

Rethinking and redesigning defamation law ... Dr Matt Collins QC identifies the problems with Australian defamation law and proposes some prescriptions ... Dusting-off the New South Wales Law Reform Commission's defamation report of 1995 ... Declarations of falsity ... Current regime inadequate for the task ... Reputations inadequately protected against unjustifiable attack ... Public interest reporting stifled ... Paper presented at Melbourne Law School alumni seminar, October 2019

I wouldn't start here if I were you



Matt Collins with defamation client

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

In my 2014 book, the modestly-titled *Collins on Defamation*, a text on the defamation law of England, I describe English defamation law, metaphorically, as resembling Frankenstein's monster: countless complications and piecemeal reforms riveted to the rusting hulk of a centuries'-old cause of action.

In Australia, we inherited the English common law and then proceeded to make it worse.

Until 2005, there were differences between the defamation laws of the six Australian states and two territories, with the result that there were things you could say on Collins Street, Melbourne that you could not say on Pitt Street, Sydney. That was, perhaps, tolerable until the advent of the national media, when defamation cases became multi-jurisdictional and Australia's defamation laws

became the battleground for resolving questions of conflict of laws in torts: almost all of the decisions, worldwide, that have considered the application of conflict rules to the law of defamation are Australian.

In 1979, the Australian Law Reform Commission, under the chairmanship of Michael Kirby, recommended the adoption of uniform defamation and privacy laws. Even today, that report stands up as one of the finest pieces of law reform analysis undertaken in this country. However, in practical terms it sank without trace. It took a further 26 years, to 2005, before the Australian states and territories finally passed uniform defamation laws, drawing in only limited respects upon that 1979 report. We still do not have, for example, privacy laws.

The importance of achieving uniformity in 2005 cannot be overstated, yet the laws that were passed then were in many respects a pragmatic compromise. They took the common law as their base (reflecting what had been the position in Victoria, South Australia, Western Australia and the Territories). They then bolted on to the common law a number of aspects of the defamation statutes of the other jurisdictions which had codified or near-codified the law of defamation, particularly NSW, but also Queensland and Tasmania. The price of uniformity was compromise, and not a very coherent one at that.

Some of the rot that besets Australia's current defamation laws can be traced to this flawed attempt to fuse concepts, largely drawn from the Defamation Act 1974 (NSW), with the common law, particularly the baffling obsession with imputations, a cancer that began in NSW and has now spread to the entire country. But I have written and spoken about that elsewhere and today I have other targets in mind. Because our current defamation laws are uniform national laws, they are all-but-impossible to change. Despite myriad acknowledged problems with them, they have not been amended since 2005. That is no small matter.

Australia's defamation laws predate the internet

Our defamation laws are the result of consultation and drafting that occurred, for the most part, in 2004. That was the year that Facebook was established. At the end of 2004, Facebook had approximately 1 million users. Today, it has 2.23 billion active users.

Twitter was founded in March 2006, about three months after our uniform defamation laws commenced.

In 2005, about 28% of the Australian population had broadband internet access, with most people still accessing the internet via dial-up. A typical broadband download speed in 2005 was 1.5 Mbit/s. Average download speeds in Australia are now just under 26Mbit/s, although my iPhone, connected to the Telstra mobile network, regularly has a download speed exceeding 200 Mbit/s; I routinely get above 500Mbit/s in my chambers.

Speaking of iPhones, the first model was not released until June 2007: 18 months after our uniform defamation laws commenced. In 2005, the most popular mobile phones in Australia were manufactured by Nokia and Sony Ericsson. They looked like candy bars and, if they were able to access the internet at all, they were painfully slow to the point of being unusable.

Defamation laws seek to achieve their purpose only by proxy

Not only are they out-of-date, but Australia's defamation laws—like those in the rest of the common law world—are in my view fundamentally flawed in a number of other respects, which can be traced back to their origins. In the case of libel, it started as a crime that was often prosecuted in the Star Chamber.

Defamation laws are supposed to balance two important, fundamental rights: the right to freedom of expression, and the right to reputation.

Yet nowhere in either the elements of the cause of action, or in the defences, will you find a direct reference to either of those rights. The rights are balanced, at best, only obliquely.

Reputation comes into the cause of action indirectly. According to the traditional formulations, matter is defamatory and thus capable of founding a cause of action, if it: exposes a person to hatred, contempt or ridicule; causes a person to be shunned and avoided; or tends to lower a person in the estimation of right-thinking people generally.

Those formulations are, in a sense, proxies for reputation, but they are defective. It is, for example, defamatory to impute that a person has a communicable disease or is a rape victim; and yet no-one would say that being unwell or the victim of rape diminishes your reputation.

