

TITLE:

*Media Defendants Performing Fourth Estate Functions
Deserve Better Protection
From Australian Defamation Law*

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On

The Review of Model Defamation Provisions

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Introduction

Australia, and Sydney in particular, has often been disparagingly referred to as the defamation capital of the world. Judge Judith Gibson, Defamation List judge of the District Court of New South Wales, noted that such references to Australian defamation law can be traced to as early as 1990 and asked “what damage is done to the standing of the Australian legal system if we continue to be derided” in this way (Gibson, 2019). The chorus of voices lamenting the state of Australian defamation law includes journalism academic and author, Louisa Lim, writing in the *The New York Times* about “how badly broken Australia’s defamation laws are” (Lim, 2019). Such sentiments are reflected elsewhere – including by Australian media organisation groupings, law reform advocates, judges and lawyers. Almost a century ago Street ACJ, in explaining the rationale for treating the truth defence in defamation law as a complete defence, referred to the “proper level” for a person’s reputation thus:

[A]s the object of civil proceedings is to clear the character of the plaintiff, no wrong is done to him by telling the truth about him. The presumption is that by telling the truth about a man, his reputation is not lowered beyond its proper level, but is merely brought down to it. (*Rofe v Smith’s Newspapers Ltd*, p. 21).

This purpose often gets lost in the maze of rules that govern defamation law (Fernandez, 2008, p. 17). The task of ascertaining the proper level for a person’s reputation has increasingly been buffeted by the realities of the 21st Century publishing landscape. Ordinary citizens have an unprecedented opportunity to have their say on public platforms; elaborate corporate communications and public relations infrastructure are engaged in managing reputations; and a growing number of individuals and groups play advocacy roles that often target personal reputations. A wide range of factors make the ascertainment of the ‘proper level’ for a person’s reputation extremely difficult. It is not the object of defamation law to perform a freestanding role as an arbiter of the proper level for a person’s reputation. The object of defamation law is to provide an avenue for the settlement of disputes arising from a plaintiff’s claim that their reputation has been unlawfully tarnished. The media, by virtue of its ‘watchdog role’ has traditionally been vulnerable to defamation complaints. Strong arguments can be advanced for better safeguarding the media against chokes on its ability to play its vital role:

If it is accepted that the media, for all its imperfections, is an essential component of a liberal democracy, then the publication of well-researched, probing stories on all aspects of our complex political, social and economic mix – health, transport, cities, politics, corporations, creative endeavours, sport – is nothing short of crucial. (Ackland, 2018).

It is readily acknowledged that a press that can hold the powerful to account remains an essential component of our democracy (Hancock, 2018). This proposition is trite and it should not be in question but such is the contemporary reality that powerful forces have been working to undermine trust in the media, and consequently on democracy itself, as the discussion below will show.

Defamation law reform and the media

The NSW Department of Justice report of the statutory review of the *Defamation Act 2005* issued in June 2018 while expressing support for national uniformity, noted the NSW government's recognition of significant changes since the introduction of the Model Defamation Provisions that led to the National Uniform Defamation Laws (NUDL, the Act). The report noted that “the manner in which information is published and transmitted has changed significantly, particularly with the exponential growth in reliance on digital publications and communications, interactive online forums and blogs” (NSW Department of Justice, 2018, para 1.7). The report found that the “views of stakeholders expressed in submissions, correspondence and direct consultation over the course of the Review period indicated that the Act is *generally well supported, and operates effectively*” (ibid, para 1.14, emphasis added).

Among the stakeholders cited as being “generally supportive of the Act” were a coalition of 12 media organisations, under the banner of *Australia's Right to Know*, that comprised major Australian publishers, and the Media, Entertainment and Arts Alliance. The coalition's submission acknowledged “the significant features and achievements of the Uniform Acts” and stated that “[o]f greatest note” were the following – the speedy non-litigious dispute resolution achieved by a suite of provisions most notably, the *offer of amends* procedure and requiring plaintiffs to articulate their claim at an early stage; the adoption by all jurisdictions of the truth alone as a defence; greater public discourse on corporations by removing the right of corporations to sue; retention of jury trials

recognising the importance of community standards and involvement in proceedings; and the statutory cap on damages which has facilitated early resolution of matters” (Australia’s Right to Know Coalition, no date but possibly 2011). The coalition said the Uniform Acts “did provide a regime which has proved effective in many respects” (ibid). While the media coalition’s submission acknowledged the “significant features and achievements of the Uniform Acts” it also identified various areas for reform focus, including: where policy objectives had not been achieved; where judicial interpretation was inconsistent with the legislature’s intent; where community expectations had changed as a result of rapid technological change; where the Act allowed plaintiffs to avoid the cap on damages; amending the section 30 defence of Qualified Privilege to overcome the interpretation of the section in a way that requires journalists to meet unrealistic standards; and making the comment defence less technical and addressing its failure to reflect the manner in which members of the community express their opinions.

While the ARTK coalition’s position stated above indicated a degree of satisfaction in the media community regarding how the Act was operating, the coalition suggested that the review “should be used as a means of ensuring defamation law continues to uphold: the balance between individuals’ rights to reputation and freedom of speech and expression; the guiding principles that led to the implementation of the Uniform Acts agreed by SCAG; the need to ensure defamation law meets ongoing technological changes”. The coalition’s submission contained several suggestions for reform. Some of the coalition’s suggestions for reform can be summarised as follows: (a) address a loophole to ensure that plaintiffs do not circumvent the statutory cap on damages; (b) address the diminution of the effectiveness of the sections relating to *contextual truth*; (c) address weaknesses in the defence of *qualified privilege*; (d) address the overly technical nature of the defence of *comment* so that it takes into account the manner in which members of the community express their opinions especially on blogs, forums and opinion sites and to better protect those who express their views on matters of public interest; and (e) reform the defence of *fair report* to avoid an undue technical application of the defence.

