
Freedom of Speech and Defamation Law

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Defamation law seeks to strike a balance between the protection of reputation and freedom of speech. How that balance is struck may need to be varied and nuanced to take into account the different types of speech and the different impacts they may have on reputation. This article examines a range of areas of Australia where the balance between these competing interests may be a source of particular tension. It examines criminal defamation. It canvasses political speech and public interest speech more generally. It then turns to consider low-level or trivial speech. Finally, it examines academic speech and the newly created protections for it under Australian law.

INTRODUCTION

Reputation is the central interest protected by the tort of defamation. For centuries, the common law has valued and protected reputation highly.¹ Reputation is essentially what other people think of the plaintiff.² It is the plaintiff's public self.³ Yet reputation is not the only interest implicated in the tort of defamation. Defamation seeks to balance the competing interests between the protection of reputation and freedom of speech.⁴ The conventional account of defamation law is that the balance between these competing interests is inherent in the common law principles of defamation law. Yet until recently, defamation law in Australia tended to favour the protection of reputation at the expense of freedom of speech.⁵ This may be contrasted with United States defamation law, which, since the landmark decision in *New York Times Co v Sullivan*,⁶ has favoured freedom of speech significantly at the expense of the protection of reputation.⁷ In recent decades, in Australia as well as in other Commonwealth countries, courts and legislatures have become more astute to concerns about freedom of speech. There have been recalibrations in favour of freedom of speech, both at common law and under statute.

This article considers some of the types of speech where the tension between the protection of reputation and freedom of speech presents challenges. It considers the ongoing availability of criminal defamation in Australia and questions its relevance. It analyses the protection afforded to government or political speech under Australian defamation law, and to public interest speech more broadly. From this high-level speech, this article then turns to consider the effect of defamation law on low-level or trivial speech. Finally, it examines the particular position of academic speech under Australian defamation law. This article seeks to demonstrate that the balance between the protection of reputation and freedom of speech is a variegated one, depending upon the type of speech being affected, as well as being one which evolves over time.

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¹ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 192 (Lord Nicholls of Birkenhead); [1999] UKHL 45.

² *Plato Films Ltd v Speidel* [1961] AC 1090, 1138 (Lord Denning). See also 1128–1129 (Lord Radcliffe).

³ David Rolph, *Defamation Law* (Thomson Reuters, 1st ed, 2016) [2.20].

⁴ *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 569 (*per curiam*); *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575, 599 (Gleeson CJ, McHugh, Gummow and Hayne JJ). See also *Silkin v Beaverbrook Newspapers Ltd* [1958] 1 WLR 743, 745–746 (Diplock J); *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680, 690 (Gleeson CJ), 699 (Kirby P); *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519, 576 (Kirby J).

⁵ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 133 (Mason CJ, Toohey and Gaudron JJ).

⁶ *New York Times Co v Sullivan*, 376 US 254 (1964). See also David Partlett, “*New York Times v Sullivan* (1964)” in David Rolph (ed), *Landmark Cases in Defamation Law* (Hart Publishing, 2019) 125–150.

⁷ *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575, 609 (Gleeson CJ, McHugh, Gummow and Hayne JJ), 614, 639 (Kirby J), 650 (Callinan J).

THE PURPOSES OF DEFAMATION LAW

Before considering specific aspects of Australian defamation law which affect particular types of speech, it is worth reflecting upon the purposes of defamation law, with a view to identifying the place of freedom of speech in them. On one level, the purpose of defamation law is straightforward. Defamation is a tort; the principal interest protected by it is reputation; the fundamental impulse of tort law is compensatory – *restitutio in integrum* – seeking to put the plaintiff in the position they would have been in, had the tort not been committed; therefore, the purpose of defamation is to provide compensation for damage to reputation.⁸ However, reputation is an intangible interest, being, in essence, what other people think of the plaintiff, so it is difficult to quantify damage to reputation. As Windeyer J eloquently observed in *Uren v John Fairfax & Sons Pty Ltd*, “money and reputation are not commensurables”.⁹ Therefore, the harm done to a plaintiff’s reputation cannot be measured in the same way that damage to property can be. Compensation in the context of defamation law assumes a slightly different meaning. It includes vindication of the plaintiff’s reputation and consolation for the plaintiff’s injured feelings, recognising that being publicly defamed will inevitably harm not only the plaintiff’s reputation but also their feelings.¹⁰ Viewed in this way, it becomes clear that defamation law, in its own terms, serves multiple purposes.

More broadly, like other torts, defamation serves multiple purposes.¹¹ Concentrating on compensating a plaintiff’s damaged reputation arguably distorts the focus of defamation law at the expense of freedom of speech. In addition to compensation, there are normative, regulatory and deterrent purposes to defamation law, which underscore the impact of defamation law on freedom of speech.

Like other forms of tort law, defamation law creates and enforces legal and social norms. By the application of the ordinary, reasonable reader standard,¹² which is central to defamation, it is determined whether it is acceptable to think less of a person when they are alleged to be, for example, an adulterer,¹³ a Communist,¹⁴ a homosexual¹⁵ or a witch.¹⁶ The ordinary, reasonable reader also determines whether a given statement is one of fact or one of comment.¹⁷ Notions of reasonableness are increasingly important to defences to defamation. Now, in addition to reasonableness as the crucial determinant of statutory

⁸ *Rookes v Barnard* [1964] AC 1129, 1221 (Lord Devlin); *McCarey v Associated Newspapers Ltd (No 2)* [1965] 2 QB 86, 105 (Pearson LJ), 106 (Diplock LJ); *Butler v Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185, 191 (Taylor and Owen JJ); *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 149 (Windeyer J); *Broome v Cassell & Co Ltd* [1972] AC 1027, 1071 (Lord Hailsham of St Marylebone LC).

⁹ *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 150.

¹⁰ *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 150 (Windeyer J); *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 60–61 (Mason CJ, Deane, Dawson and Gaudron JJ).

¹¹ For a classic consideration of the range of purposes served by tort law, see Glanville Williams, “The Aims of the Law of Tort” (1951) 4 *Current Legal Problems* 137.

¹² *Lewis v Daily Telegraph Ltd* [1964] AC 234, 260 (Lord Reid); *Farquhar v Bottom* [1980] 2 NSWLR 380, 386 (Hunt J).

¹³ *Cairns v John Fairfax & Sons Ltd* [1983] 2 NSWLR 708, 710 (Hutley JA), 719 (Mahoney JA).

¹⁴ *Cross v Denley* (1952) 52 SR(NSW) 112, 115 (Owen J); *Dowding v Ockerby* [1962] WAR 110, 119 (Wolff CJ). See also *John Fairfax Publications Pty Ltd v Rivkin* (2003) 77 ALJR 1657; 201 ALR 77, 109 (Kirby J); [2003] HCA 50.

