COMMUNICATIONS LAW BULLETIN
The Official Publication of the Australian Communications Law Association (ACLA)
ISSN 0272-1301 Edited by John Mancy Vol 2 No 2 July 1982

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Defamation Law Reform

The effort to secure a uniform Australian law of defamation may have moved a step forward at the February meeting of the Standing Committee of Attorneys-General.

CLB reproduces the full text from the official Commonwealth Record:

"Standing Committee of Attorneys-General

15 February 1982 - Decisions made by the Standing Committee of Attorneys-General today substantially advanced progress towards uniform defamation law in Australia the Attorney-General, Senator the Hon Peter Durack, said today.

He said the Attorneys-General had now agreed on most of the major issues which would form the basis of a uniform defamation law.

Ministers are to give further consideration to whether it is practicable for the uniform law to take the form of a code or whether, in view of the time that this would involve, it would be preferable in the first instance to provide for uniform modification of the common law rule.

The position of Queensland and Tasmania, which already have codes, was recognised in this regard.

The meeting of the Standing Committee took place in Queenstown, New Zealand under the chairmanship of the New Zealand Attorney-General, Mr J. McLay.

Senator Durack said that before today's meeting, the Standing Committee had considered aspects of reform of the defamation law based on the reports of the Australian Law Reform Commission and Western Australian Law Reform Commission.

Ministers had today agreed that a person wishing to plead justification as a defence should establish that his statement was for the public benefit as well as the truth.

Further consideration is to be given to the circumstances in which privilege exists. However, Ministers had agreed that the absolute privilege which at present attaches to statements between husband and wife should remain unchanged.

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Registered by Australia Post — Publication No NBH 4474. Produced by Media Law, GPO Box 3793, Sydney 2001. Inquiries and contributions to: The Editor, *Australian Communications Law Bulletin*, 167 Phillip Street, Sydney 2000 (DX 423).

In order to establish qualified privilege, it will no longer be necessary that the person making the statement had a duty to do so; it will be sufficient that the statement was made to a person with an interest in receiving it.

There is to be a uniform list of proceedings, reports of which will be entitled to qualified privilege.

Ministers had agreed that defamation actions should be commenced within one year of the plaintiff becoming aware of the defamatory matter or three years from the date of publication, whichever is the sooner.

It had also been agreed that there should be a right to bring proceedings in respect of statements which are defamatory of deceased persons. In such proceedings the court would be able to grant an injunction or require the publication of a correction. Further consideration is to be given to whether damages should be recoverable in such proceedings and, if so, the extent of such damages.

The Attorney-General said that as a result of the consensus reached today, there was substantial material that could be included in the draft model legislation now being prepared.

Senator Durack said he was hopeful that the remaining issues could be disposed of at the next meeting of the Standing Committee."

The decision of the Standing Committee of Attorneys-General to add a requirement of 'public benefit' to the defence of truth in defamation proceedings was "a major set-back to the development of a credible and coherent national unfair publication code", the Shadow Attorney-General, Senator Gareth Evans, said the next day.

He continued:

"It sounds the death-knell for the attempt by the Law Reform Commission to rationalise and liberalise this area of the law by removing the vague and uncertain test of 'public benefit' from those States where it now exists (NSW, Queensland, Tasmania, ACT), and substituting for it in all jurisdictions a much narrower and more precisely defined test of unfair privacy invasion.

"There does need to be some protection against the malicious or sensational dredging up of what the Law Reform Commission described as 'sensitive private facts relating to home-life, private behaviour, health, and personal and family relationships'.

"There can be no over-riding public interest, for example, in revealing some public figure's minor but embarrassing conviction long ago forgotten.

"But it is infinitely preferable to deal with these situations by precisely tailored provisions, rather than the open-ended public benefit test - which requires a defendant to establish that the publication was of positive advantage to the community, and which has operated as a severe fetter on press freedom.

"Other aspects of the Attorneys' statement give cause for some alarm. It seems likely - although no details have yet been released - that the proposed new rules about privilege will significantly cut back the number of government and official matters which can now be freely reported.

"Again, while it is defensible to introduce some limited forms of protection for the reputation of the recently deceased - as recommended by the Law Reform Commission - it would be a most unfortunate new inhibition on press freedom if, as is apparently being contemplated by the Attorneys, damages were to be payable in these circumstances.

"Overall, while some improvements in the present law have certainly emerged from the long drawn out deliberations so far, it seems likely that - if agreement on a uniform law is ever finally reached - the Attorneys' labours will produce not the carefully balanced structure recommended by the Law Reform Commission, but a ramshackle edifice lacking both principle and

certainty, whose only advantage over the present law will be its nation-wide application", Senator Evans concluded.

Further reaction to the decision was summarised in REFORM, Journal of the Australian Law Reform Commission, April 1982.

The following extract from Reform has been abbreviated:

> I never give them hell. I just tell the truth and they think it's hell. President Harry S. Truman

The Standing Committee of Federal and State Attorneys-General agreed that a person wishing to plead justification as a defence to a defamation action should have to establish that his statement was 'for the public benefit as well as that it was the truth'.

Under Australian law at present, truth alone is a defence to civil actions for defamation in a number of jurisdictions, whilst in others, it is necessary for the defendant to establish truth and public benefit or truth and public interest.

The ALRC report, **Unfair Publication** (ALRC 11), upon which moves for a single national law of defamation are based, proposed a different compromise to that now suggested by the ministers.

The ALRC suggestion was that truth alone should be the defence of justification. But, to compensate for the deletion of the uncertain element of 'public benefit', the ALRC proposed a carefully designed privacy action, where it was established that the publication complained of, though true, invaded, without public justification, the private zone of the subject.

The Federal Attorney-General, Senator Durack, said that the Attorneys-General had 'now agreed on most of the major issues which would form the basis of a uniform defamation law'. Earlier decisions at a meeting of the Committee in Perth in November 1981 are recorded in [1982] **Reform** 29.

No sooner had the announcement been made from Queenstown than the criticisms started.

In the same mood as Senator Evans' criticisms were the criticisms of the Law Council of Australia, the Law Institute of Victoria and the Victorian Bar Council (**Age**, 18 February 1982).

The Chairman of the Victorian Bar Council, himself an ex-ALRC Commissioner, Mr Brian Shaw QC, criticised the rejection of the ALRC's proposals 'without equally careful examination of the new proposals and a detailed explanation of the reasons for the change'.

The Chairman of the Law Council of Australia Defamation Law Reform Committee, Mr Tony Smith, said that the decision would result in defamation trials becoming longer, more expensive and more uncertain. He also said that it would make more difficult for the Australian media the decision of whether to publish or not.

Doubts were also expressed about the proposed uniform law by the Australian Press Council and by the NSW Attorney-General, Mr Walker.

Mr Walker's comments were directed particularly at the proposed uniform list of privileged documents which he said could drastically cut the range of matters which have enjoyed absolute privilege in his State, and also severely limit the defence of qualified privilege for newspapers, radio and television.

In view of these reservations by one of the key members of the Standing Committee of Attorneys-General, it seems clear that the future of the uniform Bill, even after it is settled by the Standing Committee of Attorneys-General, is far from certain. The Bill will then have to be presented to State Parliaments throughout Australia. Recent experience in respect of uniform credit and companies legislation suggests that much water may flow under the bridge before a national defamation law is achieved.