A largely similar grouping, under the umbrella of Joint Media Organisations, in a later ‘briefing’ to coincide with the tenth anniversary of the Act, recommended more than two dozen amendments to update the law (Joint Media Organisations, 2016). Some of the recommendations covered the earlier ground. Among the 2016 recommendations were:

to remove the limited scope in the present law for some classes of businesses to sue for defamation; introduce a ‘serious harm’ threshold test for suing, similar to the UK’s section 1 of the *Defamation Act 2013*; introduce a single publication rule; permit plaintiffs to only bring one set of proceedings in relation to the same imputations against all defendants; and replace section 30 of the Act with the public interest defence in section 4 of the UK Act so as to give publishers a better chance of success. The foregoing discussion prompts a question as to the true extent of the claimed support for the Act and whether it truly “operates effectively”, as set out above.

Defamation law – negatives and positives

Evaluating the merits, or otherwise, of defamation law is a fraught exercise. Balancing the competing primary interests – the protection of reputation and the protection of freedom of expression – is not amenable to easy solutions or formulae. The weighing up of the competing interests cannot ignore the specific circumstances of each case in which the tension arises. The rules relied on must accommodate the demands of the specific circumstances while also serving the important objective of providing for certainty on how the rules would apply. The following discussion is a modest attempt at considering some of the positive and negative aspects of defamation law. Sight must not be lost of the fact that whether any feature of defamation law is a negative or a positive is often in the eyes of the beholder. While most in the media and those who empathise with the media’s defamation predicament have expressed strong reservations about the efficacy of defamation law, caution has been sounded about relaxing it further in the media’s favour. In the view of former High Court judge Ian Callinan:

The law (NUDL) rightly allowed the media a great deal of latitude. The media, as always, wished for more, claiming that it was difficult for them to defend defamation cases. That claim was wrong. Anybody who has had to prove the negative, the absence of good faith for a plaintiff, knows what a formidable defence this is. (Callinan, 2012)

In his view, the media exploited the opportunity presented by the 2005 reform to “change the law, by tilting the balance further in their favour. That is exactly what happened” (ibid). He agreed with Ray Finkelstein QC that plaintiffs, rather than defendants, were at a “disadvantage” and that the imbalance should be remedied (ibid).

Negatives of defamation law

Among the criticisms of defamation law – perhaps the foremost criticism – is its level of complexity. The Western Australia committee considering defamation law reform in 2003 observed that the application of the law to certain circumstances was far from certain resulting in an inhibition on freedom of communication (Western Australia Defamation Law Committee, 2013, p. 3). More recent assessments suggest that not much has changed. A former NSW Court of Appeal judge Peter McClellan in a speech in 2009 said he had “little doubt that the path [taken in the 2005 Act] was not the correct one – either from the plaintiff or the defendant’s viewpoint” (McClellan, 2009). In the same speech he cited judicial colleagues, speaking pre-NUDL, as criticising Australian defamation law for being “the Galapagos Islands division of the law of torts” (David Ipp); for being “a complex maze for the initiate, let alone the novice” (Steven Rares QC); and of having “labyrinthine complexities” (*Renouf v Federal Capital Press*, p. 58). Others have described defamation law as: an “intellectual wasteland”; being “perplexed with minute and barren distinctions”; an area where “there is a great deal...which makes no sense”; an area that contains “anomalies and absurdities for which no legal writer ever has had a kind word”; as “dripping with contradictions and confusion”; and as having defences that are an “unprincipled mishmash” (Fernandez, 2008, pp. 155–156, references omitted). In *Chakravarti v Advertiser Newspapers*, long before the introduction of the NUDL, Kirby J observed:

The commonest criticism is that both law and practice are unnecessarily complicated. Such complexity has consequences which are often unfortunate for plaintiff and defendant alike. But also for the public which has its own interest, particularly where...the matter complained of involves issues of more than private concern. (pp. 561–2)

It may be asked how much has changed since an American law professor, writing almost three decades ago, mused about the merits of abolishing libel law:

As it stands today, libel law is not worth saving. What we have is a system in which most claims are judicially foreclosed after costly litigation. It gives plaintiffs delusions of large windfalls, defendants nightmare of intrusive and protracted litigation, and the public little assurance that the law favours truth over falsehood.

If we can do no better, honesty and efficiency demand that we abolish the law of libel. (Anderson, 1991, p. 489)

It has been suggested that one United States case – *Rosenbloom v Metromedia* – almost abolished libel, when it handed down a decision that was heralded by some as the ultimate victory for the mass media over the threat of libel (Overbeck, 2008, p. 141). Although there was no majority opinion in that case, the three-justice plurality opinion seemed to foreclose libel judgments against the media whenever the plaintiff was involved in an issue of public interest, no matter how private a citizen he or she might be (ibid). And because proving actual malice turned out to be so difficult, it appeared for a time in the early 1970s that the media were virtually free from being sued for libel (Overbeck, 2008, p. 142).

There are many people with vast expertise in Australian defamation law and it is not possible to do justice to all of them in this submission for their consideration of defamation law reform. For the purposes of this submission some are cited more extensively. The author's immediate objective is mainly to draw attention to the enormity of the reform task. Australian defamation barrister Dr Matt Collins QC, who actively practises in the defamation law area, speaking at a Melbourne defamation law seminar in 2018, advised that we should be pragmatic and recognise that no common law country, not even Australia, "is about to abolish the law of defamation and replace it with a rights-based analysis. And yet the need for reform is acute" (Collins, 2018). For the purposes of illustration, a "rights-based" approach towards formulating defamation law could entail an inquiry that examines the competing interests and the justifications for interfering with the asserted rights. Such an inquiry might: ask of the plaintiff whether and how the defendant's speech has damaged their reputation; ask of the defendant why their free speech right should prevail over the plaintiff's right to reputation and in turn consider the value of the defendant's speech, whether it was in the public interest for it to be published, whether the publication was fair, whether malice was absent, and whether the speech occurred on an occasion deserving of special protection (ibid). Collins added: "Put crisply, we would likely devise defamation laws that look rather like the exercise that is undertaken by the European Court of Human Rights, when defamation verdicts from European signatories to the European Convention on Human Rights are considered by that court (ibid).