¹⁵ *Kerr v Kennedy* [1942] 1 KB 409, 413 (Asquith J); *Harrison v Galuszko* (Unreported, Supreme Court of Western Australia, Adam AM, 8 November 1991) 9; *Horner v Goulburn City Council* (Unreported, Supreme Court of New South Wales, Levine J, 5 December 1997) 5; *Rivkin v Amalgamated Television Services Pty Ltd* [2001] NSWSC 432, [30] (Bell J); *Obermann v ACP Publishing Pty Ltd* [2001] NSWSC 1022, [20]–[21] (Levine J); *Kelly v John Fairfax Publications Pty Ltd* [2003] NSWSC 586, [32]–[38], [40] (Levine J); *John Fairfax Publications Pty Ltd v Rivkin* (2003) 77 ALJR 1657; 201 ALR 77, 109 (Kirby J); [2003] HCA 50; *Tassone v Kirkham* [2014] SADC 134, [35] (Judge Cole).

¹⁶ *Loukas v Young* [1968] 3 NSW 549, 550 (Taylor J).

¹⁷ *John Fairfax Publications Pty Ltd v O’Shane* [2005] Aust Torts Reports 81-789, 67,456 (Giles JA); [2005] NSWCA 164; *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245, 253 (Gleeson CJ).

¹⁸ *Civil Law (Wrongs) Act 2002* (ACT) s 139A; *Defamation Act 2006* (NT) s 27; *Defamation Act 2005* (NSW) s 30; *Defamation Act 2005* (Qld) s 30; *Defamation Act 2005* (SA) s 28; *Defamation Act 2005* (Tas) s 30; *Defamation Act 2005* (Vic) s 30; *Defamation Act 2005* (WA) s 30.

qualified privilege¹⁸ and *Lange* qualified privilege,¹⁹ there is, except in Western Australia and the Northern Territory, a public interest defence to defamation, which turns upon the reasonableness of the publisher's belief that the publication was in the public interest.²⁰ A significant aspect of the normative effect of defamation law is to delineate between the acceptable and unacceptable ways of talking about others.

Defamation law also serves the additional purpose of regulation. The regulatory and deterrent impulses of defamation law are connected. Defamation law operates as a form of indirect, private regulation of publishers' conduct and therefore of speech more generally. This regulatory effect is most obviously seen in relation to media outlets. A fundamental feature of a free press is that the government does not directly licence or regulate the content disseminated by media outlets. However, private actors can object to such content, through defamation proceedings brought by a private individual or entity in their own right to protect their own interest in their reputation. The indirect effect of the imposition of liability on media outlets for defamation for the content they disseminate may be to regulate media outlets' conduct in the future and to set and enforce norms of reasonable or responsible communication.²¹

Similarly, like other forms of tort law, defamation law has a deterrent effect, which can operate both generally and specifically. Publishers learn that if they publish certain material or behave in certain ways leading up to publication, they can expose themselves to liability. Prudent publishers then know what to avoid. By regulating publishers' past and future conduct, as well as deterring publishers and potential publishers, defamation law has a well-known "chilling effect".²² It can inhibit speech, as much as it can impose liability for speech.

CRIMINAL DEFAMATION

One area in which defamation law directly regulates speech is criminal defamation. Criminal defamation remains an offence under Australian law.²³ For most of its history, defamation was dealt with significantly as a crime. It first emerged in English law as a crime punished by the ecclesiastical courts.²⁴ The statutory offence of *scandalum magnatum*, first enacted in 1275 and re-enacted on a number of occasions during the late medieval period, was prosecuted most intensively in the 17th century, with the last recorded prosecution occurring in 1773²⁵ and only abolished in 1887.²⁶ The Star Chamber was instrumental in developing criminal, seditious, blasphemous and obscene libel.²⁷ The development of civil liability for slander and later libel occurred alongside these developments, from the early 16th century onwards, in the royal courts.²⁸ Nevertheless, for centuries, a significant proportion of liability imposed for defamatory

¹⁹ *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520. See the heading "Political Speech" further in this article.

²⁰ As to the public interest defence to defamation under Australian law, see the heading "Public Interest Speech" further in this article.

²¹ As to reasonable or responsible communication generally, See the heading "Public Interest Speech" further in this article.

²² *Gertz v Robert Welch Inc*, 418 US 341; 94 S Ct 2997, 3007 (1974) (Powell J); *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 547–548 (Lord Keith of Kinkel); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 131 (Mason CJ, Toohey and Gaudron JJ), 154 (Brennan J); *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 192 (Lord Nicholls of Birkenhead); [1999] UKHL 45; *Branson v Bower* [2002] QB 737, 746 (Eady J); *Bennette v Cohen* [2009] Aust Torts Reports 82-002, 62,825 (Ipp JA); [2009] NSWCA 60. See also E Barendt et al, *Libel and the Media: The Chilling Effect* (Clarendon Press, 1997) 182–194; C Dent and AT Kenyon, "Defamation Law's Chilling Effect: A Comparative Content Analysis of Australian and US Newspapers" (2004) 9 *Media and Arts Law Review* 89, 111; U Cheer, "Myths and Realities about the Chilling Effect: The New Zealand Media's Experience of Defamation Law" (2005) 13 *Torts Law Journal* 259, 299–301.

²³ *Crimes Act 1900* (ACT) s 439; *Criminal Code* (NT) ss 203–208; *Crimes Act 1900* (NSW) s 529; *Criminal Code 1899* (Qld) s 365; *Criminal Law Consolidation Act 1935* (SA) s 257; *Criminal Code Act 1924* (Tas) s 196; *Wrongs Act 1958* (Vic) ss 9–11; *Criminal Code Compilation Act 1913* (WA) s 345.

²⁴ See generally Rolph, n 3, [3.20].

²⁵ *Earl of Sandwich v Miller* (1773) Lofft 210; 98 ER 614.

²⁶ See generally John Lassiter, "Defamation of Peers: The Rise and Decline of the Action for Scandalum Magnatum, 1497-1773" (1978) 22 *American Journal of Legal History* 216; Rolph, n 3, [3.50].

²⁷ Rolph, n 3, [3.40].

²⁸ Rolph, n 3, [3.30].

speech was criminal and English law was comfortable with this, in a way which is profoundly alien to a modern lawyer.

