

**Hurley, Chris**

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**From:** Hurley, Chris  
**Sent:** Thursday, 20 April 2006 9:35 AM  
**To:** 'Robinson, Catherine'  
**Cc:** asa-council@archivists.org.au  
**Subject:** RE: Update on 2004 Conference proceedings

Catherine Robinson  
 President, ASA  
 PO Box 77  
 Dickson ACT 2602

Dear Ms Robinson,

I refer to your email communication of yesterday and its attachment. It is unclear whether you are referring this document to me as a draft for consultation or as a courtesy with regard to a document you intend to publish unilaterally regardless of any objections I may have. In either case, I take the strongest possible exception to it. I regard it as libellous and if (after taking advice) it appears to me that action for damages would be likely to succeed I must advise you now that I intend to take such action against you in the event that you proceed with its publication.

A year ago, I advised you that I regard what Council has been doing as damaging to my reputation. At that time, grounds for action against you lacked the ingredient that Council had not as yet made any public statement of the reasons for their actions. Damage to my reputation would have to be inferred from Council's actions and this would have been difficult to prove. If you proceed to publish this statement you will have supplied the missing ingredient and given unquestionable cause of offence. You will have substituted words for action. I have not hitherto sought a recantation because there were no words for you to recant. By proceeding in this way you will now be making a statement the recantation of which must form part of any claim I make against you. Your resolve to sustain this position will need to be of a most steadfast kind if you decide to proceed.

The only acknowledgement of fault on your part in the statement is of flawed process and unclear communication. I have not sought (and do not now seek) such acknowledgements but if, in the context of a justification of your past actions, this is the only form of recantation you propose to make it is insufficient. By trying to defend your past actions, you repeat the libel that lies at the heart of your offence. You also state that in taking action to suppress my paper you were guided by advice that "while the Society could mount a defence to any such legal action, it was likely that such a case would be lengthy and expensive". Perhaps you forget that I have a copy of the legal opinion upon which you acted at that time and it contains nothing to justify such an assertion. To add a lie to the libel simply compounds the offence. Whatever advice you may have received subsequently, it does not justify this statement which clearly implies (falsely) that it was an ingredient in the advice upon which your original decision was based.

You state "that there were no precedents or process in place to handle such a situation". The essence of my claim for damages will be that, as my colleague Sue McKemmish and I have both pointed out, ASA has an established record of publishing material that is prima facie defamatory (presumably on a judgement that, notwithstanding the danger of expensive legal proceedings, no litigant would be reasonably likely to succeed). By singling out my work for extraordinary treatment, notwithstanding the precedents, Council was not (as claimed) acting in the absence of precedent but acting contrary to well-established practice. The clear implication of these words is that my work gave rise to an unprecedented situation. Council's position, therefore, unrepeated in this document, is that my work was of such an egregious and reckless nature that the danger of successful prosecution from a claim for damages made this departure from precedent justified. Nothing could be more likely to injure the reputation and professional position of a widely published author within the professional community to which these words will be addressed. You are, of course, entitled to take (or to have taken) legal advice and to act (or to have acted) upon it provided you did so in a manner that did not damage me; but stating your opinions in print for the world to read is a very different matter, unjustified by any necessity for you to do so, and a most reckless course for you to embark upon.

You try to make out that the legal position is (or was) disputed and that you had regard to both the issues of the defamatory nature of the material and the likelihood of successful prosecution. This is whitewash. The