In respect of the current NSW Discussion Paper, Gibson (referred to above) identified some weaknesses, which are set out in some detail here as it provides a convenient overview of some key issues the present review must address, coming from someone at the forefront of practical operation in this area. These are among the weaknesses of the Discussion Paper Gibson cited:

- that it relied on the submissions made to the long-delayed 2011 review rather than call for new submissions;
- that the earlier submissions are “not only out of date but limited in scope”, except for the 2016 submission from Australia’s Right to Know which was the only submission to raise “modern” issues such as social media, the single publication rule and serious harm, but it predates events since 2016;
- that it “has taken up piecemeal issues” in respect of the defences of contextual truth, fair report, honest opinion, and made no reference to the striking out of so many justification defences in the Federal Court;
- that there are other gaps arising from the decision not to call for fresh submissions e.g. the profound lifestyle changes driven by online publication, issues such as the ‘internet rage’, online intermediary liability issues, and various inconsistencies and uncertainties in the law that “can only be described as a mess”; and
- that there was an “absence of understanding of technology and resultant social change” (Gibson, 2019).

Gibson suggested that some “big picture” issues the Discussion Paper could look at include:

- the place for defamation have in an online world where everyone is a publisher and can be sued;
- the social cost of defamation actions – people selling homes to pay unchecked legal costs that are such a feature of defamation litigation;
- the abuse of process and costs reform;
- how Australians balance the tension between the right to know and the protection of reputation;

- the “novel and disturbing” rate of failure of the truth defences in the Federal Court;
- what ‘good journalism’ is for the purposes of the qualified privilege defence;
- whether there should be a constitutionally guaranteed right of freedom of speech?;
- why only damages are awarded when many plaintiffs are only really after false publications to be taken down, or corrections; and
- how to fit the policy directives for defamation legislation into the “seething cauldron of State-Federal politics” if the Federal Court disregards the decisions of other courts in certain aspects? (ibid).

Legal commentators writing in the Media, Entertainment and Arts Alliance’s *Press Freedom Report*, stated:

At present, the NUDL is complex, incoherent and substantially stacked against media defendants, thereby stifling public-interest journalism. (Bartlett, Levitan & Rosenthal, 2018, p. 10)

In the view of Collins (referred to above) the problems with the current defamation law regime include: the NUDL are in many respects a pragmatic compromise and not a very coherent one at that; there is a baffling obsession with imputations, a cancer that began in NSW has now spread to the entire country; Australia’s defamation laws predate the internet; nowhere in the elements of the cause of action or in the defences is there a direct reference to the two important fundamental rights that defamation laws are supposed to balance – the right to freedom of expression, and the right to reputation; damage to reputation is not necessary to found a cause of action for defamation – it is enough that a person is exposed to hatred, contempt or ridicule and as a result, too often in Australia, it has become a cause of action to compensate for hurt feelings even where the plaintiff has suffered little to no reputational damage; Australia’s defamation laws do not sufficiently focus on the right to reputation nor on freedom of speech; and the principal defences of truth, fair comment (or honest opinion), and privilege all have the public importance of freedom of speech as their rationale, but nowhere is that importance codified (Collins, 2018). Collins stated:

I have done entire defamation trials, for the defendant, where it has not even been relevant to talk about freedom of speech (ibid).

Collins observed that two critical ways in which our defamation laws are failing: (a) they cannot protect reputations when they are unjustifiably attacked by the publication of damaging and demonstrably false material via the internet; and (b) our defamation laws stifle freedom of expression on important matters of public interest – in cases of serious journalism in relation to matters that its targets do not want exposed (ibid). Collins stated:

Often in these cases, as a citizen, I have been in no doubt at all that the stories are valid and correct and the public ought to know them; but as a lawyer I have had to advise that they cannot be published or, if they have been published, I have had to advise that the media will lose if they seek to defend their journalists at trial (ibid).

Ascertaining the full financial cost of a defamation action is difficult but it would be safe to say that the costs tend to be enormous. In the *Hockey v Fairfax Media* case, for instance, each side is estimated to have spent about A\$1 million on it (Jabour, 2015). In another case, *The Australian* newspaper ran up costs of about \$1.5 million against Dragan Vasiljkovic (Captain Dragan) after it revealed that he had committed war crimes in Croatia and although the newspaper won the costs could not be recovered (Berkovic, 2018). The staggering costs and potential damages awards associated with defamation actions exerts a chilling effect on speech. There is merit in establishing alternative dispute resolution mechanisms in the defamation area on a more solid footing. As the chair of the Australian Press Council Neville Stevens stated: “In some cases the Press Council can be an alternative to costly defamation action” (Stevens, 2018).

The impact of defamation law on journalists’ work was brought into stark relief in a 2018 survey by the Media, Entertainment and Arts Alliance completed by more than 1200 respondents. The survey showed that “25 per cent of journalist respondents reporting having a story stopped from going to publication for fear of defamation proceedings as a result” (McInerney, 2018, p. 10). The burden posed by defamation law on media defendants is illustrated colourfully by one journalist’s observation in reference to the media’s difficulty in explaining to the public why former Australian Broadcasting managing director Michelle Guthrie was sacked:

It sucks that our defo law is so bad that you can't explain the reasons behind a major decision like the leadership of the national broadcaster w/out fear of getting sued. (Karp, 2018)

Another journalist has noted, there are “important, high profile stories that don't get told because of the chilling effect of defamation law, and the high cost of actions” (Bachelard, 2017). There has been longstanding recognition of the potential for defamation law to protect undeserved reputations. In its report in 1995, the New South Wales Law Reform Commission wrote:

The result of relegating the determination of the truth or falsity of the defamatory matter to a defence of justification is that the issue of truth or falsity may not be, and usually is not, litigated in defamation actions, save on the issue of damages. On the one hand, plaintiffs who are not required to put falsity in issue, *can, in theory, utilise defamation actions to protect a reputation which is undeserved.* (NSW Law Reform Commission, 1995, para 4.9, emphasis added).

