre and the Faculty of Law, UNSW presented a seminar entitled *Defamation Reform After Theophanous* in Sydney on 6 November.

The report marks a convergence of recent developments in defamation law and renews the momentum for reform.

Guest speaker, Sir Anthony Mason discussed the critically important decisions in *Theophanous* and *Stephens*, noting that the recent changes in the composition of the High Court bench, particularly the departure of Justice Deane would have implications for the future development of the 'free speech' decisions. He said a significant area requiring further elaboration was the concept of political discussion. The facts of *Theophanous* and *Stephens* related to matters at the core of political discussion - the conduct of members of parliament - but the High Court's subsequent decision in *Cunliffe* that citizens giving immigration assistance is within the scope of the implied freedom, indicates the potential breadth of the concept. In *Theophanous* the Court took the preliminary view that the American *Sullivan* public figure test should not form part of Australian law, but it did not decide this authoritatively.

Sir Anthony indicated that there may be a reconsideration of the *Theophanous* majority's statement that defence of qualified privilege might have little significance in the light of the constitutional defence.

The 'chilling effect' of defamation law is inextricably linked with damages awards. Sir Anthony said the

potential 'chilling effect' of the proposed remedy of declaration of falsity was likely to be less than that of damages awards.

The Hon Gordon Samuels, Chairman of the NSW Law Reform Commission, outlined the report's main proposals, with particular emphasis on the issues of damages and truth. He said damages awards as a means of vindication of reputation were inadequate as they were not usually made until long after the event and might never be published.

The report proposes the inclusion of 'falsity' as an element of the cause of action. The rationales are that the public interest requires protection only against false defamatory matter; that vindication comes from a finding that a publication is false; that freedom of speech is facilitated by relieving the defendant of the burden of proving truth; and that a judgment referring specifically to falsity will provide direct vindication. The proposed remedy of declaration of falsity aims at providing speedy and effective vindication of reputation without recourse to damages.

The NSW Government's response to defamation law reform was presented by Jeff Shaw, NSW Attorney General. He said defamation should be made more accessible through simplification of the law and streamlining of procedure. At the state government level, the dilemma was whether to initiate reform, potentially increasing the degree of disharmony with the laws of other states, or to wait for consensus on uniformity. In the light of the failure of previous attempts at achieving uniformity, Shaw said it was better for state governments to go it alone, thereby setting an example for others to follow. □

Jenny Mullaly

THE NSW LAW REFORM COMMISSION'S REPORT ON DEFAMATION -

MAIN RECOMMENDATIONS AT A GLANCE

- ◆ In general, falsity should be an essential ingredient of defamation actions, with the plaintiff bearing the onus of proof.
- ◆ The introduction of a new remedy, the 'declaration of falsity', as an alternative to damages. The plaintiff must seek the declaration within four weeks of publication and establish that the imputation is false, defamatory and capable of being proved true or false. The court can order the defendant to publish the declaratory judgment so as to reach substantially the same audience as the original publication. Successful plaintiffs will be awarded costs.
- ◆ Publication of a correction should be a defence to a claim for non-economic loss. The plaintiff must seek the correction in writing. The correction must be published in the same place and manner or calculated to reach substantially the same audience as the original publication and it must be made promptly - within seven days of the request or in the next edition.
- ◆ The government should give urgent consideration to the development of privacy laws and their interaction with the law of defamation.