opinion on which you acted stated simply that the material was defamatory and declined to go into the issue of defences. The author of that opinion said he was "in no position as to advise as to whether a defence of truth would succeed" nor whether my article was fair comment - key ingredients in any responsible consideration given to the question of publication. Your communications with me at that time dealt only with the fact of defamatory nature of the material not with the likelihood of a successful defence. It was only subsequently that I raised the issues of defence with you by obtaining a QC's opinion. You make out that these are conflicting legal views on the same issues. The legal advice upon which you initiated action declined to consider the very point upon which my QC's advice was predicated - viz. the likelihood of an action succeeding. Moreover, the advice I received was in terms that hardly leave in doubt the impossibility of your sustaining a position that my work was so much worse than any other material that ASA has ever had to deal with that ASA must take precautions against me that it had not felt it necessary to apply to anyone else. The QCs advice, you will recall, was that he "could not conceive" how a successful action could be taken. To state now that ASA was justified in acting cautiously in my case where it had not felt so obliged in any other instance (despite such an unequivocal statement from a leading QC) asserts the very thing that is damaging to me - viz. that I had placed matters on a uniquely dangerous footing - whereas I feel I have had to take extraordinary steps to disabuse you of any such notion.

Whatever may have been your state of mind in the past, you cannot now, as if nothing had happened and with impunity, repeat and justify holding to that opinion as if it was still a reasonable position to hold (or to have held) - i.e. without acknowledging that you were wrong. The fact that you are now co-operating in having the paper forwarded (in the form approved by my QC) for consideration for publication in the ASA's own journal makes such an acknowledgement (in the context of a statement such as this) or else a decent silence about the whole question of justification for your past actions an imperative. You say "this might seem" to be a reversal and then go on to deny any change of position on your part by stating that your approach is due to flaws of process and communication not to errors of judgement. You thus assert and reaffirm the reasonableness of your original position with the attendant damage that does to my reputation - putting it beyond argument that this is now your intention. If, notwithstanding all this, you make a statement that purports to justify your application to my work of a standard that ASA has manifestly not applied to the work of any other author and has not applied to its own statements on the very subject that my paper deals with, your actions, combined with the words you are about to utter, must do considerable harm to my reputation as a prudent, careful, and responsible author.

You plead a justification in caution. But there is a much more plausible explanation. What was the difference between my work and all other utterances and publications of a defamatory nature issued by the ASA? Was it, as suggested, that my work was, despite the opinion of competent counsel, so much more dangerous than anything else that ASA has ever published? Or was it that, unlike any of the other works and utterances that have been published, my piece was uniquely critical of ASA Council and its activities - the very body that took it upon itself to break with tradition and suppress my piece where it had passed others (arguably more likely to attract litigation)?

C Hurley

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**From:** Robinson, Catherine [mailto:standards@records.nsw.gov.au]  
**Sent:** Wednesday, 19 April 2006 4:30 PM  
**To:** Hurley, Chris  
**Cc:** asa-council@archivists.org.au  
**Subject:** Update on 2004 Conference proceedings

Dear Chris

I'm writing to advise you about progress on publication of the 2004 Conference proceedings. The editor of the Conference proceedings has advised me that the electronic version of the papers should be available on the ASA website from early May. In relation to publication of the printed version, the Managing Editor has been in discussion with the ASA Editorial Board regarding the publication of the printed papers/CD ROM and we hope to have a process in place soon to publish in paper and on CD.

In the latest issue of the Bulletin, ASA Council has made a statement about the issues arising from the

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publication of the 2004 Conference papers. A copy is attached for your information. I trust the statement is in line with your understanding of Council's position. Please contact me if you would like clarification of any of the issues covered in the statement.

Yours sincerely

Catherine Robinson  
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Dear Members,

Over recent months ASA Council has been dealing with a number of issues arising from the publication of the proceedings of the 2004 ASA Conference in Canberra.

Council has been in discussion with Chris Hurley about the publication of his conference paper in the conference proceedings. Some members will already be aware of these issues through postings on the aus-archivists mailing list over the past four months. This report to members sets out some of the background to these issues and actions being taken to resolve them.

