



'Should Australian defamation laws be reformed?'

Defamation, defined as the “*the publication of false and derogatory statements, without any justification recognised by law*”,¹ is an important tort that allows for the recovery of compensation by those who have suffered loss or damage to their reputation in consequence of a breach of their civil rights. Whilst Australian defamation law is largely a product of common law, inherited from England and developed by Australian judges over many decades, it is modified by statute law.² Prior to 2005, the legislation governing defamation varied significantly across Australian state boundaries. In 2005 each state statute was repealed and replaced by the so-called “*model defamation provisions*”, which underpinned a largely uniform set of state defamation legislation, with the Northern Territory following suit in 2006.³ The fact that the states passed these uniform laws under the threat of federal legislation being introduced by the Commonwealth, in reliance on its corporations power, lends credence to the suggestion that the laws were somewhat ill-considered.⁴ Nevertheless, Australian defamation laws have not been reformed since 2005, and as such they are open to criticism that they do not make adequate allowance for the use of technology and social media.⁵ This notable lack of flexibility is in addition to observations that the laws are overly complex and do not appropriately balance the tension that exists between competing rights of personal reputation and freedom of speech.⁶ Section 3 of the *Defamation Act 2005 (SA)*, provides that the purpose of the laws is to ensure that no unreasonable limits are placed on freedom of expression, whilst also providing for fair remedies for persons whose reputations are harmed by defamatory publications.⁷ The prevalence of recent high profile defamation cases in Australia has prompted continued calls for a review of effectiveness of current Australian defamation laws.⁸

Significantly, Australia’s defamation laws have not been reformed in over 15 years, meaning they do not address more recent developments in social media.⁹ Aspects of these current laws have their origins in English common law, whereby some precedents date as far back as the 13th century.¹⁰ Evidently, these laws do not accurately reflect current community values, rendering them inappropriate and demonstrating a lack of flexibility. Communications law expert Brett Walker asserts that, “*The law is struggling to adapt the traditional principles of*

¹ Legal Services Commission of South Australia. 2020. Glossary. [online] Available at: <<https://lawhandbook.sa.gov.au/go01.php#idm140176703407968>> [Accessed 18 October 2020].

² Douglas, M., 2020. Australia's 'Outdated' Defamation Laws Are Changing - But There's No 'Revolution' Yet. [online] The Conversation. Available at: <<https://theconversation.com/australias-outdated-defamation-laws-are-changing-but-theres-no-revolution-yet-143532>> [accessed 1 August 2020]

³ Rolph, D., 2008. Uniform at Last? An Overview of Uniform, National Defamation Laws. Sydney Law School Research Paper, 08(141), p.1.

⁴ Ibid

⁵ NSW Government. 2019. National Defamation Law Reform. [online] Available at: <<https://www.justice.nsw.gov.au/Pages/media-news/news/2019/National-Defamation-Law-Reform.aspx>> [Accessed 23 June 2020].

⁶ Rolph, D., 2008. Uniform at Last? An Overview of Uniform, National Defamation Laws. Sydney Law School Research Paper, 08(141), p.1.

⁷ South Australian Legislation. 2005. *Defamation Act 2005*. [online] Available at: <<https://www.legislation.sa.gov.au/LZ/C/A/DEFAMATION%20ACT%202005/CURRENT/2005.50.AUTH.PDF>> [Accessed 9 September 2020].

⁸ Douglas, M., 2020, op cit.

⁹ ALRC. 2019. Report Launch – The Future Of Law Reform | ALRC. [online] Available at: <<https://www.alrc.gov.au/news/report-launch-the-future-of-law-reform>></https:> [Accessed 1 July 2020].

