

Submission to the Parliamentary Joint Committee on Intelligence and Security inquiry into press freedom on the issue of defamation law

Introduction

This submission is written by Dr Denis Muller, Senior Research Fellow in the Centre for Advancing Journalism at the University of Melbourne. It is written as a supplement to his original submission and has a different focus. This submission focuses on the effect on press freedom of Australia's defamation laws; the previous submission focused on national security, secrecy and whistle-blower laws. Dr Muller teaches defamation law in the Masters program at the Centre for Advancing Journalism and is a former editorial executive of *The Sydney Morning Herald* and *The Age*.

Summary of proposals

The submission contains the following proposals:

- An additional form of qualified privilege grounded in the concept of the public interest. For this purpose, public interest should be defined as concerning the defence of the nation, the integrity of its political and electoral processes, its economic security, the health and safety of the Australian people, public sector administration, administration of public companies, and matters calculated to affect citizens' political and economic choices.
- The imposition of a citizenship or permanent residency qualification on who can sue for defamation in Australia, so as to discourage "defamation tourism".
- A broadening of the Lange form of qualified privilege beyond matters of government and politics and removal of its associated reasonableness test.
- Procedures to protect the identity of journalists' confidential sources while at the same time enabling these sources to give evidence for the defence in defamation trials.

- Introduction of a defence to the re-publication of user-generated content based on a “reasonable endeavours” approach by publishers and broadcasters to vet and take down defamatory material.
- Repeal of the provision in defamation law that treats every re-tweet or re-post as a new publication, instead confining a cause of action to the originating publication in the jurisdiction where the suit is brought.
- A cap on all damages for defamation in order to redress the present situation in which damages for economic loss are at large, leading to huge awards which have a chilling effect on journalism.
- A threshold of seriousness in respect of damage to reputation be added to the elements that a plaintiff has to prove in order for an defamation action to proceed.
- An opportunity for defendants to contest imputations claimed by plaintiffs that includes the ability to draw on intended meaning and test the imputations by reference to that intention.

Each of these proposals is outlined contextually below.

Arguments

Australia’s defamation laws are in urgent need of review. They were last reviewed in the early 2000s before social media became the ubiquitous and influential communications phenomenon it is today. Social media has brought with it challenges to existing defamation law that were unimaginable when that review was done. In applying the existing laws as they stand, courts have demonstrated how unfair and inimical to free speech those laws now are.

Most recently, the Voller case has drawn attention to the way in which the established principle of strict liability can play out in an utterly impractical way in the online

publishing world (*Voller v Nationwide News Pty Ltd; Voller v Fairfax Media Publications Pty Ltd; Voller v Australian News Channel Pty Ltd [2019] NSWSC 766*).

This ruling, if it survives appeal, tilts the balance even further against free speech than is already the case. Even if it does not survive appeal, the doctrine of strict liability needs review anyway to make it reasonable and workable in the digital age.

In *Voller*, the New South Wales Supreme Court held that publishers and broadcasters were liable for comments posted on news stories on their websites. This principle was all very well when audience contributions were limited to letters to the editor and calls to talkback radio. Volumes of material were relatively small; there were workable editorial procedures in place for pre-publication screening, and broadcasters had – and still have – access to a delay-dump system that enables them to quickly dump potentially defamatory material before it goes to air.

Now, audience-generated material is so voluminous and incessant that it is unreasonable to expect publishers and broadcasters to head them off before they appear on a website. It should be a defence that they had reasonable procedures in place for monitoring this content and that when defamatory content was drawn to their attention, they took it down expeditiously: a “best endeavours” defence, in effect.

The other established principle that makes Australia’s present defamation laws an acute burden on free speech is the principle that says every new publication creates a separate cause of action. In online publishing, new publications occur rapidly: every re-tweet, every re-posting is a new publication. A cause of action should be confined to the originating publication in the jurisdiction in which the suit is brought.

These are merely two of the most egregious ways in which Australia’s defamation laws are maladapted to the internet age.

In addition to internet-related matters, the way in which damages are awarded in defamation positively invites what has been called “defamation tourism”, consisting of largely speculative actions by people rich enough to take the risks involved in suing for defamation. While vindictory damages are capped at \$250,000 in 2006 dollars (about \$380,000 today), the awarding of aggravated damages and damages for economic loss have made a mockery of that cap. A cap on all damages for defamation should be

introduced. The Rebel Wilson and Geoffrey Rush cases are two spectacular recent examples (*Wilson v Bauer Media Pty Ltd* [2017] VSC 521; *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496). While neither of these fell into the category of “defamation tourism”, they sent a signal that in Australia’s plaintiff-friendly defamation jurisdiction, the odds on winning lie with the plaintiff and the rewards can be large. Moreover, these intimidating awards have been stated by media organisations and media lawyers to have had a chilling effect on the press. See, for example, Richard Ackland’s commentary in *The Guardian Australia*: <https://www.theguardian.com/media/2018/nov/30/your-right-to-know-how-australias-defamation-law-stifles-public-interest-journalism>

Australia’s defamation laws are plaintiff-friendly for two main reasons.

The first is that the three elements of an action that the plaintiff has to prove in order for a suit to proceed are ludicrously easy to establish: first, that the material was published; second, that the impugned material was of and concerning the plaintiff, even if the identification was mistaken; third, that the impugned material conveyed a defamatory meaning.

There is no obligation on the plaintiff to demonstrate that the publication did any actual harm to his or her reputation. The law conclusively presumes that it did and that the impugned material was false. The law also conclusively presumes that the publisher’s intended meaning was irrelevant, while allowing the plaintiff a free ride to assert an open-ended range of imputations, subject only to the court’s deciding that a particular imputation did not arise from the impugned material. There is no obligation on the plaintiff to demonstrate that the imputations had any serious consequences for his or her reputation, nor is the intended meaning of the publisher able to be used as a means of challenging the asserted imputations.