Defamation law now occurs in the Australian legal system overwhelmingly as a tort, not as a crime. This has been so for more than a century. There is a real question as to the ongoing necessity of an offence of criminal defamation in contemporary Australia. It is so infrequently punished that it serves no real purpose any longer. It is a moribund and otiose offence. The last apparent prosecution was in 2009 in Kadina Magistrates' Court in South Australia, where a 19-year-old man was found guilty of criminal defamation of a police officer, arising from a number of Facebook posts.²⁹ This was an isolated prosecution. Prior to that, it had been a long time since there had been a successful prosecution for criminal defamation.³⁰ A significant reason for the lack of convictions for criminal defamation, let alone prosecutions, is that the written consent of the Director of Public Prosecutions is required to commence criminal defamation proceedings³¹ and this has not been readily granted.

The necessity of having a person criminally punished for defamation, with a maximum sentence of three years' imprisonment, is doubtful. If addressing social media abuse is the problem, that is better addressed by existing offences, such as using a carriage service to menace, harass or cause offence under s 474.17 of the *Criminal Code* (Cth), or by creating targeted offences, rather than having recourse to a general offence of criminal defamation. It is worth noting that England, Wales and Northern Ireland abolished criminal defamation in 2010.³² Abolishing criminal defamation in Australia would be a straightforward reform. Other forms of speech may need to be criminalised or remain criminal offences. Defamation, though, should be treated only as a civil wrong, not as a crime.

POLITICAL SPEECH

One of the significant justifications for freedom of speech is its importance for representative democracy.³³ In hierarchies of protected speech, political speech is unsurprisingly accorded the greatest weight. It is well known that, in Australia, special protection is afforded to government or political speech, through the implied freedom of political communication. Whatever the efficacy of the implied freedom of political communication in facilitating freer communication on government or political matters so as to avoid other forms of liability, its impact on defamation should be characterised as limited. The initial promise of the implied freedom of political communication to affect defamation law has not perhaps been fully realised.

It is unsurprising that, following the recognition of the implied freedom of political communication in the landmark cases of *Nationwide News Pty Ltd v Wills*³⁴ and *Australian Capital Television Pty Ltd v Commonwealth*,³⁵ the first substantive area of law to which the implied freedom of political communication was sought to be applied was defamation law. Politicians in Australia, for across the political spectrum, have demonstrated their willingness to have recourse to defamation law over a long period of time.³⁶ Within two years of the discernment from the text and structure of the Commonwealth Constitution, the

²⁹ N Hunt, "Teen Guilty of Facebook Slur", *Sunday Mail* (Adelaide), 22 November 2009.

³⁰ Prior to that, there had been an unsuccessful attempt to commence criminal defamation proceedings in the Australian Capital Territory in 2003. See *Byrnes v Barry* (2003) 151 ACTR 1; [2003] ACTSC 54.

³¹ *Crimes Act 1900* (ACT) s 439(4); *Criminal Code* (NT) s 208 (Crown Law Officer); *Crimes Act 1900* (NSW) s 529(7); *Criminal Code Act 1899* (Qld) s 365(7); *Criminal Law Consolidation Act 1935* (SA) s 257(4); *Criminal Code Act 1924* (Tas) s 196(6); *Criminal Code Compilation Act 1913* (WA) s 345(6).

³² *Coroners and Justice Act 2009* (UK) s 73.

³³ Eric Barendt, *Freedom of Speech*, (OUP, 2nd ed, 2005) 18–21.

³⁴ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

³⁵ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

³⁶ See, eg, *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118; *Hawke v Tamworth Newspaper Co Ltd* [1983] 1 NSWLR 699; *Cairns v John Fairfax & Sons Ltd* [1983] 2 NSWLR 708; *Random House Australia Pty Ltd v Abbott* (1999) 94 FCR 296; *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33; *Leyonhjelm v Hanson-Young* (2021) 282 FCR 341; *Barilaro v Google LLC* [2022] FCA 650; *Bazzi v Dutton* [2022] FCAFC 84.

implied freedom of political communication's impact on defamation arose for consideration in two cases involving politicians as plaintiffs, *Theophanous v Herald & Weekly Times Ltd*³⁷ and *Stephens v West Australian Newspapers Ltd*.³⁸ The lack of a clear *ratio* in those cases led, within a further three years, to the High Court of Australia returning to this issue.

In a rare joint judgment of all seven justices, the High Court of Australia in *Lange v Australian Broadcasting Corp (Lange v ABC)*³⁹ sought to introduce some clarity to the confusion created by *Theophanous* and *ACTV*. The High Court took the opportunity to make clear that the implied freedom of political communication did not create a positive constitutional defence to defamation. Holding thus was consistent with the proper characterisation of the implied freedom of political communication as a negative limitation on legislative and executive encroachment upon freedom of speech on government or political matters rather than a conferral of a positive right to communicate on government or political matters.⁴⁰ Their Honours accepted that the common law of defamation must comply with the requirements of the Commonwealth Constitution, including any implications drawn from it, such as the implied freedom of political communication.⁴¹ The High Court noted that freedom of speech was "an indispensable incident" of the system of representative government created by the *Commonwealth Constitution*.⁴² Freedom of communication operated between electors and elected representatives and candidates for election, as well as among electors themselves.⁴³ However, the effect of the implied freedom of political communication was not confined to election periods. The doctrine of representative government underlying the *Commonwealth Constitution* operated continuously and was not limited to election periods.⁴⁴ In addition, the implied freedom of political communication reflected the common law's approach to freedom of speech. At common law, speech is presumptively free and can only be constrained if there is a lawful restriction upon it. Defamation is a well-established limitation upon freedom of speech.⁴⁵ The High Court identified the relevant test, subsequently refined,⁴⁶ as asking whether the law effectively burdens freedom of communication about government or political matters and, if so, whether it was reasonably appropriate and adapted to serve a legitimate end which was consistent with the maintenance of the constitutionally prescribed system of representative government.⁴⁷ This approach was applicable to determining the constitutional validity of common law principles as much as statutory provisions.⁴⁸ Their Honours held that the protection of reputation was compatible with representative government. Indeed, allowing people the unqualified freedom to publish whatever they liked about those participating, or seeking to participate, in government or political life, would be injurious to representative democracy.⁴⁹ The real issue was not whether there was an unfettered right to discuss government or political matters, even if that discussion damaged reputations, but rather whether the existing law of defamation was reasonably appropriate and adapted to the protection of reputation, having regard to the need for freedom of communication about government or political matters.⁵⁰ The High Court found that, without a statutory defence of qualified privilege, then provided for under s 22

³⁷ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.

³⁸ *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

³⁹ *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520.

⁴⁰ *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 560, 567 (*per curiam*).

⁴¹ *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 556.

⁴² *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 559.

⁴³ *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 560.

⁴⁴ *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 561.

⁴⁵ *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 564.

⁴⁶ See *Coleman v Power* (2004) 220 CLR 1; *McCloy v New South Wales* (2015) 257 CLR 178.

