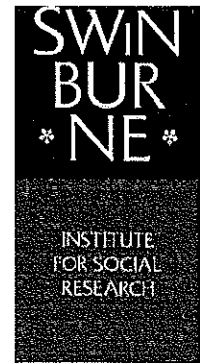


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29 May 2009

Helen Ross-Soden
Parliament of Victoria Law Reform Committee
Parliament House
Spring Street
East Melbourne VIC 3002

Email: vpirc@parliament.vic.gov.au

Dear Ms Ross-Soden

REVIEW OF THE MEMBERS OF PARLIAMENT (REGISTER OF INTERESTS) ACT 1978

Please find attached a submission to this review from the Democratic Audit of Australia. The submission addresses the 'Restrictions on Publications' provision of the legislation.

Information about the Democratic Audit and its work is available at:
http://democraticaudit.org.au/?page_id=2

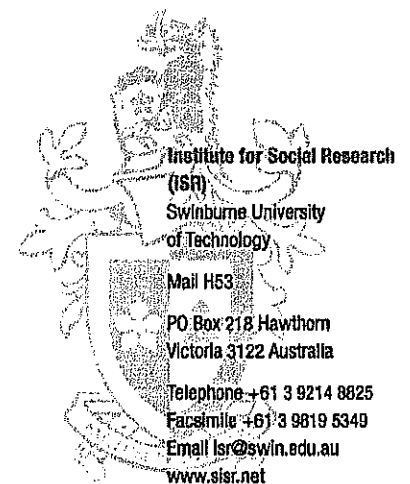
While the Democratic Audit is now located within the Institute for Social Research at Swinburne University of Technology, the views expressed in the submission are not to be taken as being those of the University.

Thankyou for the opportunity to contribute to this review. Our contact for this submission is Jock Given: 03 9214 4887, jgiven@swin.edu.au

Yours sincerely

A handwritten signature in black ink, appearing to read "B. Costar". The signature is fluid and cursive.

Professor Brian Costar
Coordinator, Democratic Audit of Australia



ABN 13 628 586 609
CRICOS Provider 00111D

Parliament of Victoria Law Reform Committee

REVIEW OF THE MEMBERS OF PARLIAMENT (REGISTER OF INTERESTS) ACT 1978

Submission by the Democratic Audit of Australia

About the Democratic Audit of Australia

The Democratic Audit conducts audits to assess Australia's strengths and weaknesses as a democratic society. Initially based at the Australian National University, since early 2008 the Audit has been based at the Institute for Social Research, Swinburne University of Technology, with continuing input from researchers at ANU and other universities. The views expressed in the submission are not to be taken as being those of the participating universities.

Restrictions on publications

This submission addresses the 'Restrictions on Publications' provision of the legislation the Members of Parliament (Register of Interests) Act 1978 (the Act).

The Act establishes a Register of Members' Interests and restricts what can be published about it. The Clerk of the Parliaments is required to table a summary of information contained in MPs returns as a Parliamentary Paper (s. 7). Publication of any information derived from the Paper is restricted under section 8, 'Restrictions on publications':

After a summary has been laid before the Parliament pursuant to section 7(4) and published as a Parliamentary Paper a person shall not publish whether in Parliament or outside Parliament any information derived from the Parliamentary Paper unless that information constitutes a fair and accurate summary of the information contained in the Parliamentary Paper as is published in the public interest nor publish any comment on the facts set forth in the Parliamentary Paper unless that comment is fair and published in the public interest and without malice.

Wilful contravention of this or other requirements of the Act are a contempt of the Parliament.

Introducing the legislation, the Premier and Treasurer Mr Hamer said:

The Bill prohibits any malicious use of the information published in the Parliamentary paper but will not impede the publication of a fair and accurate extract from a Parliamentary paper or any comment therein that is fair and in the public interest. [*Assembly Hansard*, 21 November 1978, p. 6028]

The restrictions drew on the concepts of 'fair report' and 'fair comment', defences to actions for defamation that were available under the law at the time. This meant a person publishing information from the Register that was not a 'fair and accurate extract' or fair comment not only ran the risk of being unable to defend a defamation action brought by an MP or anyone else defamed by the publication, but was in contempt of Parliament.