A test of seriousness, as now used in English law, and an opportunity for the defendant to argue intended meaning against the claimed imputations, are two measures that would go some way to redressing the gross imbalance in favour of plaintiffs that now exists in the elements of an action for defamation.

The second main reason why Australia’s defamation laws are plaintiff-friendly is that the defences available are limited in number and have been read down or applied

narrowly in successive court proceedings so that in practice they are extremely difficult to use successfully.

The defence of justification or truth requires that the defendant be able to prove on admissible evidence that the imputations conveyed are substantially true. In cases where the impugned material has come from a confidential source – as happens in many cases arising from investigative journalism – it is impossible for the media to successfully use this defence without exposing the identity of the confidential source. That could – and should – be resolved by procedures under which a confidential source could give evidence *in camera* and under a privilege preventing disclosure of the source's identity by the plaintiff's lawyers to their client. Existing defamation procedures have been routinely abused by vengeful plaintiffs over many years to find out who has supplied information against them ostensibly so they can sue them but really in order that they might take retaliatory action. The Cojuangco and Madafferi cases come immediately to mind (*John Fairfax & Sons Ltd v Cojuangco [1988] 165 CLR 346*; *Tony Madafferi v The Age [2015] VSC 687*).

Eduardo Cojuangco – a so-called “coconut king” -- was a crony of Ferdinand Marcos; Madafferi is alleged to be a leading Mafia figure in Melbourne. These are not the sort of people to whom any ethical journalist would wish to expose a confidential source. Shield laws, which did not exist in 1988 when Cojuangco was heard, were successfully used by *The Age* in the latter case. However, the problem of protecting confidential sources remains a serious barrier to the use of the truth defence.

The defence of qualified privilege can be hamstrung by the same problem. On 3 February 2010, *The Age* published an article under the headline “Fitzgibbon’s \$150,000 from Chinese developer – former Defence Minister cultivated over years”. It alleged that Ms Helen Liu, whom the newspaper described as a Chinese Australian businesswoman, had made substantial payments to the former Defence Minister, Mr Joel Fitzgibbon, as part of “a campaign to cultivate him as an agent of political and business influence”.

In *Liu v The Age Company Ltd [2012] NSWSC* Ms Liu sued *The Age* for defamation.

The newspaper sought to defend itself using the defence of Lange qualified privilege: an implied constitutional guarantee of free speech on matters of government and politics.

Ms Liu made a discovery application in the Supreme Court of New South Wales to establish the identity of the sources for the article. In 2012, McCallum J ordered *The Age* and the journalists to give discovery of “all documents that are or have been in their possession which relate to the identity or whereabouts of the sources”. An appeal against this ruling to the NSW Court of Appeal was dismissed and the High Court refused leave to appeal there. *The Age* then abandoned the qualified privilege defence.

In her initial judgment in *Liu*, McCallum J stated: “The present case sits poised uncomfortably on the fault-line of strong, competing public interests”. This is familiar territory in defamation law: the public interest in the administration of justice and the public interest in freedom of speech. In *Liu*, the argument came down to the legally recognised ethical duty of the newspaper not to reveal the identity of a confidential source and Ms Liu’s untested allegation that the impugned article was part of a vendetta against her. The trial judge accepted the latter at the expense of the former.

This case shows that in the absence of clear and unambiguous law, there is a tendency in defamation law to favour the plaintiff over the defendant. For the same reason, the use of the Lange qualified privilege defence has often foundered on a court’s decision that the journalist has not satisfied the associated test of reasonableness. Courts have applied this so strictly – one might say so *unreasonably* -- that ordinary standards of ethical journalism are not sufficient to meet it.

Since truth and qualified privilege are two of the most commonly used defences, and since they are each so closely related to the balancing of free speech against people’s right to the protection of their reputation from wrongful harm, urgent attention should be given to reforming these defences to strike the balance at a point more favourable to freedom of speech.

This requires adoption of a procedure that protects the identity of confidential sources in a way that allows defendants to avail themselves of these defences while at the same time adhering to their ethical obligations, recognised in the shield laws, to keep the confidences they have entered into.

It also requires the codifying of the Lange defence in amendments to the defamation laws that both broaden its scope beyond “matters of government and politics” and removes the test of reasonableness. Let this latter point be decided, if necessary, by use of the provisions in defamation law concerning malice.

Finally on the question of defences, there should be an additional form of qualified privilege grounded in the concept of the public interest. For this purpose, public interest should be defined as concerning the defence of the nation, the integrity of its political and electoral processes, its economic security, the health and safety of the Australian people, public sector administration, administration of public companies, and matters calculated to affect citizens’ political and economic choices.

Defendants in actions for defamation that fall under this heading should be able to avail themselves of a qualified privilege akin to the public-figure test in US defamation law as established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). That is to say the onus should be on the plaintiff to prove malice in order for the action to succeed.

If “defamation tourism” is to be discouraged, then there should be citizenship and residency limitations on who can sue. The right to sue in Australia should be confined to Australian citizens usually resident in the country or people with permanent residency rights who live in Australia for the greater part of the time and who have had permanent residency for at least five years at the time of publication of the impugned material. After all, it is where people live that their reputation is most precious and where any damage done to it is likely to have the most serious impact.

It is acknowledged that these are bold proposals, especially given the deeply conservative history of defamation law development in Australia. But in fact they echo, in many respects, the changes already made in England under the 2013 amendments to its defamation laws.

Australia is living in a communications universe unrecognizable from that in which the present laws were developed, and bold changes are needed.