¹⁰ Douglas, M., 2019. A Push To Make Social Media Companies Liable In Defamation Is Great For Newspapers And Lawyers, But Not You. [online] The Conversation. Available at: <<https://theconversation.com/a-push-to-make-social-media-companies-liable-in-defamation-is-great-for-newspapers-and-lawyers-but-not-you-127513>> [Accessed 1 July 2020].

defamation law to new technologies in a consistent manner.”¹¹ In *Voller v Nationwide News & Fairfax Media Publications & Australian News Channel* [2019] NSWSC 766, Dylan Voller sued a range of media publications over defamatory comments left by members of the public on their Facebook pages.¹² NSW Supreme Court judge Rothman J ruled that the media companies were publishers of the comments therefore they were liable for them, however the scope of this liability still remains uncertain.¹³ Crucially, defamation laws do not consider how the *Broadcasting Services Act 1996 (Cth)*, which is designed “to encourage providers of commercial and community broadcasting services to be responsive to the need for a fair and accurate coverage of matters of public interest”¹⁴ is affected given the absence of any guidance as to how the Act applies to search engines and social media websites.¹⁵ Therefore, with regard to the prevalence and significance of social media in Australian society, Australia’s defamation laws can be considered in desperate need of reform to resolve this inherent uncertainty and enhance their flexibility.

Furthermore critics maintain that Australian defamation laws fail to adequately balance the rights of plaintiffs and defendants.¹⁶ Arguably there are too many technical rulings that prevent relevant material being introduced into evidence, meaning the cases are confined to the claims of the plaintiff rather than the publication as a whole, causing unfairness to defendants.¹⁷ In addition, the laws are too complex and lack clarity, meaning the filtering of specious claims does not occur until trial.¹⁸ A 2019 Australian Law Reform Report identified the debate regarding the appropriate balance between freedom of expression and the protection of reputation as being an area of concern.¹⁹ It concluded that defamation laws currently permit unworthy claims to succeed due to a lack of a threshold test such that specious claims are not filtered out until the trial concludes. As a consequence, significant time and legal costs are expended on undeserving matters, creating obvious inefficiencies within the resolution of disputes.²⁰ In *Hockey v Fairfax Media Publications Pty Limited* [2015] FCA 652, White J determined that journalists were motivated by spite in exacting revenge on Joe Hockey, meaning the defendants were unable to use a qualified privilege defence.²¹ Arguably, a technical ruling in this case prevented any defences against a claim that possibly lacked merit and significantly extended the length of the dispute.²² Furthermore, delays caused due to complexities within the laws are evident in *Reid v Dukic* [2016] ACTSC 344, where Heather Reid spent two years fighting her defamation action against a man who had published posts on his public Facebook page, falsely

¹¹ Walker, B., 2019. Voller Defamation Case Highlights Law’s Struggle To Keep Pace In Digital Age, Says ANU Law Expert. [online] ANU College of Law. [Accessed 23 June 2020].

¹² *Voller v Nationwide News & Fairfax Media Publications & Australian News Channel* [2019] NSWSC 766. Online. Available at: <<https://www.caselaw.nsw.gov.au/decision/5d0c5f4be4b08c5b85d8a60d>> [Accessed 1 August 2020]

¹³ *Ibid.*

¹⁴ Federal Register of Legislation. 2020. Broadcasting Services Act 1992. [online] Available at: <<https://www.legislation.gov.au/Details/C2018C00375>> [Accessed 1 July 2020].

¹⁵ Wils, T., 2020. Media And Broadcasting In The Digital Age – Parliament Of Australia. [online] Parliament of Australia. Available at:

<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook46p/MediaBroadcasting> [Accessed 1 July 2020].

¹⁶ Douglas, M., 2019. Australia’S Proposed Defamation Law Overhaul Will Expand Media Freedom – But At What Cost?. [online] The Conversation. Available at:

<<https://theconversation.com/australias-proposed-defamation-law-overhaul-will-expand-media-freedom-but-at-what-cost-128064>> [Accessed 1 July 2020].