⁴⁷ *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 567.

⁴⁸ *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 568.

⁴⁹ *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 568.

⁵⁰ *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 568–569.

of the *Defamation Act 1974* (NSW), New South Wales (NSW) defamation law would impose an undue burden on the implied freedom of political communication.⁵¹ To overcome this deficiency, the High Court extended the common law defence of qualified privilege to accommodate the requirements of the implied freedom of political communication. Their Honours stated:

Accordingly, this Court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion – the giving and receiving of information – about government and political matters. The interest that each member of the Australian community has in such a discussion extends the categories of qualified privilege. Consequently, those categories now must be recognised as protecting a communication made to the public on a government or political matter.

The High Court took an expansive view of the matters to which this extended form of privilege might apply, including discussion of the United Nations or other countries⁵² and discussion about State, Territory and local governments.⁵³ Their Honours observed that, if an occasion was protected by qualified privilege at common law, it could only be defeated by proof of malice. This was understandable, given that common law qualified privilege ordinarily attached to limited publications. By contrast, the extended form of common law qualified privilege propounded by the High Court would apply to widely disseminated publications on government or political matters.⁵⁴ For this extended form of common law qualified privilege to apply to government or political matters, the High Court imported an additional element of reasonableness. In doing so, it consciously borrowed from the statutory defence of qualified privilege under s 22 of the *Defamation Act 1974* (NSW).⁵⁵ When deciding whether the defendant acted reasonably for the purposes of this extended form of qualified privilege, their Honours stated that this needed to be determined upon all of the facts in the case. However, the High Court did provide further guidance on the issue of reasonableness, stating that:

[A]s a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond.⁵⁶

Lange v ABC is a landmark case in Australian defamation law, as well as in Australian constitutional law. The defence it recognised, commonly referred to as “*Lange* qualified privilege”, has been frequently pleaded in the intervening 25 years. However, *Lange* qualified privilege has been notable in its lack of success.⁵⁷ Although *Lange v ABC* is not strictly a case of the dog that barked once, it is one which has barked so infrequently since that it has not generated a noise complaint. Politicians in Australia still sue for defamation and are largely untroubled by *Lange* qualified privilege.⁵⁸

⁵¹ *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 569.

⁵² *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 571.

⁵³ *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 571–572.

⁵⁴ *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 572.

⁵⁵ *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 572–573.

⁵⁶ *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 574.

⁵⁷ Justice Peter Applegarth, “Distorting the Law of Defamation” (2011) 30 *University of Queensland Law Journal* 99, 99. For a rare instance of *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 qualified privilege succeeding, see *Brander v Ryan* (2000) 78 SASR 234.

⁵⁸ See, eg, *Random House Australia Pty Ltd v Abbott* (1999) 94 FCR 296; *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33; *Leyonhjelm v Hanson-Young* (2021) 282 FCR 341; *Barilaro v Google LLC* [2022] FCA 650; *Bazzi v Dutton* [2022] FCAFC 84.

Although the High Court has developed a substantial jurisprudence on the implied freedom of political communication since *Lange v ABC* was decided, it has not revisited the issue of the interaction between the implied freedom of political communication and defamation law. It is an open question as to whether the extension and adaptation of common law qualified privilege to accommodate the implied freedom of political communication is the sole change needed to be made to Australian defamation law to ensure its consonance with constitutional requirements.⁵⁹ Given that the breadth and complexity of the principles of defamation law and their potential to affect discussion of government or political matters, it is difficult to conclude that *Lange v ABC* is the final word on the implied freedom of political communication's impact on Australian defamation law. As Gaudron, McHugh and Gummow JJ observed in *Roberts v Bass*, "[i]t is a serious mistake to think that *Lange* exhaustively defined the constitutional freedom's impact on the law of defamation".⁶⁰

Lange qualified privilege is a narrow and inefficacious defence. It may now have been overtaken by the introduction of a broad-based statutory public interest defence, which is not limited to government or political matters. The narrowness of *Lange* qualified privilege reflects its constitutional basis.

A focus on the implied freedom of political communication's impact on defamation law as a means of liberalising freedom of speech about government or political matters may detract from the proper recognition of the common law's capacity to protect political speech. Two cases illustrate this capacity. In *Healy v Askin*, the endorsed Labor candidate for the Division of North Sydney at the 1974 Federal election made an application for an interlocutory injunction to restrain the broadcast of an allegedly defamatory election advertisement. In rejecting the application, Lee J found not only that the plaintiff could not establish the element of identification⁶¹ and that the restrictive approach to interlocutory injunctions tended strongly against the relief sought⁶² but also reasoned explicitly about the undesirability of allowing defamation law to interfere unduly with electioneering, stating that:

Throughout the Australian community it is recognized that criticism of the ideals and policies and conduct of political parties is vital to the interests of democracy, and this whether the criticism comes from other political parties, from ordinary citizens seeking to express an opinion or from any other source. At no time can it be more vital to the democratic process than at election time. Inevitably such criticism may operate to the disadvantage of candidates of the party criticized but if this happens, it does so because the individual candidates' election fortunes are in the most instances closely linked to the opinion held by the electors of the party and the policy of the party to which he belongs.

The common law does not give a right of action to a political party claiming to be defamed, and there is certainly no warrant in law for the courts to use the weapon of injunction as a means of enforcing anything in the nature of the standards of fair play in political criticism; this judgment of what is right and proper in that regard is left to the community, which of course means the electors, when an election is being held.⁶³

In *Ballina Shire Council v Ringland*, a case decided shortly after the discernment of the implied freedom of political communication, the New South Wales Court of Appeal had to determine whether a local council had standing to sue for defamation. The majority, consisting of Gleeson CJ and Kirby P, found that a local council lacked standing to sue for defamation. Their Honours did so by following the House of Lords' decision in *Derbyshire County Council v Times Newspapers*.⁶⁴ Gleeson CJ resolved the issue by recourse to the concept of reputation, identifying a fundamental incongruity between a democratically elected body seeking to protect its "governing reputation" and defamation law. Any "governing reputation" of a local council would be dynamic and contested and inflected by partisanship and, as such, not readily amenable to vindication by defamation law.⁶⁵ Significantly, for Gleeson CJ, the

⁵⁹ See also *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 575.

⁶⁰ *Roberts v Bass* (2002) 212 CLR 1, 29.

⁶¹ *Healy v Askin* [1974] 1 NSWLR 436, 439.

⁶² *Healy v Askin* [1974] 1 NSWLR 436, 440–441.

⁶³ *Healy v Askin* [1974] 1 NSWLR 436, 440.

