



defamationreview@justice.nsw.gov.au

Dear Sir/ Madam

I understand from The Conversation website that you are reforming defamation law and as a consequence I then read your discussion paper. I am 100% in support. But I would like to have an additional say, please. I live in NSW and am not a lawyer, nor a person who can afford one. I have 3 times been threatened with defamation for exposing fraud. Twice I retreated. But in all 4 cases some 2- 5 years later the companies closed after committing a fraud on others. I don't like defamation because it's a shield, too frequently, by powerful crooks.

You are looking at the problem in the manner as lawyers are trained to do. A legal balancing of rights- reputation v free speech- is a good way, but not the only way. Many who aren't lawyers see it as a question of power. The powerful in society use defamation law to subjugate the truth. Not because the balance is wrong or not well-intentioned. But because most legal threats occur in an expensive system. You haven't built the defamation laws taking that into account. You assume a rational judge. Most defamation I see is a 2 man law firm that behaves like a rottweiler. In those circumstances the system you have designed just fails. The only control on rotweillers is costs but half the defendants cannot afford \$ 200,000 in legal fees. So the rottweillers savage everything in sight.

So you haven't dealt with defamation itself- just defences to claims. The core problem is that no lawyer can tell me what this phrase means in reality :

statement which may lower the applicant in the estimation of right-thinking members of society generally".

Rottweillers say any statements that "hurts" or "offends" their clients are defamatory. They say that they are "right-thinking" and that they rightly think their client doesn't want to be criticised because criticism "lowers". They want to control the narrative. It's all bluster but because "right thinking" is so vague they just pile on the damages so will easily ASSERT they meet your serious harm test.

The lawyers then say then you have to spend money on other lawyers to prove the truth. That you could have gone to the authorities (knowing full well they gave a 5 year backlog). What happens is that lawyers abuse vague law.

So make the law less vague because the only real cure is to limit what defamation means in the first place. Rather than creating long vague tests, why not try to be precise? That's what the rule of law should be. For example, defamation can only be threatened if it:

1. Alleges the person committed a serious crime such as sex offences, murder, fraud and treason; or
2. Was scurrilous and INTENDED primarily to recklessly hurt by lies; or
3. Was made by a competitor or for commercial profit ; or
4. Alleged the person lied for profit

and so as to exclude (at the gate head, so to speak):

- retorts and abuse
- statements made by any person to or concerning a politician. I have real sympathy for Sarah Hanson-Young but why are claims of misogyny defamatory ?
- statements broadcast to less than 10,000 people (closed Facebook groups)
- arguments between spouses that can better be resolved in the family court

In addition "easy" defences without going to court should be either:

- if the matter relates to a dispute that can be resolved by a government body, or a club of which they are members, or a tribunal (ie rent tribunal or Land and Environment Court or Department of Consumer Affairs, ACCC) and the maker offers to use that forum to resolve the dispute and to publish its findings in place of the original statement of which offence was taken.
- The complaint is given an equal right to reply. This is not an offer to "make amends" because people can have a legitimate dispute and consumers can better understand what the cross allegations are. There is too much being swept under the table by the big end of town.

Stop the lawyers using vagueness and threats as a mean of intimidation.

1. Make it if they lose, then lawyers pay you \$100,000 regardless of your time of work in fact. Putting lawyers at risk would stop the free kicks they enjoy.

2. In a claim, a judge shall immediately make an analysis at the first appearances having regard to:

- the relative economic power of each side
- the presence of lawyers and equality of legal skills
- the need to ensure defamation upholds free speech that holds the powerful accountable
- proportionality by reigning in of ambit claims for damages used to coerce or intimidate

and suggests mediation, arbitration, or how a retraction can best heal conflict in Australian society or in the case of a clear breach take immediate rectifying action , so as to best optimise the goals of this Act.

Otherwise, the proposed public interest defence is a binary analysis - you are in or out. A better back up would be taking the same factors into account. So if an investigative journalist fails the test her motives reduce the "damages" , relative to say a competitor posting on face book.

I suspect you won't do much. It seems a very lawyer centred process with journalists input. But just remember the law has to apply at all levels of society. On the one hand, if the law doesn't unwind conflict people just sort it out in the pub with fists. We don't want that! But if it gets so expensive that you see cheats using the vague law to be a bully you just turn to Twitter anonymously to get justice.

That's my 2 cents worth. Thanks for hearing me out. I do hope this reform isn't just about the big end of town.

Regards

Duncan Mouat

It needs to be narrowed at the river mouth to 1. Pedophilia and sex crimes 2. Fraud . 3. Treason 4. A crime. 5. Matters of equivalent gravitas. Its not about the court cases. Its about lawyers outside courts threatening huge economic loss if you don't cover up their clients bad behaviour.