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EDITED BY MICHAEL BERRY

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NSW Attorney-General John Dowd



Criminal defamation and the road to uniformity

**The NSW Attorney-General John Dowd believes there should be a break on individuals
bringing defamation actions for personal reasons.**

Mr Dowd was giving his views about criminal defamation in a lunchtime address to members of CAMLA at the Hilton Hotel on Friday August 19.

Mr Dowd posed the question, "... if it is acknowledged that the practices which presently constitute criminal defamation are undesirable ... how can they be stopped?"

Mr Dowd said he agreed with Mr Justice Hunt of the Supreme Court and the NSW Director of Public Prosecutions who have suggested that there should be some discretion in deciding whether or not a prosecution for criminal defamation should go ahead.

"There should be some controlling factor to prevent the launching of such actions by individuals for personal reasons, without any consideration as to the interests of the community as a whole."

The NSW government has been guided by the views of the experts said Mr Dowd, and it has decided to include the recommended discretion in criminal defamation actions.

This discretion to prosecute or not, will be exercised by the Director of Public Prosecutions. In Mr Dowd's view, this will ensure that political considerations will not have any bearing on the exercise of the discretion. The change would not affect the individual's right to sue for civil defamation.

Mr Dowd said his government was also looking at reducing the limitation period under which defamation proceedings must be commenced.

"Where a person's reputation has been impugned, there is no logic in having a six year limitation period", Mr Dowd said. "In most, and probably all cases, the maligned person

will wish to clear his or her reputation at the earliest possible opportunity.

"The Government has been considering reducing the six year limitation period to six months for defamation proceedings.

"It should be noted that the proceedings would merely need to be commenced within the six month period. Any delays after that time, for example by lawyers or courts, would not bar the

person's right to bring action", Mr Dowd said.

In his speech to CAMLA members the Attorney-General invited suggestions from anyone who might help smooth the way towards a uniform defamation law.

One of his own suggestions was a co-operative scheme similar to the companies and securities arrangements shared by the states.

Violence on television

**The latest government inquiry into television violence
is using the BBC as a role model. How relevant is the
experience of Britain's "Aunty" to the
Australian television scene?**

The BBC's guidelines on television violence are the starting point for the inquiry into violence on television, initiated by the Minister for Transport and Communications, Senator Gareth Evans.

The inquiry is being conducted by the Australian Broadcasting Tribunal and is likely to produce the strongest guidelines so far to control the portrayal of violence on commercial television.

The Tribunal has no power to inquire directly into the operations of the ABC and SBS although both broadcasters have been invited to participate in the inquiry.

The 28-page booklet, "Violence on Television - Guidelines for Production Staff" was published last year by thirteen heads of

departments in BBC Television. Copies of the guidelines have been circulated to interested organisations and individuals throughout Australia as the basis for debate on the issue.

According to the Minister, "Possible outcomes of this inquiry could be a new set of relevant rules or guidelines, either in the form of an approved self-regulatory code or appropriate Tribunal standards".

The BBC guidelines are directed at the Corporation's production staff. They refer to news, current affairs, drama, children's television, natural history and promotional clips. There is no attempt to lay down a set of rules for programme-makers. In fact, the

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tion is justified only where the subject of the prosecution is such as to affect the community; it has nothing to do with vindicating or with protecting the reputation of the person defamed."

These principles had earlier been expounded by His Honour in *Spautz v Williams* when applying *Wood v Cox*, and *Stevens v Midland Countries Railway Co.*

- 7) It is ultimately the decision of the Attorney-General or the DPP to determine whether an indictment should be filed.

In an appendix to his judgement, His Honour elaborated upon the differences between s.50 of the Defamation Act and the tort of defamation. Separate causes of action in relation to each imputation do not arise from the statutory offence.

Furthermore, s.50(1) (b) requires that the probability that the publication would cause serious harm and the accused's knowledge thereof must exist at the time of publication.