⁶⁴ *Derbyshire County Council v Times Newspapers* [1993] AC 534. See *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680, 689 (Gleeson CJ).

⁶⁵ *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680, 691.

implied freedom of political communication reinforced the conclusion reached but was not the reason for it.⁶⁶ Kirby P dealt with the implied freedom of political communication at greater length but did not dispose of the case solely on that basis.⁶⁷ What these cases suggest is that the common law has always had some potential for protecting political speech outside of the implied freedom of political communication, which has not always been as thoroughly explored as it might have been.

PUBLIC INTEREST SPEECH

Government or political speech in Australia is consistently identified as a type of speech warranting particular protection in liberal democracies. Yet it is not the only type of speech which may be worthy of this. Public interest speech of a non-governmental or non-political character may also merit its own protection.

For a long time, the common law was not especially effective at facilitating public interest speech. Publication to the world at large was rarely treated as privileged.⁶⁸ In Australia, the development of legal protection for public interest speech occurred initially through statute. The introduction of the statutory defence of qualified privilege under s 22 of the *Defamation Act 1974* (NSW) should have acted to confer greater protection for public interest speech. This defence allowed for communication to recipients who had an interest or even an apparent interest in receiving information on a subject, even if, in the course of conveying that information, the plaintiff was defamed, so long as the conduct of the defendant was reasonable in the circumstances of publication. Although, in principle, this defence seemed designed to immunise at least some forms of public interest speech from liability for defamation, it was notable for its failure in practice.⁶⁹ Yet it was the NSW defence, rather than the relatively more effective defence of qualified protection under the codified defamation law of Queensland and Tasmania,⁷⁰ which was exported nationwide when the national, uniform defamation laws were introduced in 2005.⁷¹

From the late 1990s, courts, rather than legislatures, on other Commonwealth countries, began revisiting the issue of whether the common law adequately protected public interest speech. The process began with the decision of the House of Lords in *Reynolds v Times Newspapers Ltd*. The House of Lords revisited the common law, finding in essence that it had taken a wrong turn in the mid-19th century, the formative period of the common law defence of qualified privilege. Their Lordships decided to formulate a new defence of responsible journalism on a matter of public concern. The *Reynolds* defence was not limited to government or political matters. As Lord Nicholls of Birkenhead observed, there was no principled reason to treat public interest speech differently, depending upon whether it related to government or political matters or not.⁷² Regard was had to the High Court's decision in *Lange v ABC* but its narrower approach was not followed.⁷³

The *Reynolds* jurisprudence in the United Kingdom developed over the following decade⁷⁴ and was the impetus for developments in other common law jurisdictions. Almost a decade later, the Supreme Court

⁶⁶ *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680, 688.

⁶⁷ *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680, 696–697, 701–703.

⁶⁸ *Wake v John Fairfax & Sons Ltd* [1973] 1 NSWLR 43, 48 (*per curiam*); *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749, 782 (*per curiam*); *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, 250 (Brennan J).

⁶⁹ For instances of a successful defence of statutory qualified privilege under the *Defamation Act 1974* (NSW) s 22, see, eg, *Barbaro v Amalgamated Television Services Pty Ltd* (1989) 20 NSWLR 493; *Searcy v Molomby* [1999] Aust Torts Reports 81-536; [1999] NSWSC 981.

⁷⁰ *Defamation Act 1889* (Qld) s 16 (repealed); *Defamation Act 1957* (Tas) s 15 (repealed).

⁷¹ David Rolph, "A Critique of the National, Uniform Defamation Laws" (2008) 16 *Torts Law Journal* 207, 232–235; Applegarth, n 57, 101–102.

⁷² *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 205; [1999] UKHL 45.

⁷³ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 199–200 (Lord Nicholls of Birkenhead); [1999] UKHL 45.

⁷⁴ See, eg, *Bonnick v Morris* [2003] 1 AC 300; [2002] UKPC 31; *Jameel v Wall Street Journal Europe SprL* [2007] 1 AC 359; [2006] UKHL 44; *Charman v Orion Publishing Group Pty Ltd* [2008] 1 All ER 750; [2007] EWCA Civ 972; *Flood v Times Newspapers Ltd* [2012] 2 AC 273; [2012] UKSC 11.

of Canada in *Grant v Torstar Corp* recognised the defence of responsible communication on a matter of public interest.⁷⁵ More recently, the New Zealand Court of Appeal in *Durie v Gardiner* also recognised a defence of responsible communication on a matter of public interest as part of the law of New Zealand.⁷⁶

Courts in Australia have not followed their Commonwealth counterparts in recognising a public interest defence to defamation. There are a number of reasons for this. A significant one is that courts in Australia, at any early stage, declined the invitation to follow the House of Lords' approach in *Reynolds v Times Newspapers*. This is a position Australian courts have consistently maintained.⁷⁷ This stance meant that Australian courts did not engage with the substantial common law developments in the United Kingdom, Canada and New Zealand. The related reason for why a public interest defence to defamation did not develop at common law in Australia is that the availability of *Lange* qualified privilege (in respect of government or political matters) and statutory qualified privilege (exported nationwide from New South Wales, in respect of matters of interest or apparent interest) should have operated to protect many instances of public interest speech. Although, in theory, this should have occurred, it did happen in practice.

Although courts in Australia have not followed the House of Lords in *Reynolds v Times Newspapers*, legislatures in the majority of Australian States and Territories have now followed the legislature in the United Kingdom. Following a three-year reform process, the *Defamation Act 2013* (UK) was enacted. This is now the applicable statute in England and Wales.⁷⁸ One of its significant reforms included the abolition of the common law *Reynolds* defence and its replacement with a statutory public interest defence.⁷⁹ The statutory public interest defence under s 4 of the *Defamation Act 2013* (UK) served as the template for the public interest defence which was introduced across Australia, except in Western Australia and the Northern Territory, as part of Stage 1 of the reforms to the Model Defamation Provisions, which came into effect in 2021.⁸⁰

The statutory public interest defence in Australian defamation law requires a defendant to prove that the matter concerns a matter of public interest and that the defendant reasonably believed that the publication of the matter was in the public interest.⁸¹ Whether such a defence has been established should be determined by taking into account all of the circumstances of the case.⁸² The legislation identifies a number of factors which may be taken into account: the seriousness of the defamatory imputations conveyed by the matter; the extent to which the matter distinguishes between suspicions, allegations and proven facts; the extent to which the matter relates to the plaintiff's public activities or performance of public functions; whether it was in the public interest for the matter to be published expeditiously; the sources of information for the matter, including their integrity; if the source of information is a person whose identity is being kept confidential, whether there is a good reason for that person's identity being kept confidential, such as the need for compliance with a professional code or standard; whether the matter contained the substance of the plaintiff's side of the story and, if not, whether a reasonable

⁷⁵ *Grant v Torstar Corp* 2009 SCC 32; [2009] 3 SCR 353.