Nor is damage to reputation even necessary to found a cause of action for defamation: it is enough that a person is 'exposed' to hatred, contempt or ridicule; it is enough that a statement may 'tend to' lower a person in the estimation of right-thinking people generally. As a consequence, the cause of action for defamation has, all too often in Australia, become a cause of action to compensate for hurt feelings, in circumstances where the plaintiff has suffered little to no reputational damage. This is one of the reasons why, in my view, Australia should follow England's lead and legislate a threshold of seriousness for defamation actions.

Australia's defamation laws, then, do not sufficiently focus on the right to reputation.

Nor, though, do they focus sufficiently on freedom of speech.

As with reputation, freedom of speech is also dealt with only indirectly in our defamation laws, this time via the defences that may be pleaded to defeat a cause of action. The principal defences are 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. The defences are, again, proxies for the right that is supposed to be weighed in the balance.

Nor is it relevant, in most defamation cases, to analyse why particular speech might be deserving of protection or otherwise. I have done entire defamation trials, for the defendant, where it has not even been relevant to talk about freedom of speech.

What would defamation laws look like if we started from scratch

I started by observing that if you were devising defamation laws from scratch, you wouldn't come up with the laws with which we are saddled.

If we were starting from scratch, we would almost certainly adopt a rights-oriented approach towards the formulation of the law of defamation.

We might ask, of the plaintiff: has the defendant's speech damaged your reputation and in what way?

And if a plaintiff's reputation has been damaged, beyond a threshold of seriousness, we might ask, of the defendant: why should your right to freedom of speech prevail, given the damage you have done to the plaintiff's reputation? For the purpose of that inquiry, we would look at the value of the defendant's speech: was it in the public interest for the matter to be published? Was the publication fair, in the sense that it was competently researched and not motivated by malice? Did it occur on an occasion deserving of special protection?

And then, to determine the outcome of a defamation action, we would subject the competing interests of the right to reputation and the right to freedom of expression to a carefully focused and penetrating balancing exercise, taking into account the justifications for interfering with or restricting each right. We would inquire into the extent to which it is necessary to qualify one right in order to protect the underlying value which is protected by the other.

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. And they would likely resemble the tort of misuse of private information that has been developed by English courts over the past generation, which expressly engage in a balancing exercise between the right to privacy and the right to freedom of expression.

Current reform proposals

One must, however, I suppose, be pragmatic. No common law country, and certainly not this one, is about to abolish the law of defamation and replace it with a rights-based analysis. And yet the need for reform is acute.

The need to amend various provisions of our uniform defamation laws so that they achieve their intended purpose is well known.

I authored an attempt to catalogue the problems comprehensively in my 2001 article, 'Five years on: a report card on Australia's national scheme defamation laws' (2011) 16 Media & Arts Law Review 317.

There are many problems. To name just a few:

- the contextual truth defence in section 26 is a dead letter, because of a drafting problem;
- the honest opinion defence in section 31 has been interpreted as importing common law requirements that are not expressly stated in the section, thereby preventing it from achieving any liberalising effect on the expression of comments;
- the section 30 defence of qualified privilege, which is supposed to protect defendants who have acted reasonably, but got their facts wrong, has been so conservatively interpreted that it has never actually succeeded since 2005;
- the innocent dissemination defence is riddled with drafting anomalies;
- the statutory cap on damages can be set aside in any case involving conduct that warrants an award of aggravated damages; it can also effectively be

circumvented by plaintiffs bringing multiple proceedings in relation to the same publication in any cases where there are different publishing entities—so plaintiffs routinely bring separate proceedings, for example, in relation to the same article in The Age and the Sydney Morning Herald;

- the limitation period was reduced to one year, but that has only limited practical significance in online cases, because we have a multiple publication rule in Australia, which means that the limitation period starts to run in respect of defamatory matter every time it is downloaded and read, no matter how much time has expired since the matter was first written and uploaded;
- the legislation has a focus on imputations, drawing upon the position as it was in NSW, Queensland and Tasmania before uniformity, which is overlaid by a line of authority about the extent to which parties can depart from the plaintiff's imputations, that together has the effect of distracting attention from the publication, and instead focusing it on the pleadings.

Earlier this year, the NSW Attorney-General released a discussion paper which is a very worthwhile contribution to the debate which picks up some of these, as well as some other questions. I support a national debate about fixing the drafting problems with our current laws.

In the past month, Minter Ellison released a paper identifying what it sees as the five top problems with the current legislation.

These are worthwhile contributions to the debate, but they are timid.

They assume we are stuck with our current defamation laws and that the best we can do is tinker at the edges. That might prove to be right, but I believe we should aim higher. We should be bolder.

We need to start by diagnosing where our defamation laws are most letting us down.