¹⁷ Cattle, J., 2020. Review Of Model Defamation Provisions – Draft Amendments. [online] The Law Society of South Australia. Available at: <<https://www.lawsocietysa.asn.au/pdf/submissions/ModelDefamation.pdf>> [Accessed 1 July 2020].

¹⁸ Cattle, J., 2020. Review Of Model Defamation Provisions – Draft Amendments. [online] The Law Society of South Australia. Available at: <<https://www.lawsocietysa.asn.au/pdf/submissions/ModelDefamation.pdf>> [Accessed 1 July 2020].

¹⁹ ALRC. 2019. Report Launch – The Future Of Law Reform | ALRC. [online] Available at:

<<https://www.alrc.gov.au/news/report-launch-the-future-of-law-reform>></https:> [Accessed 1 July 2020].

²⁰ Bartlett, P., 2019. Defamation Regime Is Unfit For Digital Age Without Radical Reform. [online] The Australian. Available at: <<https://docs.google.com/document/d/1qIBcotBo7Rb5wg1Flh7lvglE-cmAxZhKtHck4uFDPLA/edit>> [Accessed 1 July 2020].

²¹ *Hockey v Fairfax Media Publications Pty Limited* [2015] FCA 652

²² *Ibid.*

accusing her of sexism, bias and fraud in her local sporting job.²³ In this case, the plaintiff Reid particularised nine separate defamatory imputations in her Statement of Claim.²⁴ Evidently, many complexities arise within defamation laws, due to their lack of reform, that prevent efficiency in Australia's adversarial system of dispute resolution.

Moreover, journalism and media is an essential process for a liberal democracy such as Australia, however current defamation laws prevent journalists from completing their jobs successfully for the greater interest of Australians.²⁵ Publication of well-researched, probing stories on all aspects of Australia's legal and political system, is significant for public interest.²⁶ One of the country's leading defamation barristers, Dr Matt Collins QC, considers the current law regarding defamation neither adequately protects the fundamental human rights of free speech or of reputations when matters of public interest are exposed.²⁷ Therefore, the current defamation laws undermine aspects of Australia's democratic principles, by restricting media and journalism from adequately informing the public.²⁸ The tension between competing rights is not appropriately resolved by defamation laws that provide too much protection of an individual's reputational rights at the expense of the public interest in a free and open press.

On the other hand, Australian defamation laws are designed to protect all Australians from defamatory statements that may cause harm to their personal or professional reputation.²⁹ The current defamation laws recognise the competitive nature of society, protecting companies and individuals from unfair reputational attacks.³⁰ These laws reflect that an untrue or misleading statement that is made about a person in a public forum can have a highly damaging effect.³¹ In *Bauer Media v Wilson (No 2) [2018] VSCA 154*, Wilson was awarded with \$4.7 million in compensation, which was significantly reduced on appeal, after presenting evidence that suggested she had lost job opportunities as a result of a newspaper article that claimed she had lied about her real age, name and childhood.³² After her legal battle, despite the reduction in compensation, Wilson claimed, "At the end of the day the jury restored my reputation, I've moved on personally and professionally."³³ This suggests that these laws are able to successfully restore the reputation of Australians, in the eyes of the community. On that basis

²³ *Reid v Dukic* [2016] ACTSC 344

²⁴ *Ibid.*

²⁵ Douglas, M., 2019. Australia's Proposed Defamation Law Overhaul Will Expand Media Freedom – But At What Cost?. [online] The Conversation. Available at: <<https://theconversation.com/australias-proposed-defamation-law-overhaul-will-expand-media-freedom-but-at-what-cost-128064>> [Accessed 1 July 2020].

²⁶ *Ibid.*

²⁷ Ackland, R., 2020. Your Right To Know: How Australia's Defamation Law Stifles Public Interest Journalism | Richard Ackland. [online] the Guardian. Available at: <<https://www.theguardian.com/media/2018/nov/30/your-right-to-know-how-australias-defamation-law-stifles-public-interest-journalism>> [Accessed 1 July 2020].