Since then, defamation law has been standardised across the country. A new *Defamation Act 2005* (Vic) commenced on 1 January 2006. It is part of a uniform national code, created through the passage of mirror legislation in other states and territories. A particularly significant change was the codification of defences, including several relevant to this issue:

Defence for publication of public documents (s. 28)

Defence for fair report of proceedings of public concern (s. 29)

Defences for honest opinion (s. 31)

The full text of these provisions is attached.

Section 28, adapting the previous 'fair report' defence, allows material to be published even though it is defamatory, provided the matter is contained in a public document or a fair copy of it, or in a fair summary or extract from a public document. The defence will be defeated if the person claiming to have been defamed can show the material 'was not published honestly for the information of the public or the advancement of education'. Public documents include 'any report or paper published by a parliamentary body, or a record of votes, debates or other proceedings relating to a parliamentary body published by or under the authority of the body or any law', court and tribunal judgments, documents issued by governments for the information of the public and public registers. This clearly includes the Parliamentary paper prepared by the Clerk.

Section 31, adapting the previous 'fair comment' defence, allows material to be published even though it is defamatory, provided:

- it is identified as opinion rather than a statement of fact;
- the opinion was honestly held at the time of publication;
- it is based on 'proper material' (material that is substantial true, privileged, or would be defensible under the 'fair report' defence); and
- it relates to a matter of public interest.

In addition to these changes to the law, the internet now makes it possible and desirable for information from the Register to be published online.

It is submitted that the changed legal context offered by these important changes to defamation law, the technical possibilities of the internet and the changed expectations of citizens makes the specific restrictions on publication in the *MPs (Register of Interests) Act* redundant.

Arguments in favour of change

The language of section 8 no longer reflects current defences available in actions for defamation. The uniform national legislation represented an historic modernization of law in this area, endorsed across all states and territories. It should now be accepted as the contemporary code for the regulation of speech affecting people's reputations. Other specific restrictions, such as section 8, should be removed.

MPs aggrieved about the publication of material drawn from the Register will still be able bring actions in defamation against the publishers. As in other actions alleging defamation, they will succeed if they can show the material is defamatory and the publisher is unable to show that any defences apply.

The internet has greatly expanded the range of people able to publish and expectations about the accessibility of public registers. The public and the Parliament will be best served if information from the Register is available online and restrictions on publication of information from it are as simple and consistent as possible.

Arguments against change

Repealing section 8 would mean that publishers who publish information drawn from the Clerk's summary of the Register which is neither 'fair report' nor 'fair comment' will no longer be in contempt of Parliament. A legal remedy will only be available to an MP if they choose to pursue a private action.

Although defamation actions will still be able to be brought by aggrieved MPs, the uniform national legislation also introduced several limitations on them:

- they must be brought within one year, extendable by a court to three years in certain circumstances (see ss. 5(1AAA), 23B, 23C *Limitation of Actions Act 1958*);
- the maximum damages award for non-economic loss, other than aggravated damages, is limited to \$250,000 indexed from 2006 (s. 35); and
- actions cannot be brought or continued over material published about a deceased person, including material published while they were alive (s. 10).

Recommendation

- The s. 8 'Restrictions on Publication' provision should be removed, leaving MPs interests to be safeguarded by the general law of defamation.
- Members' returns should be published online within 14 days of their submission.

Democratic Audit of Australia

29 May 2009

Attachment

Extracts from the Defamation Act 2005 (Vic)

28 Defence for publication of public documents

- (1) It is a defence to the publication of defamatory matter if the defendant proves that the matter was contained in—
 - (a) a public document or a fair copy of a public document; or
 - (b) a fair summary of, or a fair extract from, a public document.
- (2) For the purposes of subsection (1), if a report or other document under the law of a country would be a public document except for non-compliance with a provision of that law about—
 - (a) the formal requirements for the content or layout of the report or document; or
 - (b) the time within which the report or document is prepared, or presented, submitted, tabled or laid to or before a person or body—the report or document is a public document despite that non-compliance.
- (3) A defence established under subsection (1) is defeated if, and only if, the plaintiff proves that the defamatory matter was not published honestly for the information of the public or the advancement of education.
- (4) In this section—