Finally, His Honour appended an earlier passage of his judgement in *Spautz* concerning the need for reform of s.50 with a view to reinstating the leave provisions in respect to criminal defamation prosecutions (as applied prior to the 1974 Act). An applicant for leave was previously obliged to demonstrate that a matter of public welfare was involved, as distinct from a dispute between individuals. The notion of reforming the law so as to incorporate the requirement of leave prior to commencement of a criminal defamation prosecution had earlier been mooted by Viscount Dilhorne in *Gleaves v Deakin & Ors* 1980 AC 477 as follows (p.487-88):

"It would, I think, be an improvement in our law if no prosecution for criminal libel could be instituted without leave. There are many precedents for the leave of the Attorney-General or the Director of Public Prosecutions being required for the institution of prosecutions. In considering whether or not to give his consent, the Attorney-General and the Director must have regard to the public interest. The leave of a judge must be obtained for the institution of a prosecution for criminal libel against a newspaper (Law of Libel Amendment Act 1888, s.8), and where such leave is sought, the judge must consider whether a prosecution is required in the public interest: see *Goldsmith v Pressdram Limited*. As I do not myself regard it as very desirable that judges should have any responsibility for the institution of prosecutions, I would like to see it made the law that no prosecution for criminal libel could be brought without the leave of the Attorney-General or of the Director of Public Prosecutions."

The House of Lords in the *Gleaves* decision also lent weight to the test of "seriousness" (as compared with "triviality") in establishing the existence of criminal libel, and shifted from the earlier requirement that it involve the public interest or the likelihood of disturbance of the peace.

It should be noted that shortly after this decision the New South Wales Director of Public Prosecutions determined that no bill of indictment should be filed in respect of the informations laid by William Waterhouse. In his statement of reasons for that determination the Director accorded significant weight

to the judgement of Hunt J and accepted His Honour's assessment that lawful excuse of qualified privilege was a strong argument available to the two accused.

Whilst one can only speculate as to the outcome of the proceedings before the Magistrate had the Plaintiff chosen to give evidence, and whether, in that event, the DPP would have proceeded to file bills of indictment, the *Four Corners* case when read together with *Spautz* provides a useful analysis of the obstacles to be encountered by a prospective prosecutor in criminal defamation proceedings.

Robert Kaye is the joint author of "Defamation Law Practice", to be published by Butterworths.

Violence on television

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introduction to the booklet lays the decision making about violence firmly at the feet of the programme-maker:

"Decisions on whether to include violent material in any television programme are complicated and subtle. They change according to context, the time of transmission, the content of surrounding programmes and the current climate of the society in which we live. The most important element in making these decisions cannot be prescribed by these guidelines. They are the programme-maker's own common sense, human sensibilities, feeling for what is right, proper, decent, prudent and necessary to put before a general audience; an audience which may contain one's own and other people's children, one's own and other people's parents, the mentally disturbed and those who have experienced the very actions which are depicted on the screen."

The BBC also acknowledges the difficulty in providing a regulatory framework to control violence on television.

"There is a mass of confusing and inconclusive research into violence on television. Piecing together the findings, one is left with the impression that the relationship between violence on the screen and violence in real life is extremely complicated."

The BBC prefers to take the route of urging its programme-makers to take a reflective, "how would you feel?" approach to the use of violence in television programmes. They are urged to get advice from colleagues and to place themselves in the viewer's chair when deciding whether or not scenes are overtly violent.

This was a theme expressed in discussions at the recent Prix Jeunesse International in Munich. A Creed for Producers was

suggested to cover children's television in particular. The maker of children's programmes should endeavour to develop a child's positive self-image, confidence and dignity and help his or her capacity for sharing and caring and getting on with others.

One of the social differences of opinion between the BBC and Australian television programmers is at what time of the evening the viewing pattern changes from the whole family to just adults. In Britain the BBC has a well established policy of making 9pm the pivotal point of the evening's television. Any programme before that time is considered suitable for viewing by children.

In Australia the pivotal point is 8.30pm and it is interesting that the latest industry code established by the Federation of Australian Commercial Television Stations (FACTS) to cover programme promotions allows for the following depictions of violence after 8.30pm.

1. Use of guns or other weapons in a threatening manner.
2. Heavy punches or other physical violence against humans or animals.
3. Violence to, or abuse of, children.
4. Generally frightening situations.
5. Actions involving loss of life.
6. Close-up views of dead bodies.
7. Close-up views of wounded bodies.
8. Nudity or partial nudity.
9. Depictions of, or discussion of, sexual activity.
10. Improper language.
11. Condoning references to illegal drug use.

Recent research, although fragmented and inconclusive, points to special concern by viewers over real violence as presented on news bulletins. Of course, all major television news bulletins are broadcast within the family viewing period before 8.30pm.