⁷⁶ *Durie v Gardiner* [2018] 3 NZLR 131; [2018] NZCA 278.

⁷⁷ *John Fairfax & Sons Ltd v Vilo* (2001) 52 NSWLR 373, 380–381 (Heydon JA); *Skalkos v Assaf* [2002] Aust Torts Reports 81-644, 68,529 (Mason P); [2002] NSWCA 14; *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419, [1165]–[1170] (Beazley, Giles and Santow JJA); *John Fairfax Publications Pty Ltd v Hitchcock* (2007) 70 NSWLR 484, 499 (McColl JA); *Daily Examiner Pty Ltd v Mundine* [2012] NSWCA 195, [128] (*per curiam*).

⁷⁸ The relevant legislation in Scotland is the *Defamation and Malicious Publication (Scotland) Act 2021* (Scot), which commenced on 1 April 2021.

⁷⁹ *Defamation Act 2013* (UK) s 4.

⁸⁰ *Civil Law (Wrongs) Act 2002* (ACT) s 139AA; *Defamation Act 2005* (NSW) s 29A; *Defamation Act 2005* (Qld) s 29A; *Defamation Act 2005* (SA) s 27A; *Defamation Act 2005* (Tas) s 29A; *Defamation Act 2005* (Vic) s 29A. Given the constraints of space, subsequent references will be limited to the NSW legislation.

⁸¹ *Defamation Act 2005* (NSW) s 29A(1).

⁸² *Defamation Act 2005* (NSW) s 29A(2).

attempt was made by the defendant to obtain and publish a response by the person; and the importance of freedom of expression in the discussion of issues of public interest.⁸³

The Australian public interest defence differs from its English model by including this list of factors. Most of these factors have been moved from the statutory defence of qualified privilege, which has been retained but is now less public interest-oriented than it was. The new public interest defence has yet to be tested. It is likely to overtake *Lange* qualified privilege, given that defence's relative lack of success and that the public interest defence is broadly based, encompassing, but extending beyond, government or political speech. There is a real question as to the potential efficacy of the new public interest defence. The combination of *Lange* qualified privilege and statutory qualified privilege should already have provided broad protection for publications on matters of public interest. The efficacy of these sorts of defences depends in part upon judicial approaches to their application. They can be applied strictly or beneficially, with the latter approach being preferable, being more consistent with their beneficial intent in allowing greater freedom of speech.⁸⁴ Whether the public interest defence is applied strictly or beneficially may similarly affect outcomes in the cases in which it is applied. Given that the public interest defence covers material already potentially defensible under existing defences, it may be that it will highlight public interest considerations in defamation cases without necessarily leading to substantially different outcomes.

LOW-LEVEL OR TRIVIAL SPEECH

Defamation law not only affects speech about issues of high public importance. It also has the potential to affect low-level, everyday speech. Indeed, many basic principles of defamation law have been established in cases involving marginal publication. The "multiple publication" rule, a fundamental feature of the common law of defamation, was cemented by the decision in *Duke of Brunswick v Harmer*,⁸⁵ a case involving a nobleman sending his manservant to the archive to locate an allegedly defamatory article first published two decades earlier. The classic formulation of the test for what is defamatory, the "lowering in the estimation of right-thinking members of society", emanates from Lord Atkin's speech in *Sim v Stretch*, a case involving a telegram between neighbours about an alleged borrowing of funds from a servant.⁸⁶ It is not only in cases of wider public concern that basic principles of defamation law are established.

Over recent decades, however, courts and legislatures have become understandably concerned to promote greater efficiency in the administration of civil justice. The overarching purpose of the administration of civil justice is the facilitation of the just, quick and cheap resolution of disputes.⁸⁷ Defamation litigation is not, and should not be, immune from the need to modernise to further this objective. Indeed, defamation litigation may have further to go than other areas of civil litigation in order to modernise. Defamation litigation has a reputation for complexity, technicality and artificiality, with extensive interlocutory skirmishes as a defining characteristic.

Nevertheless, over the last two decades, English courts began to develop two doctrines which were central to excluding trivial or marginal defamation claims at an early stage. The first development is known as the *Jameel* principle. In *Jameel v Dow Jones & Co Inc*, the English Court of Appeal permanently stayed defamation proceedings brought by a Saudi national in the High Court of Justice. The claimant could only point to five recipients of the matter within the United Kingdom, three of whom were the claimants'

⁸³ *Defamation Act 2005* (NSW) s 29A(3).

⁸⁴ *Jameel v Wall Street Journal Europe SprL* [2007] 1 AC 359, 383–384 (Lord Hoffmann); [2006] UKHL 44; *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33, 75–76 (White J).

⁸⁵ *Duke of Brunswick v Harmer* (1849) 14 QB 185; (1849) 117 ER 75.

⁸⁶ *Sim v Stretch* [1936] 2 All ER 1237.

⁸⁷ *Federal Court of Australia Act 1976* (Cth) s 37M; *Court Procedures Act 2004* (ACT) s 5A; *Supreme Court Rules 1987* (NT) r 1.10; *Civil Procedure Act 2005* (NSW) s 56(1); *Uniform Civil Procedure Rules 1999* (Qld) r 5; *Uniform Civil Rules 2020* (SA) r 3.1; *Supreme Court Rules 2000* (Tas) r 414A; *Civil Procedure Act 2010* (Vic) s 7; *Rules of the Supreme Court 1971* (WA) r 4B.

legal representatives.⁸⁸ Their Lordships were not satisfied that there had been a real and substantial tort committed within the jurisdiction.⁸⁹ The English Court of Appeal held that, where there was a gross disproportionality between the costs involved in litigating a right, including not only the costs to the parties but also the use of the court's resources, and the vindication of the right likely to be achieved by that litigation, a court could permanently stay the proceedings as an abuse of process.⁹⁰ Although buttressed by reference to particular features of UK law relating to civil procedure and human rights,⁹¹ the juridical basis of *Jameel* was abuse of process.⁹² Because the *Jameel* principle was based on abuse of process, it applied not only to defamation but was subsequently applied to other causes of action.⁹³ A significant reason, though, that the *Jameel* principle had particular application to defamation was because there were, at common law, few doctrinal barriers to a plaintiff suing for defamation.⁹⁴ As the English Court of Appeal noted in *Jameel*, no small claims processes have been developed for defamation, unlike other areas of law, such as contracts.⁹⁵ Nevertheless, the *Jameel* principle is not confined to defamation claims.