public document means—

 - (a) any report or paper published by a parliamentary body, or a record of votes, debates or other proceedings relating to a parliamentary body published by or under the authority of the body or any law; or
 - (b) any judgment, order or other determination of a court or arbitral tribunal of any country in civil proceedings and including—
 - (i) any record of the court or tribunal relating to the judgment, order or determination or to its enforcement or satisfaction; and
 - (ii) any report of the court or tribunal about its judgment, order or determination and the reasons for its judgment, order or determination; or
 - (c) any report or other document that under the law of any country—

- (i) is authorised to be published; or
- (ii) is required to be presented or submitted to, tabled in, or laid before, a parliamentary body; or
- (d) any document issued by the government (including a local government) of a country, or by an officer, employee or agency of the government, for the information of the public; or
- (e) any record or other document open to inspection by the public that is kept—
 - (i) by an Australian jurisdiction; or
 - (ii) by a statutory authority of an Australian jurisdiction; or
 - (iii) by an Australian court; or
 - (iv) under legislation of an Australian jurisdiction; or
- (f) any other document issued, kept or published by a person, body or organisation of another Australian jurisdiction that is treated in that jurisdiction as a public document under a provision of a law of the jurisdiction corresponding to this section; or
- (g) any document of a kind specified in Schedule 2.

29 Defences of fair report of proceedings of public concern

- (1) It is a defence to the publication of defamatory matter if the defendant proves that the matter was, or was contained in, a fair report of any proceedings of public concern.
- (2) It is a defence to the publication of defamatory matter if the defendant proves that—
 - (a) the matter was, or was contained in, an earlier published report of proceedings of public concern; and
 - (b) the matter was, or was contained in, a fair copy of, a fair summary of, or a fair extract from, the earlier published report; and
 - (c) the defendant had no knowledge that would reasonably make the defendant aware that the earlier published report was not fair.
- (3) A defence established under subsection (1) or (2) is defeated if, and only if, the plaintiff proves that the defamatory matter was not published honestly for the information of the public or the advancement of education.
- (4) In this section—

proceedings of public concern means—

- (a) any proceedings in public of a parliamentary body; or
- (b) any proceedings in public of an international organisation of any countries or of the governments of any countries; or

- (c) any proceedings in public of an international conference at which the governments of any countries are represented; or
- (d) any proceedings in public of—
 - (i) the International Court of Justice, or any other judicial or arbitral tribunal, for the decision of any matter in dispute between nations; or
 - (ii) any other international judicial or arbitral tribunal; or
- (e) any proceedings in public of a court or arbitral tribunal of any country; or
- (f) any proceedings in public of an inquiry held under the law of any country or under the authority of the government of any country; or
- (g) any proceedings in public of a local government body of any Australian jurisdiction; or
- (h) proceedings of a learned society, or of a committee or governing body of the society, under its relevant objects, but only to the extent that the proceedings relate to a decision or adjudication made in Australia about—
 - (i) a member or members of the society; or
 - (ii) a person subject by contract or otherwise by law to control by the society; or
- (i) proceedings of a sport or recreation association, or of a committee or governing body of the association, under its relevant objects, but only to the extent that the proceedings relate to a decision or adjudication made in Australia about—
 - (i) a member or members of the association; or
 - (ii) a person subject by contract or otherwise by law to control by the association; or
- (j) proceedings of a trade association, or of a committee or governing body of the association, under its relevant objects, but only to the extent that the proceedings relate to a decision or adjudication made in Australia about—
 - (i) a member or members of the association; or
 - (ii) a person subject by contract or otherwise by law to control by the association; or
- (k) any proceedings of a public meeting (with or without restriction on the people attending) of shareholders of a public company under the Corporations Act held anywhere in Australia; or

- (l) any proceedings of a public meeting (with or without restriction on the people attending) held anywhere in Australia if the proceedings relate to a matter of public interest, including the advocacy or candidature of a person for public office; or
- (m) any proceedings of an ombudsman of any country if the proceedings relate to a report of the ombudsman; or
- (n) any proceedings in public of a law reform body of any country; or
- (o) any other proceedings conducted by, or proceedings of, a person, body or organisation of another Australian jurisdiction that are treated in that jurisdiction as proceedings of public concern under a provision of a law of the jurisdiction corresponding to this section; or
- (p) any proceedings of a kind specified in Schedule 3.

