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Nothing to write home about: Australia the defamation capital of the world

Speech delivered by Dr Matt Collins AM QC, President of the Victorian Bar at the National Press Club, Canberra.

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Australian defamation laws – the laws of libel and slander – bear the indelible stamp of their lowly origins.

Libel was derived from Roman law. It was originally a crime, often prosecuted in the Star Chamber.

Slander emerged in the ecclesiastical courts in England in the early middle ages.

Not a promising start for a cause of action that is supposed to balance two fundamental rights when they come into conflict in the internet age: the private right to protect one's reputation, and the public interest in freedom of expression.

It used to be said that London was the libel capital of the world.

Let me give you one statistic to ponder: I recently asked a researcher, Hannah Douglas, to identify every decision by a superior court in the United Kingdom and Australia considering a defamation law issue over the five-year period from 2014 to 2018. We found 268 references in the United Kingdom, for a national population of about 66 million people. In Australia, with our population of 25 million people, we found 577 references: more than double the number in the UK, despite our much smaller population.

Even more stunningly, 312 of the Australian references came from New South Wales, with its population of about 7.5 million people. On a per capita basis, that means that defamation law issues were considered by superior courts in Sydney more than 10 times more frequently than in London in the period we analysed.

And we did not even look at proceedings in lower courts, such as the District Court of NSW, which is a very active jurisdiction.

In Australia, we inherited the English common law and then made it worse.

Until 2005, when uniform national defamation laws were passed, 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.

Those problems were overcome when we achieved uniformity in 2005, but the laws we passed then were a pragmatic compromise, and not a very coherent one at that.

Because our 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.

At the end of 2004, Facebook had approximately 1 million users globally. Today, it has 2.41 billion active users per month. Twitter was founded in March 2006, about three months after our current defamation laws commenced. In 2005, only 28% of the Australian population had broadband internet access. The first iPhone was not released until June 2007.

In short – our defamation laws predate the modern communications era.

Not only are they out-of-date, but they are flawed in a number of other respects.

There are many problems. I will identify just a few, to give a sense of the scale of the problems:

- the limitation period for defamation actions was reduced to one year, but the period starts to run afresh every time the same material is accessed, no matter how much time has passed since it was first written, so in most online cases the statute of limitations never actually expires;

- there is a drafting problem with the defence of contextual truth, which is supposed to stop plaintiffs from cherry-picking minor parts of a publication that are wrong, while ignoring all the true parts that have really caused them damage, as a result of which the defence is in practice a dead letter;

- the honest opinion defence, which was supposed to liberalise the common law defence of fair comment, has been interpreted by courts as importing some of the requirements of the common law that are not expressly stated in the legislation, so the new defence has not actually had any practical impact;

- there is a defence of qualified privilege, which is supposed to protect publishers who have acted reasonably, but got their facts wrong, but which has been interpreted so conservatively that it has never actually succeeded in a case involving the media since 2005;

- the statutory cap on damages can be set aside in any case involving conduct that warrants an award of aggravated damages;

- the statutory cap can also be circumvented by plaintiffs bringing multiple proceedings in relation to the same material in any case where there are different publishing entities – so plaintiffs routinely bring separate proceedings, for example, in relation to the same article in *The Age*, the *Sydney Morning Herald* and the *Canberra Times*; and

- the legislation focuses on the imputations conveyed by a publication – which are, in any serious case, formulated by the small number of ingenious lawyers who have mastered the arcane art of defamation pleadings – rather than on what a defamation action should be about: the meaning of what a publisher actually wrote or said.

Last year, the NSW Attorney-General released a discussion paper for the reform of defamation law which addresses some of these and other issues with the legislation. I support the current debate. But it is timid.

It assumes we are stuck with our current 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.

There are two critical ways in which our defamation laws are failing us.

The first is that our laws have proven singularly unable to provide an effective remedy to persons whose reputations are destroyed, often in a heartbeat, 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, defamation plaintiffs are not motivated by money, at least initially; they are looking to have 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 in which mud is thrown, some of which inevitably sticks. In addition, in some cases, plaintiffs have been awarded eye-watering sums of damages, vastly in excess of what would be awarded for a workplace injury resulting in, say, the loss of a limb.

The second failure is that our laws do not adequately 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. Often, these cases involve stories that journalists profoundly believe in; subject matter of high public importance; plaintiffs who are motivated by a desire to shut down public debate; and information provided to journalists by whistleblowers or confidential sources who are useless in a legal sense, because they cannot be called to give evidence at trial.

There is a common element to both of these failures.

It resides in the fact that our defamation laws presume that all defamatory publications are false, and place a burden on defendants to displace that presumption.

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

Although we do not talk about it in terms of the presumption of innocence, there are analogies: in all other fields of civil law, defendants are not presumed to be liable; plaintiffs have to prove some wrongdoing on the part of the defendant and that they have suffered some damage before they are entitled to compensation. In defamation law, the law presumes that every defamatory publication is false; and that every defamatory publication has caused damage to the plaintiff's reputation – that second presumption, in Australia, is irrebuttable.

Surely, it would be better for the law to enable plaintiffs to demonstrate quickly and cost-effectively that false material has been published about them?

And surely it would be better to impose upon plaintiffs the burden of establishing the falsity of what has been published, and that their reputations have in fact been damaged, so that we can be sure that plaintiffs are not compensated for the publication of the truth or of matters that have not caused any actual harm?

For those reasons, I favour making falsity an element of the cause of action for defamation, and introducing a threshold of seriousness as a precondition for commencing a defamation action.

More fundamentally, however, I am convinced that the time has come for Australia to have a mature debate about how to balance fundamental rights when they come into conflict. This is, obviously, not a problem which is confined to defamation law – it rears its head in national security law, in restrictions on court reporting, in the expression of religious belief and so on – but defamation law makes a good case study.

The fundamental rights at play in defamation law are reputation and freedom of expression.

Damage to reputation, however, is not even necessary to found a cause of action for defamation: it is enough that a person is 'exposed' to hatred, contempt or ridicule; or that a statement may 'tend to' lower a person in the estimation of right-thinking people generally. As a consequence, defamation has, all too often, become a cause of action to compensate for hurt feelings, in circumstances where the plaintiff has suffered little or no reputational damage.

Freedom of speech is also dealt with only indirectly. Our laws are silent as to the reasons why freedom of speech matters: nowhere do we find, for example, reference to John Stuart Mill's 1859 insight that there is a 'peculiar evil' in silencing the expression of an opinion, because it robs us of 'the clearer perception and livelier impression of truth, produced by its collision with error'.

If we were drafting defamation laws from scratch, I think we would start by asking of the plaintiff: has the defendant published something that is false and that has damaged your reputation and in what way?

And if a plaintiff's reputation has been damaged by a false publication, beyond a threshold of seriousness, I think we would ask, of the defendant: why should your right to freedom of speech prevail, given the damage you have caused? For the purpose of that inquiry, I 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 that it was competently researched and not motivated by malice? Did it occur on an occasion deserving of special protection

for some reason; for example, because it was said in court or parliament, at a public meeting, in a boardroom or clubhouse, or in the course of a work performance review?

In other words, we would subject the competing interests of reputation and freedom of expression to a 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.

In short, we would do what happens in places where the law must conform to a charter of rights and freedoms.

The absence of a charter has been used by Australian courts as a justification for not following liberalising trends in defamation law that have emerged in countries like the United States, the United Kingdom, Canada and New Zealand.

It is no coincidence that our defamation laws are among the most restrictive of any western democracy, and that we are at the same time the only western democracy without a charter.

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