The other development in English case law for addressing trivial or marginal defamation claims at the outset was the recognition of a minimum threshold of seriousness. In *Thornton v Telegraph Media Group Ltd*, Tugendhat J reviewed the various tests for what is defamatory – exposure to hatred, contempt or ridicule;⁹⁶ lowering in the estimation of right-thinking members of society;⁹⁷ shunning and avoiding;⁹⁸ and exposure to more than a trivial degree of ridicule⁹⁹ – and concluded that the common law required a minimum threshold of seriousness to be passed before a matter could be actionable as defamation. In his Lordship's view, a plaintiff needed to establish not just any harm to reputation but substantial harm to reputation, before a matter could be actionable.¹⁰⁰ The minimum threshold of seriousness differs from the *Jameel* principle in important respects. The minimum threshold of seriousness is particular to defamation law, whereas the *Jameel* principle is grounded in abuse of process, which is part of the inherent jurisdiction of a superior court of record. The *Jameel* principle is only useful in extreme cases in excluding marginal or trivial cases, given the high bar presented by the need to establish an abuse of process, whereas the minimum threshold of seriousness will operate to exclude more marginal or trivial defamation claims.

The common law developments of the *Jameel* principle and the minimum threshold of seriousness informed the development of the statutory serious harm threshold now embodied in s 1 of the *Defamation Act 2013* (UK). In defining the requisite level of harm to reputation as “serious” rather than “substantial”, the statutory serious harm threshold was intended to raise the bar for what was required to make a matter actionable.¹⁰¹

Section 1 of the *Defamation Act 2013* (UK) was the model for the statutory serious harm threshold under Stage 1 of the reforms to the Model Defamation Provisions which came into effect in 2021 in all

⁸⁸ *Jameel v Dow Jones & Co Inc* [2005] QB 946, 956–957 (*per curiam*); [2005] EWCA Civ 75.

⁸⁹ *Jameel v Dow Jones & Co Inc* [2005] QB 946, 970 (*per curiam*); [2005] EWCA Civ 75.

⁹⁰ *Jameel v Dow Jones & Co Inc* [2005] QB 946, 970; [2005] EWCA Civ 75.

⁹¹ *Jameel v Dow Jones & Co Inc* [2005] QB 946, 966 (*per curiam*); [2005] EWCA Civ 75.

⁹² *Jameel v Dow Jones & Co Inc* [2005] QB 946, 965–66 (*per curiam*); [2005] EWCA Civ 75.

⁹³ See, eg, *Abbey v Gilligan* [2012] EWHC 3217 (QB); *Briggs v Jordan* [2013] EWHC 3205 (QB).

⁹⁴ David Rolph, “A Serious Harm Threshold for Australian Defamation Law” (2022) 51 *Australian Bar Review* 185, 186.

⁹⁵ *Jameel v Dow Jones & Co Inc* [2005] QB 946, 970; [2005] EWCA Civ 75.

⁹⁶ *Parmiter v Coupland* (1840) 6 M & W 105; (1840) 151 ER 340, 342 (Parke B).

⁹⁷ *Sim v Stretch* [1936] 2 All ER 1237, 1240 (Lord Atkin).

⁹⁸ *Yousouppoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581, 587 (Slesser LJ).

⁹⁹ *Ettingshausen v Australian Consolidated Press Ltd* (1991) 23 NSWLR 443, 449 (Hunt J).

¹⁰⁰ *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985, 2009–2010 (Tugendhat J); [2010] EWHC 1414 (QB).

¹⁰¹ *Lachaux v Independent Print Ltd* [2020] AC 612, 623 (Lord Sumption); [2019] UKSC 27.

jurisdictions across Australia, except Western Australia and the Northern Territory.¹⁰² There are, however, important differences between the English serious harm threshold and its Australian counterpart. Section 1 of the *Defamation Act 2013* (UK) deals with serious harm to reputation in terms as an aspect of what is defamatory. It is in effect a superadded, albeit negative, test for what is defamatory.¹⁰³ In contrast, the serious harm threshold under the Model Defamation Provisions treats serious harm to reputation as a separate element of the cause of action.¹⁰⁴ Another significant difference is the role of common law developments in the interpretation and application of the respective serious harm thresholds. The *Jameel* principle and the *Thornton* minimum threshold of seriousness are well-established in English case law and s 1 of the *Defamation Act 2013* (UK) consciously builds upon them. In contrast, the *Jameel* principle has had a mixed reception in Australia¹⁰⁵ and the minimum threshold of seriousness has had a marginal impact.¹⁰⁶ The statutory serious harm threshold does not have a solid common law foundation to draw upon as its English counterpart does. The statutory serious harm threshold in Australia will not be able to be interpreted and applied against the backdrop of common law principle as it does not exist. How the serious harm threshold will be interpreted and applied in Australia remains largely untested.¹⁰⁷ The stakes are high, though, for the serious harm threshold to work in Australia. At the same time that the serious harm threshold was introduced, the defence of triviality¹⁰⁸ – a unique creation of New South Wales defamation legislation, dating back to 1847¹⁰⁹ – was abolished. The defence of triviality had problems in its drafting, which affected its efficacy, but these might have been reformed.¹¹⁰ However, the legislature has placed its hopes in the statutory serious harm threshold effectively excluding trivial or marginal defamation claims at the outset. It is important for the serious harm threshold to succeed. Defamation litigation should not intrude unduly into low-level, everyday speech.

ACADEMIC SPEECH

There is another type of speech where intrusion by defamation law is undesirable. This is academic speech. The free exchange of ideas, the creation and dissemination of new knowledge, the challenging of orthodoxy and the pursuit of truth, which are or should be central to academic inquiry, may be hampered even by the threat of defamation litigation. Academic disputes have occasionally been the subject of defamation proceedings.

Perhaps the most high-profile example was David Irving's libel proceedings against Deborah Lipstadt.¹¹¹ Lipstadt is the Dorot Professor of Modern Jewish History and Holocaust Studies at Emory University in Atlanta. In 1993, Lipstadt published a book, *Denying the Holocaust: The Growing Assault on Truth*

¹⁰² *Civil Law (Wrongs) Act 2002* (ACT) s 122A; *Defamation Act 2005* (NSW) s 10A; *Defamation Act 2005* (Qld) s 10A; *Defamation Act 2005* (SA) s 10A; *Defamation Act 2005* (Tas) s 10A; *Defamation Act 2005* (Vic) s 10A. Given the constraints of space, subsequent references will be limited to the NSW legislation.

¹⁰³ Rolph, n 94, 202.

¹⁰⁴ *Defamation Act 2005* (NSW) s 10A(1).