(5) In this section—

law reform body of a country means a body (however described and whether or not permanent or full-time) established by law to conduct inquiries into, and to make recommendations on, reforming the laws of that country;

learned society means a body, wherever formed—

- (a) the objects of which include the advancement of any art, science or religion or the advancement of learning in any field; and
- (b) authorised by its constitution—
 - (i) to exercise control over, or adjudicate on, matters connected with those objects; and
 - (ii) to make findings or decisions having effect, by law or custom, in any part of Australia;

ombudsman of a country means a person (however described and whether or not permanent or full-time) authorised by law to investigate complaints about the actions or other conduct of any public officials or public bodies of that country;

relevant objects of a learned society, sport or recreation association or trade association means—

- (a) in relation to a learned society—objects of the kind referred to in paragraph (a) of the definition of *learned society* in this subsection; or
- (b) in relation to a sport or recreation association—objects of the kind referred to in paragraph (a) of the definition of *sport or recreation association* in this subsection; or

- (c) in relation to a trade association—objects of the kind referred to in paragraph (a) of the definition of *trade association* in this subsection;

sport or recreation association means a body, wherever formed—

- (a) the objects of which include the promotion of any game, sport, or pastime to the playing of which or exercise of which the public is admitted as spectators or otherwise and the promotion or protection of the interests of people connected with the game, sport, or pastime; and
- (b) authorised by its constitution—
 - (i) to exercise control over, or adjudicate on, matters connected with the game, sport, or pastime; and
 - (ii) to make findings or decisions having effect, by law or custom, in any part of Australia;

trade association means a body, wherever formed—

- (a) the objects of which include the promotion of any calling, that is to say, a trade, business, industry or profession and the promotion or protection of the interests of people engaged in any calling; and
- (b) authorised by its constitution—
 - (i) to exercise control over, or adjudicate on, matters connected with a calling or the conduct of people engaged in the calling; and
 - (ii) to make findings or decisions having effect, by law or custom, in any part of Australia.

...

31 Defences of honest opinion

- (1) It is a defence to the publication of defamatory matter if the defendant proves that—
 - (a) the matter was an expression of opinion of the defendant rather than a statement of fact; and
 - (b) the opinion related to a matter of public interest; and
 - (c) the opinion is based on proper material.
- (2) It is a defence to the publication of defamatory matter if the defendant proves that—

- (a) the matter was an expression of opinion of an employee or agent of the defendant rather than a statement of fact; and
 - (b) the opinion related to a matter of public interest; and
 - (c) the opinion is based on proper material.
- (3) It is a defence to the publication of defamatory matter if the defendant proves that—
- (a) the matter was an expression of opinion of a person (the *commentator*), other than the defendant or an employee or agent of the defendant, rather than a statement of fact; and
 - (b) the opinion related to a matter of public interest; and
 - (c) the opinion is based on proper material.
- (4) A defence established under this section is defeated if, and only if, the plaintiff proves that—
- (a) in the case of a defence under subsection (1)—the opinion was not honestly held by the defendant at the time the defamatory matter was published; or
 - (b) in the case of a defence under subsection (2)—the defendant did not believe that the opinion was honestly held by the employee or agent at the time the defamatory matter was published; or
 - (c) in the case of a defence under subsection (3)—the defendant had reasonable grounds to believe that the opinion was not honestly held by the commentator at the time the defamatory matter was published.
- (5) For the purposes of this section, an opinion is based on *proper material* if it is based on material that—
- (a) is substantially true; or
 - (b) was published on an occasion of absolute or qualified privilege (whether under this Act or at general law); or
 - (c) was published on an occasion that attracted the protection of a defence under this section or section 28 or 29.
- (6) An opinion does not cease to be based on proper material only because some of the material on which it is based is not proper material if the opinion might reasonably be based on such of the material as is proper material.