Long ago Lord Diplock in *Silkin v Beaverbrook Newspapers Ltd* observed:

[O]ver the years the law has maintained a balance between, on the one hand, the right of the individual...to his unsullied reputation *if he deserves it*, and on the other hand, but equally important, the right of the public...to express their views honestly and fearlessly on matters of public interest, even though that involves strong criticism of the conduct of public people. (pp. 745–746, emphasis added)

It is also said that the law will not permit a plaintiff to recover damages in respect of injury to a reputation that she or he does not have or ought not to have (*M'Pherson v Daniels*, p. 451). The starting point of the law, it has been said in a leading defamation text, is that the claimant is presumed to have and to enjoy an unblemished reputation and it is up to the defendant to rebut that (Milmo & Rogers, 2004, p. 7). The law of defamation has been controversial “because it has provided protection to criminals and the corrupt, to rogues and villains, preventing exposure of their true characters and maintaining their undeserved reputations” (George, 2006, p. 3). Former Serbian paramilitary commander Dragan Vasiljkovic, referred to above, who unsuccessfully sued an Australian newspaper for defamation, was convicted of war crimes in Croatia (Milekic, 2018). Former NSW government minister Eddie Obeid, has been described by media lawyer Michael Bradley as “the eternal poster boy for bare-faced political corruption, and a current inmate of Her

Majesty's prisons" was a successful defamation plaintiff (Bradley, 2018b). In his view, Australian MPs "are the world's most litigious" (ibid). He wrote further:

Queensland Premier Joh Bjelke-Petersen also sued everything that moved, filing more than 20 suits. His entire cabinet at one point memorably jointly sued the opposition leader for calling them all corrupt. Which, really, they were (ibid).

In another article, Bradley wrote that the practical reality of defamation litigation is that it is "hellishly expensive, it's slow, it's a mess. Win or lose, the one thing it will never deliver is vindication" (Bradley, 2018a). It is not just politicians that present a defamation threat to public discussion of matters of legitimate public concern. One of Australia's largest banks, the Commonwealth Bank, is said to have been funding a defamation action filed against a consumer advocate for alleged defamation against a bank executive (Ferguson, 2015). This was years before the bank became among those in the financial sector to attract recommendations for "sweeping changes" by the Banking Royal Commission (Clench, 2019). Leaving aside the media's difficulty in confronting stories involving powerful persons and institutions against the present defamation law regime, even the question of whether a person such as a convicted criminal can be libel-proof remains unsettled and was described in one judgment as "a difficult question, and there is very little authority on the issue" (*Wraydeh v State of New South Wales*, para 47).

Positives of defamation law

In defence of retaining defamation law it has been said that "[n]o system of civil law can fail to take some account of the right to have one's reputation untarnished by defamation. Some form of legal or social constraints on defamatory publications are to be found in all stages of civilization, however imperfect, remote, and proximate to barbarism" (*Manning Hill*, p. 161). Lord Nicholls in *Reynolds v Times Newspapers Ltd & Ors*, similarly observed that reputation is "an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being...Protection of reputation is conducive to the public good" (p. 622). Many examples may be cited in support of the proposition that defamation law serves a useful purpose and that such support can also be found among journalists. The Joint Media Organisations has acknowledged: "The law of defamation *rightly protects the reputation of individuals*" (2016, p. 2, emphasis added). Support can be found for the

protection of reputation even when a large award is made such as in the case of *Wagner & Ors v Harbour Radio Pty Ltd & Ors*. Veteran journalist Mark Day observed that the award of \$3.7 million against broadcaster Alan Jones was “deserved” as he had engaged in a “sustained and deliberate campaign” that Queensland’s Wagner brothers were responsible for 12 deaths and that they had engaged in corrupt practices – accusations that he could not substantiate (Day, 2018). The court found Mr Jones showed “a wilful blindness to the truth or falsity of what was broadcast” (*Wagner & Ors v Harbour Radio Pty Ltd*, para 826; also see paras 835, 840 and 857). In that case, it is arguable that the case was not strictly in the domain of ‘journalism’ although it involved the ‘media’. Jones has been said to be “not a journalist” (Day, 2018). The court found that none of the five staff Jones used were either journalists or researchers and that Jones considered that his listeners were his best researchers (*Wagner & Ors v Harbour Radio Pty Ltd*, para 818). Jones is also said to have a history of “unsubstantiated lacerating of innocent citizens” (Day, 2018). In as much as journalists may deem defamation law a scourge, journalists themselves have, on occasion, found utility in the law of defamation as plaintiffs when their own reputations were impugned (see *Carleton v ABC*; and *Kenny v Australian Broadcasting Corporation*).

The above discussion of the negatives and positives of defamation law is not intended to be exhaustive. Inevitably the defamation debate space is largely dominated by the media itself which has a vested interest in the subject and this creates the potential for a ‘distortion’ of the debate. Such a distortion of itself, however, ought not to dilute the force of the media’s clamour for reform.

Overlap between defamation and other harms

In focusing on defamation reform, sight must not be lost of the nexus between defamation and other types of harms inflicted upon individuals. As Gibson has observed:

The line between defamation, hate speech and vulgar abuse, in an internet world, has never been more uncertain. Reform of defamation law needs to be effected in concert with appropriate legislation for other internet publications which troll, harass or lie in circumstances which may go beyond (but still include) defamation. (Gibson, 2018)

Similar observations can be found in discussions about harms spread online as can be seen in the examinations conducted in many jurisdictions often described as ‘fake news’ and other kinds of online harms. For example, in the United Kingdom the government has issued a White Paper aimed at designing a new regulatory framework and non-legislative package (Department for Digital Culture, Media & Sport and the Home Office, 2019, para 49, Executive Summary), aimed at addressing a variety of problems, including widespread illegal and unacceptable content online that threatens national security and the safety of children, the danger of the use by hostile actors of online disinformation to undermine democratic values and principles, the promotion of gang culture and incitement of violence, and the use of the internet to harass, bully or intimidate people (paras 2–6, Executive Summary). No reference is made specifically in the document’s Executive Summary or in the White Paper itself to defamation or to damage to personal reputations although there is a brief reference to a “worry about children damaging their reputations” (Department for Digital Culture, Media & Sport and the Home Office, 2019, *Executive Summary* and Department for Digital Culture, Media & Sport and the Home Office, 2019, *White Paper*).