### **Publication of 2004 Conference proceedings - background**

In late 2004, while preparing the proceedings of the Canberra Conference for publication, the Canberra Conference Committee sought guidance from Council about Chris Hurley's paper. The Committee was concerned that some portions of the paper might be defamatory. The Committee, on Council's recommendation, then sought legal advice in relation to the publication of the paper. The Committee and Council were advised that sections of the paper were defamatory, and that legal action could be taken against the Society as publisher of the paper. Council was also advised that while the Society could mount a defence to any such legal action, it was likely that such a case would be lengthy and expensive.

Council made a decision not to publish the paper as it was submitted, on the grounds that an action for defamation, even if successfully defended by the Society, would involve the Society in considerable expense. Council acknowledges that this was a cautious approach to take, but we believed that we were acting to protect the assets and interests of the Society.

Over the next few months Council and Chris Hurley were in communication about possible amendments to the paper to ensure its publication in the conference proceedings. Chris Hurley submitted revised versions of the paper, however the latest version that Council received was still considered to be potentially defamatory. In November 2005, Council decided to proceed with publication of the conference proceedings without including Chris Hurley's paper.

Chris Hurley has posted messages to the aus-archivists and RMAA mailing lists, expressing his concern about Council's actions and the lack of defined process. These concerns have been reiterated by other colleagues on the mailing lists, including Sue McKemmish and Barbara Reed in December 2005.

Council has had a number of difficulties in dealing with publication of Chris Hurley's paper, particularly as there were no precedents or process in place to handle such a situation. This was the first time that Council had been asked to give guidance on the publication of potentially defamatory material. Although there was no procedure to follow, Council believes that at all times we acted in good faith and in the interests of the Society. However we also acknowledge that our communication with Chris was not always clear and consistent.

### **Publication of 2004 Conference proceedings - next steps**

At the Council meeting in February 2006, Council resolved to pursue publication of Chris Hurley's paper in the conference proceedings. While this might seem like a direct reversal of a previous decision, it reflects an acknowledgement by Council that our process may have been flawed and that our communication with Chris was not always clear. It also reflects Council's wish to work with Chris to ensure publication of his paper.

Council is now working with Chris Hurley to ensure his paper is published with the Canberra conference proceedings. In the short term we propose to publish the conference proceedings on the ASA website. We are also examining strategies to ensure we meet the Society's obligation to produce a hard-copy version of the proceedings.

### **Review of ASA editorial policy and process**

The publication of the 2004 Conference proceedings has also raised issues about the Society's editorial policy and procedures. Council proposes a review to look at:

- the role of the ASA Editorial Board, which currently has editorial responsibility for *Archives and Manuscripts* only, to consider whether it should have broader responsibilities for general publication and editorial policy within the Society or whether a separate board should be established for this purpose; and
- the current practice of publishing conference proceedings, and to explore whether the Society should continue to do this or find another avenue for making conference papers more widely available (such as publication in *Archives and Manuscripts*) and to define processes which should be followed for the recommended outcome.

We intend that this review will involve the current Board and the Society's membership in establishing the terms of reference and the review itself.

### **Review of ASA governance framework and mechanisms**

The irony of this whole discussion is that Chris Hurley's paper deals with governance and accountability issues. Council recognises that the problems around publication of Chris' paper have highlighted some issues in relation to the Society's governance mechanisms.

Council has resolved to establish a review of the Society's governance framework. This could include review of the Society's rules, code of ethics, and structure. We propose that the scope and approach of the review would be initiated through the formation of a new committee of the Society. In order to give this committee the necessary independence and authority, we propose that the committee be appointed at (and by) the next AGM to report to the subsequent AGM.

Council's proposed review of the Society's governance framework is not intended to preempt or undermine Chris Hurley's proposed amendment to Rule 7 at the next AGM, as set out in his posting to aus-archivists on 28 February. We intend that the governance review can occur in addition to or subsequent to any rule changes approved by the membership.

### **Communication with Members**

Council will provide regular updates to members through this Bulletin on the progress of the various plans outlined above.

Regards,

Members of the ASA Council