The BBC's view is that a sense of shock is part of a full understanding of certain news stories - terrorist outrages, wars, natural disasters. In instances like these the BBC feels

The Problem of Violence

In this essay Will Wyatt assesses the influence of violence on British television and the obligations of the BBC to its audience.

Television brings us so much of the world that it must expect to be seen as part of the ills of the world. Violence is not the only or even the chief cause of complaint about television, but with violence, as with complaints about bad taste, sexual morality, language and much else, television is in the dock not only for its own alleged transgressions, but also as the most vivid portrayal of a world which is the cause of much worry, fear and regret.

The concern about violence on television is actually a number of quite different concerns, as the letters sent both to the Director-General and the Home Secretary have reflected. These concerns, while not conflicting, are about quite separate and not necessarily consistent aspects of violence and require separate attention. What gives a small child nightmares may be the least likely incident to arouse an aggressive teenager to action. What is a shocking scene to an elderly person may be viewed by others as a well-deserved act of retribution.

The worries about violence tumble over into wider unhappiness about the ways in which human beings behave to each other and how this is represented on the screen. The cry that there is too much violence seems often to be a howl of rage that people are not as one would wish them to be, that things are

not as they once were and that television not only shows this but, at times, appears to relish it.

"News does tend to be a catalogue of what has gone wrong in the world because what has gone right is, thank goodness, the routine."

One clear category of complaint is from those who are shocked, frightened or upset by individual violent incidents. This situation can be improved by giving viewers more and clearer information about what they are likely to experience in particular programmes, so that they come across material which is not to their taste as rarely as possible.

The BBC has an obligation to broadcast a service to all the people. This inevitably means that no one will be pleased all of the time by what he or she finds in the television schedule. It is right that there are occasions when the other fellow has his go. But it is a discourtesy for broadcasters to surprise viewers by failing to let them know what they are in for.

Forewarned is forearmed, and with clear information, viewers can and do exercise their choice.

Clint Eastwood films tend to be violent, but the genre is well known to the viewing public so that, while the huge audience which enjoys them can seek them out, those who dislike or disapprove of such material are able to steer clear. Thus, when Eastwood films are transmitted there are few complaints about violence, rather more about cuts that the BBC has made.

There are times when it is legitimate for programmes to shock, both in news and fiction. With some news stories - terrorist outrages, wars, natural disasters - a sense of shock is part of a full human understanding of what has happened. If there are pictures, with care, they should be shown. Simply telling people what happened may not be enough. What the news staff have to remember is that you cannot shock too often without ceasing to shock and, worse, robbing the audience of its capacity to be shocked.

The climate of opinion within which television is watched is constantly changing, and broadcasters need to be in tune with viewers' current sensitivities in order both to maximize the pleasure which their programmes may bring and to minimize any upset. In recent years there has been a heightening of

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that violence should be used to shock viewers. Again, in drawing the line, the BBC guidelines leave it to the good sense of the individual news editor.

"Try to anticipate the best feelings of the viewers - the moment when many will say to themselves: 'It is right for me to leave now. I have seen enough'. However, it is in the section on News that the BBC offers some does and don'ts.

"Take great care with pictures of dead bodies. Avoid close-ups, save in exceptional circumstances.

Grief should be reflected with restraint. Funeral coverage should not dwell on close-ups of the grieving ...

Reports of suicide may include the fact of

the method if editorially relevant - but not the details of the method.

Reports of rape cases should spare details."

One of the most useful reminders to news editors and current affairs producers is their propensity to become world-weary about real violence.

"The production team may have become used to the pictures and descriptions; the audience will come fresh to them. Remember your own first reactions."

One of the most potentially useful sections in the BBC booklet is a series of questions that programme-makers are urged to ask themselves when they are making editorial decisions. They include:

"Could the violence be implied rather than shown? Is the viewer meant to identify with the perpetrator? What is the reaction of

the victim? How long should the violence last? On the assumption that every programme-maker will want the world to be a better place is the violence in the programme likely to make the world less violent - or more?"

Unfortunately, there is no guidance as to how the programme-maker should go about answering these questions. The BBC prefers to, "rely on the good sense of every member of the team".

Given the variety of programme-making talent and range of editorial strengths within the television industry this rather unguided collection of guidelines is likely to produce an ad hoc and personalised approach to the portrayal of violence on television; a situation that is really no different to that which exists at present.

Michael Berry