

Defamation

Terms of Reference

In 1968, the Committee was asked to consider whether any alterations were necessary or desirable in the law of defamation in Western Australia.

Background of Reference

The law of defamation considers two competing interests: the protection of individual honour, reputation and dignity; and protection of freedom of expression and access to information on public affairs. The laws governing these matters in Australia are complex and varied. The existing law, developed in 19th century England, takes little account of changed social conditions and technological advances in communication.

Because of the breadth of the reference the Committee approached it in two parts. Part I was concerned with the law relating to the publication under the *Newspaper Libel and Registration Act 1884* (WA). The Committee submitted its report on that subject, in August 1972.¹ Part II of the project, dealing with defamation generally, was deferred in 1973 pending the outcome of moves towards a uniform law of defamation throughout Australia. In 1976, the Australian Law Reform Commission (ALRC) was given a reference to consider uniformity of legislation in the area of defamation. Consequently, the Attorney-General of Western Australia asked the Commission² to give active consideration to the remaining Part II of its project and keep abreast of progress made by the ALRC.

Nature and Extent of Consultation

Commission staff attended meetings with the ALRC in 1976 and 1977 to discuss the content of its research on defamation. In 1977, representatives from the Commission attended the ALRC public hearing on defamation held in Perth and a seminar at the Western Australian Institute of Technology. Both Commissions enjoyed a close working relationship and representatives met on several occasions to discuss progress on proposals. In June 1979, the ALRC published its report.³ The Commission submitted its independent report in October 1979.⁴

The role undertaken by the Commission in relation to this project proved challenging and rewarding. Although the fulfilment of the project imposed a considerable burden on the Commission's limited resources, the Commission and the ALRC nevertheless enjoyed a symbiotic relationship. For the first time in Australia, the ALRC and a state law reform commission shared the task of developing law reform proposals on a particular topic.⁵

Recommendations

In its report the Commission agreed with the ALRC on most issues. Specifically it agreed that:

- The distinction between libel and slander should be removed.
- The death of a person who was defamed when alive should not extinguish that person's cause of action.
- The death of a person who defamed another should not extinguish the latter's cause of action.

¹ Law Reform Commission of Western Australia, *Defamation: Privileged Reports*, Project No 8(I) (1972).

² The Law Reform Committee of Western Australia was formally reconstituted as a Commission on 19 January 1973. It acquired the conduct of all unfinished Committee projects.

³ ALRC, *Unfair Publication: Defamation and Privacy*, No 11 (1979).

⁴ Law Reform Commission of Western Australia, *Defamation*, Project No 8(II) (1979).

⁵ The Commission was of the view that the cooperative approach adopted in this project was an extremely worthwhile method of undertaking law reform in Australia. Although the Commissions expressed divergent views on some issues, uniformity of the law of defamation was the objective of both.

- There should be an action to prevent defamation of a deceased person within three years of the date of death.
- Truth should be a defence to a defamation action.
- Defences such as fair comment, limited (or qualified) privilege and fair reporting should be clarified and widened to allow more scope for the publication of material of public interest.

On two substantial matters, however, the Commission disagreed with the ALRC. The first of these was the right of action against a person who publishes sensitive private facts.⁶ As both Commissions were considering the protection of privacy generally⁷ it was the view of the Commission that it would be preferable to deal with publications that infringe privacy as part of these projects.

The second matter of disagreement concerned the ALRC's proposal to extend the defence of fair report. This proposal would permit publication of defamatory material written or spoken by another, and which is not adopted by the publisher, provided it is on a topic of public interest, the maker is identified, publication is reasonable in the circumstances and an opportunity is given to the person defamed to reply. The person defamed, however, would retain a right of action against the named originator. The Commission's concern was that a remedy against the originator of the defamatory statement might not always be available or satisfactory. Further, the defence might tend to invite the publication of unsubstantiated rumours.

Legislative or Other Action Undertaken

Following its release, the Commission's final report and the report of the ALRC on the same subject, together with a draft uniform Defamation Bill were placed on the agenda of the Standing Committee of Attorneys-General for consideration. In May 1985, the Standing Committee announced that it had been unable to agree on a uniform defamation law for Australia.⁸ The issue was reconsidered by the Standing Committee in 1997 and 1998 without agreement. The subject of uniform defamation laws was formally removed from the agenda in October 1998.

Currency of Recommendations

In 1992, the High Court recognised a freedom of political communication as a constitutional implication.⁹ Thereafter, defamation law, whether based on state, federal or territory legislation or the common law, was subject to this implied freedom.¹⁰ Recently, the High Court has reconsidered the law of defamation, expanding the common law defence of qualified privilege to make it available to publishers in the public media.¹¹

The Commission's recommendations primarily aim to create uniform legislation and, in the absence of such law, remain relevant. However, the recommendations should properly be considered with regard to the implied constitutional freedom of political communication.¹²

⁶ Whilst the Commission considered this proposal to be attractive, it was not convinced that a civil remedy, as opposed to an administrative one, was the most desirable way of protecting privacy interests. It was also concerned that debate over this policy issue could delay much needed reform of the law of defamation.

⁷ Law Reform Commission, *Privacy*, Project No 65(I) (referred 1976, withdrawn 1986); *Confidentiality of Medical Records and Medical Research*, Project No 65(II) (1990); Australian Law Reform Commission, *Privacy*, Report No 22 (1983).

⁸ Mr J M Berinson, Attorney-General of Western Australia, Press Release (3 May 1985).

⁹ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1997) 177 CLR 106.

¹⁰ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v Western Australian Newspapers Ltd* (1994) 183 CLR 211.

¹¹ *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96.

¹² It is also pertinent to note that the New South Wales Law Reform Commission considered the issue of defamation in its dedicated report on the subject in 1995: see, New South Wales Law Reform Commission, *Defamation*, Project No 75 (1995).

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Action Required

Consultation and cooperation between state and federal governments is required for the enactment of an appropriate uniform legislative scheme to deal with the issue of defamation. To enable this, the subject will need to be reintroduced to the agenda of the Standing Committee of Attorneys-General.

Priority – Medium

Although the issue of uniform defamation laws has consistently been raised at meetings of the Standing Committee of Attorneys-General, it has proved difficult to achieve consensus and commitment across all jurisdictions. Nevertheless, it is desirable that steps be taken to resolve problems arising from existing inconsistent and incompatible laws. Such problems are apt to increase with the further development of new communication technologies such as the Internet and text-messaging.