An action in defamation has a broad sweep. A publication is defamatory if it tends, in the minds of ordinary reasonable persons, to injure the reputation of the person concerned either by disparaging that person; causing others to shun or avoid that person; or subjecting that person to hatred, ridicule or contempt (*Sarina & Anor v O’Shannassy*, para 44, citing *Halsbury’s Laws of Australia*). Social media platforms, in particular, as one commentator wrote in *the New York Times*, play host to vile abuse where “swarming mobs who rise out of nowhere, leave people broken” (David Brooks cited in Tognini, 2019). Tognini, a Western Australia-based columnist wrote about abuse she receives from “every-day people using a platform to abuse with anonymity and without repercussions”:

I’ve been called a c..., a whore, a slag, a bimbo, a f...wit, a dumb bitch... All of this for the crime of holding an opinion someone doesn’t like. (ibid)

Such matter arguably qualifies to be characterised as defamatory, although in such a case the platforms permitting the carriage of such content should also be called to account. Tognini’s experience is routinely replicated across social media and women bear the brunt of unhinged attacks.

Defamation is often bound up in one or more of the other rights an individual may invoke in order to curtail the flow of information that is damaging to reputation. For example, concerns about defamation or damage to reputation can simultaneously arise where the individual's right or concern may be characterised as an invasion of privacy. Such examples arise when politicians, for instance, come under scrutiny for conduct some might characterise as being of legitimate public concern but which can also be argued as being out of bounds on the premise that such scrutiny impinges on the complainant's personal privacy (Albrechtsen, 2018; Maiden, 2019a; Bagshaw & Hunter, 2018; Bradley, 2018a). Concerns about confidentiality and reputational damage can also be bound up in the same set of circumstances (Peel, 2019). Such instances of overlap add to defamation law's complexity in that the scope of defamation law can be unduly enlarged and make it difficult to apply.

Harms arising via the internet and social media platforms

The demands on the law of defamation have come a long way since the twenty-fourth century BC when the vizier of the Fifth Dynasty king Izezi is said to have commanded: "Do not repeat slander; you should not hear it, for it is the result of hot temper" (Australian Capital Territory Community Law Reform Committee, 1995, citing Maxims of Ptahhotpe in section on 'Background', maxim No 23'). Today, in Australia, "two-thirds of cases now involved the internet", according to judge Gibson who runs the defamation list in the NSW District Court (Whitbourn, 2018). Traditional media are no longer the sole gatekeeper of published material.

It's a problem that's particular to the 21st century – information is everywhere instantaneously, and the media no longer has the kind of gatekeeper role it used to have. (Ingram, 2019)

Hundreds of millions of ordinary people with access to the internet and social media publishing platforms have an unprecedented capacity at their fingertips to publish and be heard – and to spread calumny and other online harms. For the most part the social media companies and internet service providers have managed to stave off tight regulatory oversight of their content by claiming to be postmen rather than publishers. However, as New Zealand's Prime Minister starkly stated in the wake of the 2019 Christchurch Mosques Massacre:

We cannot simply sit back and accept that these platforms just exist and that what is said on them is not the responsibility of the place where they are published. They are the publisher. Not just the postman. There cannot be a case of all profit no responsibility. (Ardern, 2019)

The regulatory framework governing liability for harms spread online has been outstripped for a long time and nations are grappling with the growing problem. A substantial portion of Twitter traffic has been said to constitute “pointless babble” according to one university research study (American Press Institute, No date). Former prime minister Malcolm Turnbull expressed it thus:

The virality of social media gives lies and crazy claims – no matter how mad they appear – salience in themselves, which means you have to respond very hard. (Johnston, 2019)

Traditional media are far more tightly regulated through self-regulation, co-regulation, legislation, professional practice codes and the courts. Social media, on the other hand, presents regulators with often intractable dilemmas compounded by resistance to regulation from the ‘tech giants’ (e.g., Facebook, Google and Twitter) and despite their insistence on being platforms for and champions for free speech “they are hell-bent on controlling the message and remain largely unwilling to be held to account” (Gorman, 2019). In a section, in a UK official report on an inquiry into disinformation, discussing Facebook’s willingness to be regulated, Facebook’s CEO Mark Zuckerberg has been chastised for having “shown contempt towards both the UK Parliament and the ‘International Grand Committee’, involving members from nine legislatures from around the world” (Digital, Culture, Media and Sport Committee, 2019, para 29). As Day observed, slanderous and toxic commentary runs rife on social media:

It is much more difficult to police than mainstream media, but allowing a two-tier system where publishers are bled dry while social media bullies and abusers remain free to operate with impunity is unfair and undesirable. (Day, 2018)

The media and media personnel with particular visibility, sometimes loosely referred to as ‘mainstream media’, are more vulnerable to threats of legal action. While “negative online behaviours” are amplified through the internet, it is not easy to regulate “dangerous speech, excitable speech, offensive speech, extremist discourse, cyber bullying, trolling, doxing and flaming” (Smith, 2019). Knowing exactly when the figurative line has been

crossed has become far more complex to interpret and even more challenging to manage (ibid). Governments are becoming increasingly concerned about the spread of harms online and have introduced or are contemplating stricter legislation. Germany's NetzDG law is cited as "the most rigorous legislation so far" (ibid). In the view of former Australian former prime minister Malcolm Turnbull the time has come for politicians and business to rethink ways to deal with the "fake news and falsehoods" running on tech giants' platforms (Johnston, 2019). Under new law targeting "abhorrent violent material" that has come into force in Australia in the wake of the 2019 Christchurch Mosques Massacre, social media giants face billion-dollar fines and their executives could be jailed (Hennessy, 2019). The objective of the law, passed on 4 April 2019, is to ensure that internet service providers or those who provide content or hosting services "take timely action to remove or cease hosting abhorrent violent material" available through their services (*Criminal Code Amendment (Sharing of Abhorrent Violent Material) Bill 2019*. Explanatory Memorandum, p. 5). It is also not only the 'fake news' phenomenon that has shone a strong spotlight on the role played by tech giants and social media companies.

In the UK, Twitter, Facebook and Google have set up a regime to bring about "rapid takedown" of material that is in contempt of court under arrangements with the Attorney-General's Office (Bowcott, 2019). This follows an effort by the A-G in the wake of the discharging of a jury and order for a retrial in the case of *R v F & D* in 2015. Following the aborting of that trial the A-G issued a 'call for evidence' to gather information on the impact that social media has on the criminal justice system (Attorney-General's Office, UK, 2019). After considering the responses the UK Government decided that "whilst there are new challenges with the use of social media, these challenges are not unmanageable" and that "existing tools are available" to mitigate against the problems that arise (ibid). The A-G has indicated that his office will consider findings from the government's proposed White Paper on the wider issue of online harms (ibid).