¹⁰⁵ The clearest endorsement of *Jameel v Dow Jones & Co Inc* [2005] QB 946; [2005] EWCA Civ 75 (*Jameel*) in Australia is *Bleyer v Google Inc LLC* (2014) 88 NSWLR 670. As to the reception of *Jameel* in Australia generally, see Rolph, n 94, 188.

¹⁰⁶ The clearest endorsement of *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985; [2010] EWHC 1414 (QB) (*Thornton*) in Australia is *Kostov v Nationwide News Pty Ltd* (2018) 97 NSWLR 1073. As to the reception of *Thornton* in Australia generally, see Rolph, n 94, 188.

¹⁰⁷ At the time of writing, the sole judicial consideration of the serious harm threshold by a superior court of record in Australia is *Newman v Whittington* [2022] NSWSC 249.

¹⁰⁸ *Civil Law (Wrongs) Act 2002* (ACT) s 139D (repealed); *Defamation Act 2005* (NSW) s 33 (repealed); *Defamation Act 2006* (NT) s 30; *Defamation Act 2005* (Qld) s 33 (repealed); *Defamation Act 2005* (SA) s 31 (repealed); *Defamation Act 2005* (Tas) s 33; *Defamation Act 2005* (Vic) s 33 (repealed); *Defamation Act 2005* (WA) s 33.

¹⁰⁹ *Slander and Libel Act 1847* (NSW) s 2 (repealed); *Defamation Act 1912* (NSW) s 5 (repealed); *Defamation Act 1958* (NSW) s 20 (repealed); *Defamation Act 1974* (NSW) s 13 (repealed). See also *Enders v Erbas and Associates Pty Ltd [No 2]* [2013] NSWDC 44, [173] (Gibson DCJ).

¹¹⁰ Rolph, n 94, 208–209.

¹¹¹ *Irving v Penguin Books Ltd* [2000] EWHC 115 (QB).

and Memory. The United Kingdom edition was published by Penguin Books. Irving commenced libel proceedings in the High Court of Justice in respect of publication in the United Kingdom. He claimed that the book conveyed the imputations that he was a Holocaust denier, a falsifier of history and a bigot. Ultimately, Gray J found in favour of Lipstadt and Penguin Books, having been satisfied that they have proved the imputations to be substantially true. Crucial to the defence was the expert evidence of noted historians, Richard J. Evans and Christopher Browning. The mediation of academic disputes through defamation proceedings is not unknown but is not common.

It is obviously not only through defamation litigation that the effect of defamation law may be experienced. The threat of defamation action may inhibit academic inquiry, even if proceedings are never commenced. There is, however, no empirical evidence about the extent of the problem. Such evidence as exists tends not to rise above the anecdotal.

Law reform need not only respond to an empirically demonstrated problem. It is legitimate to reform the law consistently with principle. In 2013, a new statutory defence was introduced in England and Wales, providing protection for the publication of peer-reviewed statements in scientific or academic journals.¹¹² This provided the model for the Australian equivalent, which came into effect in 2021 in all jurisdictions, except for Western Australia and the Northern Territory.¹¹³

Under this provision, there is a defence to defamation if the defendant proves that the matter was published in a scientific or academic journal,¹¹⁴ the matter relates to a scientific or academic issue¹¹⁵ and, prior to publication, an independent review of the matter's scientific or academic merit was conducted either by the journal's editor (if they had expertise in the scientific or academic issue)¹¹⁶ or by one or more persons with relevant expertise in the scientific or academic issue.¹¹⁷ The defence extends to a journal whether published in electronic form or otherwise. The defence also extends to any written assessment provided by any of the persons who conducted an independent review of the matter.¹¹⁸ It further extends to a fair extract or summary of the matter or assessment.¹¹⁹ These defences are defeated if, and only if, the plaintiff proves that the matter or assessment was not published honestly for the information of the public or the advancement of education.¹²⁰

Given that the provision has only been in operation across most of Australia for little more than a year, as well as the relative infrequency of academic disputes being litigated in case law, it is unsurprising that there are as yet no judicial considerations of it. There are nevertheless several observations which may be made about it. On one measure, the provision is broad in its application. The provision does not prescribe or limit itself to a particular form of peer review. The academic standard for peer review is "double blind", where the reviewer or reviewers do not know the identity of the author and the author does not know the identity of the reviewer or reviewers. The provision encompasses "single blind" refereeing, where the author does not know the identity of the reviewer or reviewers but the reviewer or reviewers know the identity of the author. It also extends to an open review, in which the identity of the author and the reviewer or reviewers are known to each other. The touchstone of the defence is the application of expertise, either by the journal editor or the reviewer or reviewers, to an evaluation of the matter.

By another measure, the defence is narrow. It only applies to peer-reviewed journals. Articles in peer-reviewed journals are only one form of academic output. The defence does not apply to books. In many

¹¹² *Defamation Act 2013* (UK) s 6.

¹¹³ *Defamation Act 2005* (NSW) s 30A; *Defamation Act 2005* (Qld) s 30A; *Defamation Act 2005* (Tas) s 30A; *Defamation Act 2005* (Vic) s 30A. Given the constraints of space, subsequent references will be limited to the NSW legislation.

¹¹⁴ *Defamation Act 2005* (NSW) s 30A(1)(a).

¹¹⁵ *Defamation Act 2005* (NSW) s 30A(1)(b).

¹¹⁶ *Defamation Act 2005* (NSW) s 30A(1)(c)(i).

¹¹⁷ *Defamation Act 2005* (NSW) s 30A(1)(c)(ii).

¹¹⁸ *Defamation Act 2005* (NSW) s 30A(2).

¹¹⁹ *Defamation Act 2005* (NSW) s 30A(3).

¹²⁰ *Defamation Act 2005* (NSW) s 30A(5).

academic disciplines, such as the humanities, the social sciences and law, monographs and treatises are regarded as the major scholarly output. The defence also does not apply to non-peer-reviewed writings. Yet increasingly, academics are encouraged to disseminate their expertise not just to specialist audiences but to share that expertise to wider, generalist audiences. Such writings would also not be covered by this defence. Any greater protection of academic speech and the exclusion of defamation law from it should be welcomed. It should, though, be recognised that many aspects of academic writing will still be exposed to the risk of liability for defamation.

CONCLUSION

Striking the proper balance in defamation law between the protection of reputation and freedom of speech can be difficult. It should be recognised that different types of speech pose different challenges to finding appropriate reconciliation of these competing interests. The impact of defamation law on freedom of speech is not uniform. In addition, the balance between the protection of reputation and freedom of speech will need to be recalibrated from time to time, to reflect the relative importance of these interests, particularly as technologies change the ways in which people communicate. The relationship between the protection of reputation and freedom of speech is necessarily dynamic and evolving.