I believe there are two critical ways in which they are failing.

Our defamation laws cannot protect reputations when they are unjustifiably attacked

The first failure, in my view, is that our defamation laws have proven singularly unable to provide an effective remedy to persons whose reputations are destroyed, often in a second, by the publication of damaging and demonstrably false material via the internet.

This is a growing problem.

In the vast majority of cases, in my experience, plaintiffs—at least at the outset—are not looking for money; they are looking to have the damaging material removed, or to have a court declare that what has been said about them is false, so that they can mitigate the damage by pointing to a finding by a responsible authority.

But our courts measure defamatory impact by an award of damages, and then only after protracted and costly litigation that almost no-one can afford, and that risks drawing attention to the problem and thereby exacerbating it.

We are prescribing the wrong medicine to cure the disease.

Our defamation laws stifle freedom of expression on important matters of public interest

The second failure, in my view, is at the other end of the spectrum: the failure of our laws to protect freedom of speech, and particularly freedom of the press, in cases of serious journalism in relation to matters that its targets do not want exposed.

I've been doing this for more than 25 years and I have seen it many, many times. Almost always, these cases are characterised by stories that the journalists profoundly believe in; concerning subject matter of high public importance; involving plaintiffs who are motivated by a desire to shut down public debate; and based in important respects upon information provided to the journalists by whistleblowers or confidential sources who are useless in a legal sense, because they cannot be called to give evidence at trial.

Often, in these cases, as a citizen, I have been in no doubt at all that the stories are valid and correct and that 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.

The major defence that is available to the media in such cases is the section 30 defence of qualified privilege that is supposed to protect defendants where they have acted reasonably in all the circumstances. That defence has not succeeded in any case involving the media. I believe that that is because the reasonableness standard in the defence has been interpreted by courts too conservatively: as in effect requiring a counsel of perfection on the part of the media. The defence has been interpreted out of any practical utility. This is an area where Australia has fallen well behind the common law countries we most like to compare ourselves with: the United States, the United Kingdom, Canada and New Zealand.

Diagnosing the reasons for these failures

There is a common element to both of the failures that I have identified. It resides in the fact that our defamation laws presume that defamatory matter is false, and place a burden on defendants, if they wish to rely on a defence of truth or honest opinion, to displace that presumption by proving that the imputations conveyed by what they published are true, or are an opinion based on facts that are true.

To put it more simply, under our defamation laws, the plaintiff does not have to prove that what has been said about them is false; the truth or falsity of what was published is only an issue if it is put in issue by the defendant.

This, it seems to me, has it exactly the wrong way around.

For those whose reputations have been destroyed in an instant by material published about them online, the main thing they want, in my experience, is a court to recognise that what has been said about them is false. And in many, perhaps most, cases, they can readily demonstrate that it is.

Surely, it would be better for the law to enable plaintiffs, in such cases, to demonstrate quickly and cost-effectively that false material has been published about them, leading to a declaration to that effect that could then be used to

facilitate the content being removed from the internet, and pointed to by the plaintiff to mitigate the damage that has been done?

And for those subjects of public interest journalism who hide behind the fact that they know that the media will not be able to prove in court that what they have published is true, because the media is reliant on whistleblowers and confidential sources, surely it would be better to impose upon them the burden of establishing the falsity of what has been published, so that we can be sure that plaintiffs are not compensated for the publication of the truth?

For these reasons, I think we would be very well served, in respect of both of the critical failings in our current law that I have identified, by requiring plaintiffs to prove that what was published about them was false.

I am not the first person to have had this thought.

It is what the United States Supreme Court did in the leading American defamation decision, *New York Times v Sullivan*, 376 US 254 (1964), in cases involving public figures. The US Supreme Court went further, by also requiring public figure plaintiffs to prove that the defendant had published the defamatory matter with actual malice. I do not support going that far, although I do think there is a fundamental flaw in the High Court's definition of malice in the leading case, *Roberts v Bass*, something I will leave for another day.

Making falsity an element of the cause of action for defamation is not just a crazy American notion. In 1995, the NSWLRC published a report on defamation. It recommended that, in general, falsity should be made an element of the cause of action.

The NSWLRC said at [4.10] that "the public interest requires the protection of individual reputations only against the publication of false defamatory matter". It went on at [4.11] to say that "vindication comes primarily from a finding that a defamatory publication is false."

That is my point in relation to plaintiffs whose lives are destroyed in a second when false and damaging material is published about them.

The NSWLRC also said at [4.9] that, because the burden rests on the defendant to prove truth, plaintiffs "can, in theory, utilise defamation actions to protect a reputation which is undeserved."

That is my point in relation to public interest journalism.