As nations become spurred to step up efforts to regulate the online space in the wake of the Christchurch Mosques Massacre, Zuckerberg has recently indicated a receptiveness to a "more active role" for regulation of the internet (ABC News, 2019) and showed an appetite for new rules that recognise that people do not want private companies "to be making so many decisions around speech", among other things (Swan, 2019). This position comes after "years of rejecting calls for increased regulatory oversight" (Quodling, 2019). While the areas Zuckerberg has identified for new

regulatory initiatives does not expressly include defamation (the four areas identified are *harmful content*, *election integrity*, *privacy*, and *data portability*), the potential exists to also address defamation. The internet previously enjoyed special treatment by virtue of being viewed as “subordinate distributors” (Gillooly, 1998, pp. 248–249). The time is ripe, however, to claw back the earlier liberties given to internet entities operating in the publishing space. Such an approach will alleviate the problem of overload on the defamation system caused by non-media actors.

Who are the parties?

At the heart of any attempt at reforming defamation law lies a need to consider the interests of two primary parties – those who seek recourse from the law of defamation and those who face liability from defamation law, respectively, plaintiffs and defendants. Efforts to address the interests of both sides must confront the reality that on each side there are parties with differing justifications for their claimed entitlement to preferential treatment from the law. Thus, for instance, on the plaintiffs’ side of the fence, those with superior means to address claimed damage to their reputations or whose exposure to public scrutiny attracts strong justifications, must be considered differently from those who are vulnerable and whose ‘public scrutiny exposure level’ is very low.

In Australia, in the area of defamation, a breakdown of the parties involved suggests a picture that conflicts with general perception. The courts are said to be dealing with an explosion of litigation between ex-spouses, neighbours and former business partners settling scores over their social media posts (Berkovic, 2018). One analysis by NSW District Court judge Judith Gibson covering 91 defamation judgments over a four-month period showed that the majority involved ordinary people suing each other, and only one third involved media defendants (ibid). According to another study which considered the emergence of disputes between individuals over posts on various digital channels “it seems a large slab of defamation action in Australia is now disputes between individuals over comments posted on social media, websites, or other digital platforms” (Wilding, 2018).

In considering defamation law reform close attention needs to be paid to the interests of freedom of speech and the role of the media in servicing those interests. While it is true that freedom of speech, as former High Court Chief Justice Robert French

recently reminded in a special report on freedom of speech in Australian institutions of higher education, “is not and has never been absolute”, it is also true that it is of “paramount importance” (French, 2019, p. 103), and “has a special and legal societal significance in Australia” as elsewhere (p. 213).

The term ‘media’ itself has undergone significant change over the years and presented conundrums caused by definitional challenges including as to ‘media’, ‘journalist’, ‘journalism’, ‘news’, ‘current affairs’ and ‘the public interest’. Gibson illustrates one challenge:

These new arbiters of online truth [citizen journalists, online bloggers] and falsity are not going to abide by journalists’ codes of ethics or Press Council rulings; most of the time, they are not even journalists. (Gibson, 2018)

The definitional problem pertaining to journalist/journalism has persisted for some time – who is a ‘journalist’ or what exactly is ‘journalism’ for the purposes of determining associated rights and responsibilities? Any adjustment to the defamation ‘balance’ that impacts on freedom of expression must take into account the special role of the Fourth Estate. In that respect, it requires clarity as to who constitutes the Fourth Estate and the definition of terms such as – ‘journalist’ and ‘journalism’. These terms are mired in controversy, confusion and ambiguity. For example, Australian *shield laws* (*journalist’s privilege*) adopts definitions that enlarge (for example, to include bloggers and citizen journalists) or narrow the scope (excludes bloggers and citizen journalists) for the purpose of determining who qualifies for source protection (Fernandez, 2013). Even prominent journalists have been divided as to whether Wikileaks founder Julian Assange, who was arrested on charges brought by the United States, deserves the media’s support for his and his organisation’s work in relation to journalism (Greste, 2019; Kwan, 2019; Strom & Murphy, 2019; Reidy, 2019; The Walkley Foundation, Statement, 2019; Tiffen, 2019; Simons, 2011; Green Left Weekly, 2010).

Defamation law is aimed at striking an appropriate balance between two “largely incompatible interests: protection of reputation, and freedom of speech. More of one necessarily entails less of the other” (Gillooly, 1998, p. 15). Great caution must be exercised to ensure that the pursuit of a redesigned balance does not leave journalists worse off.

Finding the ‘right balance’ for the competing interests

This submission does not purport to offer an incontrovertible answers. The above discussion illustrates the seemingly intractable nature of the task before the reformers. Some propositions, however, deserve strong recognition and for reform responses to accordingly reflect this. First, the law must continue to reflect a system of calibrating the primary entitlements on both sides – for the protection of reputation; and for freedom of expression – the addresses contemporary realities. The challenge is afflicted by definitional issues concerning terms such as: *journalist/journalism*; *ordinary reasonable person*; *publisher*; and *the public interest*. There is a strong justification to design the operation of defamation law so as to better protect persons and activities involving Fourth Estate functions. The group executive editor of *The Age* and *The Sydney Morning Herald* James Chessell wrote:

These are difficult times for people who want to shine light into dark corners, hold the powerful to account, and more specifically, exercise freedom of journalistic expression (Chessell, 2019).

Adjunct Associate Professor Michael West, an investigative journalist with two decades of experience working for large mastheads and who is a regular target of defamation threats, has stated:

In Australia journalists can be sued whether a story is true or not. The costs of paying lawyers and defending lawsuits are prohibitive. Law firms are shutting down bloggers. Even the threat of litigation is often enough to deter journalists from writing the truth. It leads to self-censorship. (Senate Select committee on the Future of Public Interest Journalism, 2018, para 7.56).