²⁸ Douglas, M., 2019. A Push To Make Social Media Companies Liable In Defamation Is Great For Newspapers And Lawyers, But Not You. [online] The Conversation. Available at: <<https://theconversation.com/a-push-to-make-social-media-companies-liable-in-defamation-is-great-for-newspapers-and-lawyers-but-not-you-127513>> [Accessed 1 July 2020].

²⁹ South Australian Legislation. 2005. *Defamation Act, 2005*. [online] Available at: <<https://www.legislation.sa.gov.au/LZ/C/A/DEFAMATION%20ACT%202005/CURRENT/2005.50.AUTH.PDF>> [Accessed 9 September 2020].

³⁰ Gordon Legal. 2020. Defamation. [online] Available at: <<https://gordonlegal.com.au/services/defamation-privacy-law>></https:> [Accessed 23 June 2020].

³¹ Norton Rose Fulbright. 2020. Reputation And Defamation Protection. [online] Available at: <<https://www.nortonrosefulbright.com/en-au/services/a39d83e0/reputation-and-defamation-protection>> [Accessed 23 June 2020].

³² *Bauer Media v Wilson (No 2) [2018] VSCA 154*

³³ Byrne, E., 2018. *Rebel Wilson's Legal Battle Ends As High Court Rejects Appeal Over Defamation Payout*. [online] ABC News. Available at: <<https://www.abc.net.au/news/2018-11-16/rebel-wilson-loses-high-court-bid/10503644>> [Accessed 9 September 2020].

defamation laws evidently strike an appropriate balance between the competing rights of free speech and reputation.

Similarly, current defamation laws uphold their fundamental role of striking a balance between the protection of free speech and the protection of an individuals' rights. Defamation laws involve a "contextual truth" defence, meaning that defendants only have to prove allegations are "contextually" true, rather they do not have to prove every last detail.³⁴ Essentially, this means that the defendants only have to prove the allegations to the extent satisfied by the judge or jury, thus protecting free speech for journalists in Australia.³⁵ Similarly, the *Defamation Act 2005 (SA)*, Section 29, provides a defence of honest opinion where the expression of opinion is related to a matter of 'public interest' and is based on substantially true facts or material.³⁶ However, such defences against defamation are unsuccessful if a comment or publication was made with malice.³⁷ For example, in the *Gayle v Fairfax Media Publications & The Age Company & The Federal Capital Press of Australia (No 3) [2018] NSWSC 1932* case, Gayle pursued action against the reports alleging he had exposed himself to a massage therapist.³⁸ The jury in this case found that Fairfax was unable to establish a defence of truth, upon the basis of malice.³⁹ Evidently, the current defamation laws are successful in allowing media companies to freely distribute information, however they strike a balance when such information is based upon malice, therefore successfully protecting individuals' reputations.⁴⁰

It is recommended that Australian parliaments consider defamation laws in other countries in order to explore possible reforms to the model defamation provisions. One such reform could be based on the United Kingdom scheme, which creates a threshold of serious harm, meaning a person cannot sue unless they have suffered or are likely to suffer serious harm.⁴¹ This would inhibit the presentation of weak defamation cases to the courts, and would provide some protection to media companies from being wrongfully sued for defamation. Consideration should also be given to the New Zealand law, which includes a new defence for "responsible communication in the public interest".⁴² Essentially, this would shield Australia's fundamental democratic communications from litigation, because plaintiffs would have to prove that their claim is of specific public interest.⁴³ As another way to overcome liability issues, the plaintiff in a defamation case should have to prove that the publication was not

³⁴ Sarre, R., 2020. *Craig Mclachlan, Defamation And Getting The Balance Right When Sexual Harassment Goes To Court*. [online] The Conversation. Available at:

<<https://theconversation.com/craig-mclachlan-defamation-and-getting-the-balance-right-when-sexual-harassment-goes-to-court-91223>> [Accessed 8 September 2020].