In addition to recommending that falsity become an element of the cause of action for defamation, the NSWLRC also recommend that plaintiffs should have the ability to bring an action for a declaration that imputations published about them are false. It said that such actions should be brought promptly, and ordinarily within four weeks from the date of publication. It recommended that plaintiffs should be able also, at their election, to pursue a claim for damages for defamation, but only after the truth or falsity of the imputations had been determined.

In other words, the NSWLRC recommended the establishment of a quick and effective means of affording to plaintiffs the thing they most need in order to vindicate their reputations: a declaration by a responsible authority that what has been said about them is false.

Applications for declarations of falsity were to be heard by a Supreme Court judge, sitting alone, and not a jury. Defendants would have been ordered to publish the declaration of falsity as delivered by the court. Costs would have been awarded to the successful party on an indemnity basis.

These recommendations were not taken up. I believe it is time to dust them off.

Two proposals for reform

I recommend two concrete proposals that would immediately improve Australia's defamation laws by alleviating both of the critical failings that I have identified.

My first proposal is that the Australian states and territories adopt a modified version of the NSWLRC's 1995 recommendation, and pass legislation to enable plaintiffs to seek a declaration of falsity in respect of material that has been published about them. While it would be better if this were done uniformly, it could be introduced on a state-by-state basis without detracting unduly from the integrity of the uniform national defamation laws.

Under legislation establishing a right to seek a declaration of falsity, plaintiffs should be required to act promptly: the four-week time limit recommended by the NSWLRC, subject to a judicial discretion to extend the time limit to a period up to 12 months in individual cases, seems to me to be appropriate.

In my view, plaintiffs should be required to bring their actions for a declaration of falsity against the author, editor or commercial publisher of the matter in question. They should not be entitled to bring an action against an intermediary, such as a search engine operator, social media platform or internet service provider. That is because the purpose of proceedings for a declaration of falsity is to obtain a finding from a court as to whether what has been published is false. That is a matter which can only be contested as between people who know, or ought to know, the facts. The rationale underlying declaration of falsity proceedings would be undermined if plaintiffs were permitted to bring an action against, say, Google, Facebook or Twitter, because they are platforms for the publication of content generated by others. They cannot reasonably be expected to know, and therefore contest, whether what has been published by third parties is true or false.

Proceedings for a declaration of falsity should not, in my view, preclude plaintiffs from being able to bring actions for defamation for damages, but such actions should not be allowed to be commenced until after any declaration for falsity has been granted. In that way, declaration of falsity proceedings will not get bogged down by questions about the operation of defences or damages.

Where declarations of falsity are granted, it is likely that, in most cases, they would then be able to be relied upon by plaintiffs to cause the matter in question to be taken down by the relevant search engine operator, social media network or internet service provider, because there is, generally, no public interest in the publication of false material, or what we now call fake news.

The NSWLRC recommended that declaration of falsity proceedings be brought in the Supreme Court, and heard by judge alone. I see no reason why they would need to be brought in the Supreme Court. Why could they not, for example, be heard and determined in a lower cost jurisdiction, such as a civil and administrative tribunal or Magistrates' Court?

Of course, declaration of falsity proceedings would not be available in every case. Sometimes, defamatory matter is not susceptible of being proved to be true or false. Pure opinions are an example. But pure opinions are less damaging than the publication of false matter, and remedies would still potentially be available to plaintiffs via ordinary defamation law.

Nor could declaration of falsity proceedings be brought in cases where the identity of the author, editor or commercial publisher of material could not be identified, or they were not able to be served. In such cases, ordinary defamation law actions would continue to be available.

My second proposal is for a fundamental reform to the law of defamation itself, by deeming proof of falsity to be an element of the cause of action for defamation, other than in cases where the matter in question is incapable of being proved to be true or false because it is, for example, a pure matter of opinion.

If this were to occur, a consequence would be abolition of the defence of truth at common law, and under section 25 of the Defamation Act. It would not require abolition of other truth-related defences, such as the defence of contextual truth, although as I have already said, that defence requires legislative amendment. Making falsity an element of the cause of action for defamation would be unlikely, in my view, to have any practical effect in the vast majority of cases. In most cases, plaintiffs are, quite properly, only too eager to nail the lie and demonstrate that what has been published about them is false.

Where my proposed reform would make a difference, in my view, is in those public interest cases of which I have spoken, where plaintiffs seek to hide behind the fact that the defendant, usually the media, will not be able to prove the truth of what they have published because of their inability to rely on whistleblowers or confidential sources. There is a danger in such cases that undeserving plaintiffs will win and be compensated for the publication of matters that are true and in the public interest. To the extent that my proposed reform would reduce that danger, it would serve the public interest by reducing the chilling effect of our defamation laws.