Such threats are being frequently made by elected representatives and others with important public functions aided by the imbalance and uncertainty infesting the current defamation law regime. Resorting to threats to sue is an age-old phenomenon. Defamation lawyers “do it all the time” (West, 2019). Politicians tend to wave the spectre of legal action for defamation in the face of public discussion of matters that can easily be classed as matters of legitimate public concern. One recipient of such a threat, Associate Professor West (referred to above), responded to the threat as follows:

So we are not alleging corruption here, merely saying there is enormous public interest in having the detail come to light. This is public money, for the sale of a

vital public resource, and the protagonists in the story are the stewards of our public money. (West, 2019)

Law academic Michael Douglas has noted:

In recent years, several politicians have been willing to go through with their threats and sue for defamation, usually in response to negative news coverage. (Douglas, 2019)

Threats which resulted in court action include the case of former Treasurer Joe Hockey who sued Fairfax Media (*Hockey v Fairfax Media Publications Pty Limited*); Labor MP Emma Husar who is suing *BuzzFeed* (Whitbourn & Mitchell, 2019); former Liberal MP Dennis Jensen's action against Nationwide News (Stewart, 2016); Senator Sarah Hanson-Young against Bauer Media (*Hanson-Young v Bauer Media Ltd*); and a former MP's suit against Benalla Ensign newspaper and its editor (*Mirabella v Price & Anor*). Some recent examples of threats to sue concern: allegations of sexual harassment against a government minister (Burrell, 2018); questions about whether an elected representative used taxpayer funds for private travel (ABC News, 2018); questions about whether a government minister's contact with a foreign billionaire influenced the minister's performance of official duties (Remeikis, 2019); questions about whether a government minister acted corruptly (Sainty, 2019); and questions about whether the prime minister had once sought to capitalise on anti-Muslim sentiment (Maiden, 2019b). No suggestion is made one way or another as to the merits of the complaints in the foregoing instances of threats to sue. It is also not suggested in this submission that politicians should altogether forfeit their right to sue for damage to reputation.

Politicians should be permitted to sue for defamation in limited cases where, for instance, there is demonstrable evidence of recklessness, serious factual error, malice, or absence of a legitimate public interest in the matter concerned. As Douglas argues, however, "[w]herever possible, conflicts should be ventilated through public discourse, not through the judicial system" (Douglas, 2019). Public figures and others in high office are well-equipped to respond effectively to alleged defamation and should be made to shoulder a higher burden of public scrutiny and concomitantly be made to satisfy a higher threshold for suing. The design options for such a threshold are not novel as illustrated by the various public figure and implied freedom of communication defences. Apart from the design of the legal action threshold other responses to the publication of damaging

content could borrow from the approach taken in the United Kingdom. There, in an effort to deal with the online news environment and the threat of inaccurate or misleading information, the government has launched the Rapid Response Unit, made up of specialists, to identify emerging issues with speed, accuracy and integrity and is predicated on recognising that “good communication starts with listening, and that we must be alert to what is being said about government policy, including mis- or disinformation” (Government Communication Service, 2018). More than two decades ago the High Court observed in *Lange v Australian Broadcasting Corporation*:

Since 1901, the common law – now the common law of Australia – has had to be developed in response to changing conditions. The expansion of the franchise, the increase in literacy, the growth of modern political structures operating at both Federal and State levels and the modern development in mass communications, especially the electronic media, now demand the striking of a different balance from that which was struck in 1901. (p. 565)

That “different balance” has continued to elude us in 2019. Defamation judge Gibson has observed that “the prospect of effective defamation law reform remains a distant and unrealised dream” (Gibson, 2019). According to Dr Collins:

If you were starting from scratch, the defamation laws you would draft would bear no relationship at all to those we are saddled with. (2018)

Applying defamation law to articles being considered for publication should not be an exercise akin to tightrope walking over the Niagara Falls for even media lawyers, as they approach their work with “uncertainty, risk and possible dreadful consequences” (Ackland, 2018).

Identifying the problem

In seeking solutions to a problem the first step should be to define the problem. This is a herculean task in the present context. It would be convenient to say, as many have done, that the ‘problem’ is one of an outdated legal regime governing the protection of reputations. Devising solutions to that problem, however, is far from clear. It is not surprising that the media is at the forefront of the chorus of complaints about the inadequacy of defamation law. The award of damages has a high visibility and is a

common target of criticism. It is asked, justifiably, why public figures can win more compensation for ‘injuries’ than factory workers who lose a limb or women who are sexually harassed at work (Merritt, 2019a; Merritt, 2019b). On the other hand, it may also be asked whether damages have a role to play whether the nature of the defendant’s conduct warrants it, for example, through malicious conduct and recklessness as to the truth. In the context of the ‘tech giants’, of which Facebook has been described as “a repeat offender”, it has been observed that a fine “in the low billions of dollars would amount to a slap on the wrist...that’s how Wall Street sees it too” (Swan, 2019; Isaac & Kang, 2019).

The media has on occasion itself been found by the courts to be reckless as to the truth or falsity of the damaging statements (*Wagner & Ors v Harbour Radio Pty Ltd & Ors*; *Rush v Nationwide News Pty Ltd*). Former High Court judge Ian Callinan observed from his experience that “nothing deters indefensible defamation more than the financial pain that the defamer will suffer by an award of damages and costs” (2012). The media is under unprecedented assault from powerful quarters globally and locally and is subject to a rising tide of obstacles in its ability to access information of legitimate public interest, information that can properly inform public debate, and information which, if the media was able to access it, would forestall defamation litigation. Australia is among the jurisdictions that have introduced a host of laws that have “generally impacted adversely upon journalists, information sources and whistleblowers” (Pearson & Fernandez, 2018, p. 55). Award-winning investigative journalist Andrew Fowler wrote:

With governments desperate to control information, we are witnessing a war both on journalism and the public’s right to be well informed. (Fowler, p. 17)

Traditional journalism is being depicted as a problem in society, rather than a solution. The Director-General Lord Tony Hall of the BBC captured this condition as follows:

Every day we see attempts to target, troll, intimidate them (journalists). To stop them from doing their job. This is more than an attack on journalists. It amounts to a campaign to denigrate their craft. The phrase, ‘mainstream media’, is now a term of abuse – used by people of all political persuasions. Traditional journalism is painted as part of the problem rather than the solution. This really worries me. Ultimately, it’s an assault on freedom of expression and our duty to seek out the

facts – without fear or favour – no matter how inconvenient they might prove to be.
(Walker, 2019)

This view resonates in Australia too as illustrated, for example, in successive annual Media, Entertainment and Arts Alliance Press Freedom Reports and in concerns expressed by press freedom NGO, Reporters Without Borders (RSF). The RSF's latest World Press Freedom Index, shows Australia has dropped two places from the previous year, “amid concerns that investigative journalism is in danger” (Topsfield, 2019; Reporters Without Borders, 2019). Furthermore, while some idea may be formed about the threat posed by defamation law to freedom of expression, quantifying defamation law's ‘chilling effect’ is impossible due to the “deeper, and subtler way in which libel inhibits media publication [which] may be called the structural chilling effect” resulting from the non-creation of certain material because of the risk of being sued, so nothing is written in the first place (Barendt et al, 1997, p. 190). More recently Ackland stated:

[I]t's impossible to know how many important stories in the public interest have not been chased by journalists because of the ‘chilling effect’ – the fear of a prohibitively expensive loss in a defamation suit. (2018)

The chilling effect of large awards of damages for defamation is well-acknowledged in Australia (NSW Law Reform Commission, 1995, *Executive Summary*; *Theophanous v Herald and Weekly Times Ltd*, p. 135). Professor Derek Wilding has described the amorphousness of the scale of the extent of defamation action in Australia thus:

The real scale of defamation action in Australia is unknown. Research efforts are complicated by fractured data sources, and public resources only reveal part of the picture. Confidential correspondence and settlements that try to offset costly court action – whatever the merits of those claims – is largely confined to in-house legal teams and their advisers. (Wilding, 2018)

Conditions such as those described above present problems for the design of solutions. It is a prerequisite for any effective scheme of rules to be solidly grounded in reality and for the recommended solutions to address the problems that exist rather than the problems that are speculated to exist. That should, however, not be a reason for pursuing bold reform. The above discussion has identified a plethora of avenues for action although there is a danger of being distracted by technicalities.

Conclusion

There is a wealth of reform ideas in the vast repository of literature and expert commentary over the decades. Some of them are cited in this submission. Whatever reform measure is adopted will impact on the location of the pivot on the see saw balancing the two primary interests sought to be addressed by defamation law – the interests of protecting personal reputations, and the interests of freedom of expression – and could consequently tilt the balance too far to one side. Achieving a proper balance is not amenable to a position that suits all occasions and parties simultaneously. A single movement of the pivot cannot simultaneously serve all the competing parties and interests. In his recent report on freedom of speech in institutions of higher learning, referred to above, French stated:

Freedom of speech is of fundamental importance as a general value and is particularly important to the defining characteristics of higher education institutions. (French, 2019, p. 216)

That elevated recognition for higher education institutions should not come as a surprise. Neither should there be surprise towards the argument that such recognition should also be afforded to serious journalism to enable those engaged in Fourth Estate functions to better perform their duties. The scale would not be difficult to apply so that those in the Fourth Estate who behave in a manner so as to forfeit their claim for special recognition should face consequences proportionate to their recklessness. Likewise, those who enter the marketplace of ideas with limited understanding of or unsatisfactory commitment to the principles of freedom of expression (e.g. concerning adherence to professional practice codes, attention to facts and other incidents of responsible speech) should expect a lesser entitlement to protection from the law than those who do.

The media needs to be better served by defamation law, especially those who are engaged in investigative work that scrutinises public officials and others with governance responsibilities or who wield undue negative influence on society. Survey data indicates that an “overwhelming majority of Australians have lost trust in federal politics” (Knaus, 2019). While the efforts of investigative journalists have led to many significant exposés, so too have the efforts of various inquiry commissions, and endeavours of whistleblowers – often revealing monumental social and economic damage. Defamation law must

facilitate, and not hinder, the media which sometimes operates in a cancerous environment that the following passage illustrates well:

Legislators are schmoozed; former staffers and politicians pressed into service to lobby in the corridors of power; regulators are the target of diligent efforts to capture them, or are litigated against relentlessly, or lied to... This is the Australian way of doing business for so many companies — the way of the fundraiser cheque, the way of the gutted regulator, the way of the sole-source tender to a political mate. And while Labor might not be as bad as the Coalition, it won't end until the processes of government are subjected to radical transparency to expose the inner workings of a system designed to look after mates, not the public interest. (Keane, 2019)

Much has been suggested by way of reform proposals over the decades. Defamation law's reputation "for being the most arcane area of private law...is deserved" and it has been "justifiably criticised for its technicality" (Rolph, 2016, pp. 1–2). Media lawyer Peter Bartlett, in calling for "radical reform" stated that reforms "must be comprehensive and bold [and] need to shift the balance between freedom of speech and an individual's reputation" (Bartlett, 2019). The author of this submission has previously drafted a set of model defamation provisions as part of a PhD Thesis. One reform measure discussed there is to impose a reversed burden of proof on plaintiffs so that, it is the plaintiff who bears the burden of proving falsity, in situations where the plaintiff is a public figure suing in respect of a matter of public concern. The relevant 'model provision' suggested there, among other model provisions, including definitions of terms in the following clause, merits favourable consideration:

Where the person suing for defamation is a 'public figure' and the matter complained about is a 'matter of public concern' and the defendant is a 'media defendant', the plaintiff – in addition to proving publication, identification and the existence of defamatory matter – bears the onus of proving falsity of the defamatory matter as an essential ingredient of the cause of action. (Fernandez, 2008, Appendix, Model Provisions, 1(a), p. 391)

As this submission showed above, defamation law confounds everyone, including lawyers and judges. It illustrates the ordeal that confronts journalists. To exacerbate matters, it is too easy to start an action, because the "defamation threshold is set rather

low i.e. the matters that a plaintiff must prove in order to establish a prima facie case are not particularly demanding” (Gillooly, 1998, p. 15). The present review must seize the opportunity to reform defamation law in a way that effectively meets present and foreseeable needs.

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