³⁵ Sarre, R., 2020. *Craig Mclachlan, Defamation And Getting The Balance Right When Sexual Harassment Goes To Court*. [online] The Conversation. Available at:

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³⁶ South Australian Legislation. 2005. *Defamation Act, 2005*. [online] Available at:

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³⁷ Legal Services Commission of South Australia. 2020. *Fair Comment*. [online] Available at:

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³⁸ *Gayle v Fairfax Media Publications & The Age Company & The Federal Capital Press of Australia (No 3) [2018] NSWSC 1932*

³⁹ *Ibid.*

⁴⁰ Sarre, R., 2020. *Craig Mclachlan, Defamation And Getting The Balance Right When Sexual Harassment Goes To Court*. [online] The Conversation. Available at:

<<https://theconversation.com/craig-mclachlan-defamation-and-getting-the-balance-right-when-sexual-harassment-goes-to-court-91223>> [Accessed 8 September 2020].

⁴¹ Griffiths, O., 2020. *Reform Of Defamation Law*. [online] Parliament of Australia. Available at:

<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/Briefingbook46p/DefamationReform> [Accessed 9 September 2020].

⁴² Cattle, J., 2020. *Review Of Model Defamation Provisions – Draft Amendments*. [online] The Law Society of South Australia. Available at: <<https://www.lawsocietysa.asn.au/pdf/submissions/ModelDefamation.pdf>> [Accessed 1 July 2020].

⁴³ Gray, A., 2019. Three suggested amendments to Australia's defamation laws. *Alternative Law Journal*, 45(2).

reasonable in the circumstances in order to be able to successfully prove defamation.⁴⁴ This would enable the public importance of subject matters to be taken into account, and the extent to which it was feasible for the publication to post such statements, meaning these reforms would overcome the limited scope of protections that each statutory defence in a defamation action actually has.⁴⁵ Moreover, due to the lack of reform to defamation laws since 2005, to overcome the complexities associated with the liability of social media outlets, Attorney-General Christian Porter, suggests that reforms could be made that identify social media platforms as traditional publications, thus providing for a more successful balance between public interest journalism and protecting individuals from harm to their reputation.⁴⁶

From the preceding analysis, it is evident that Australia's defamation laws require significant reform to sufficiently adapt to today's society. While it might be contended that these laws strike a balance between the protection of individuals' reputations and free speech in Australia, complexities and issues within the law are causing continued concerns in relation to modern technology.⁴⁷ Ambiguities in defamation laws, causing outcomes to unacceptably favour plaintiffs, create difficulties for journalists to perform their job and must be addressed.⁴⁸ Media and journalism are essential to Australia's democratic foundations and must be protected, in order to uphold fundamental principles of representative and responsible government.⁴⁹ By adopting aspects of defamation laws from other countries, such as New Zealand and England, lawmakers in Australia could more effectively achieve a successful balance between the protection of freedom of expression and the rights of individuals within the community. Former NSW Court of Appeal judge David Ipp has described Australia's defamation laws as the "Galapagos Islands" of tort law.⁵⁰ This description accurately illustrates the undeniable fact that Australia's defamation laws have long resisted change as the landscape around them has evolved, and this inflexibility in the law encapsulates the requirement for its urgent reform.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Douglas, M., 2019. A Push To Make Social Media Companies Liable In Defamation Is Great For Newspapers And Lawyers, But Not You. [online] The Conversation. Available at: <<https://theconversation.com/a-push-to-make-social-media-companies-liable-in-defamation-is-great-for-newspapers-and-lawyers-but-not-you-127513>> [Accessed 1 July 2020].

⁴⁷ Bartlett, P., 2019. Defamation Regime Is Unfit For Digital Age Without Radical Reform. [online] The Australian. Available at: <<https://docs.google.com/document/d/1qIBcotBo7Rb5wg1Flh7lvglE-cmAxZhKtHck4uFDPLA/edit>> [Accessed 1 July 2020].

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