ADAPTING DEFAMATION LAW REFORM TO ONLINE PUBLICATION

Defamation and Media Law,
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The challenges of yesterday

1. These are dramatic times for defamation and media law reform. In the United Kingdom, the cancellation of the second stage of the Leveson Inquiry[2] ("Leveson 2") and the repeal of s 40 *Crimes and Courts Act 2013* (UK) (imposing defamation costs sanctions on unregulated news media), both announced on 1 March 2018[3], were met by shock and anger from those calling for reform.[4] In the United States, President Trump, dissatisfied with the mainstream media publishing what he called "fake news", has repeatedly said he wants to "change libel laws",[5] which some have construed as an attack on the First Amendment right of freedom of speech.[6] Those who endorse and those who oppose these developments all, however, seem to agree that the law relating to online publication generally, not merely in relation to defamation, needs to meet the challenges of the fast-moving technological innovations which have so profoundly changed our lives.

2. In addition to these challenges, defamation law reform in Australia faces a stumbling block of a more fundamental nature. When the uniform legislation[7] was enacted in 2005, legislators were aware of the profound impact of technology on defamation law over the previous decade, so a provision for a Review of the legislation five years after enactment (s 49) was added. As the extracts from *Hansard* set out below show, the Attorneys General from all States and Territories entered into an Inter-Governmental agreement to the effect that any subsequent amendment of the uniform legislation would depend upon

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[1] Judge, District Court of NSW, 2001 -.

[2] The Leveson Inquiry, "An Inquiry into the Culture, Practices and Ethics of the Press: Report", https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270941/0780_ii.pdf.

[3] Matt Hancock, the Secretary of State for Digital, Culture, Media and Sport, House of Commons Hansard vol 636, 1 March 2018, https://www.gov.uk/government/speeches/leveson-consultation-response.

[4] See, for example, B Cathcart, "The Guardian's Leveson Betrayal, Line by Line", *Inforrm,* 2 March 2018, https://inforrm.org/2018/03/02/the-guardians-leveson-betrayal-line-by-line-brian-cathcart/.

[5] A Liptak, "Can President Trump change libel laws?" *New York Times,* 30 March 2017.

[6] J Johnson, "A brief history of Donald Trump's mixed messages on freedom of speech", *The Washington Post,* 29 September 2017. This need not be achieved through actual Constitutional amendment; see, for example, "Online and on all fronts: Russia's assault on freedom of expression", *Human Rights Watch,* 18 July 2017.

[7] The term "uniform legislation", although used throughout this paper, is something of a misnomer for the defamation legislation passed in the States and Territories in 2005. As D K Rolph points out in "A Critique of the National, Uniform Defamation Laws" (2008) 16 *Torts L J* 207 at fn. 1, not all States and Territories passed a "uniform" Defamation Act. The Australian Capital Territory included its provisions in the Civil Law (Wrongs) Act 2002 (ACT) (CLWA (ACT)) Ch 9. In South Australia and the Northern Territory, although there are separate Defamation Acts, the numbering of the provisions diverges from the numbering agreed on in the remaining jurisdictions. In addition, not all jurisdictions enacted provisions for juries, Tasmania still permits defamation of the dead, the s 49 Review is a NSW addition and there are different commencement dates. No consideration was given at the time as to whether the Federal Court had jurisdiction and, if so, whether the right to a jury or different provisions in different jurisdictions (e.g. s 10 and s 43) would apply.

issues raised in the s 49 Review. However, although submissions for this purpose were invited in early 2011 (in New South Wales at least), no s 49 Review was published on the due date of 1 January 2012 – or, for that matter, at any time thereafter.

3. Why did this happen, and what must be done to ensure that defamation law reform, even more urgent now than it was in 2011, can be put back onto the legislative agenda? If the s 49 Review process can be restarted, on what basis should the Review proceed – tinker with existing provisions in the manner suggested by the submissions made back in 2011, or by a more fundamental analysis of online publication generally?

4. The "tinkering" approach would not enable the legislation to deal with the online publication problems foreseen by Mr Matt Hancock, the UK Secretary of State for Digital, Culture, Media and Sport, in his public statement of 1 March 2018 in relation to the cancellation of Leveson 2 and the repealing of s 40:

> "Action is needed, based not on what might have been needed years ago but on what is needed to address today's problems. Our new digital charter sets out the overarching programme of work to agree norms and rules for the online world and put them into practice. Under the charter, our internet safety strategy is looking at online behaviour and we will firmly tackle the problems of online abuse. Our review into the sustainability of high-quality journalism will address concerns about the impact of the internet on our news and media**. It will do this in a forward-looking way, so we can respond to the challenges of today, not the challenges of yesterday**."[8] [Emphasis added]

5. Mr Hancock's phrase "the challenges of yesterday" is an apt one to describe Australia's defamation law reform history of "piecemeal reform and comparative neglect"[9] culminating in the currently stalled s 49 Review.

6. The initial problem facing law reformers is that, at a time when the issue of online publication is of critical concern even in countries where freedom of speech laws of the kind admired by many law reform advocates have long been in place, this inaction is unacceptable. The real problem is, however, that if a rebooted s 49 Review takes place, it must not make the same mistakes of misunderstanding online technology that the Leveson Inquiry did. The failure of the Leveson Inquiry to obtain expert evidence on the technology (and extent) of hacking and related white-collar crime and governance issues, even though companies like Cambridge Analytica were already in the marketplace, and to see the big picture of technological intrusion and online abuse, as opposed to blaming journalist ethics, is one of the reasons why Mr Matt Hancock said that it had only answered "the challenges of yesterday."[10]

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[8] Matt Hancock, the Secretary of State for Digital, Culture, Media and Sport, House of Commons Hansard vol 636, 1 March 2018, https://hansard.parliament.uk/commons/2018-03-01/debates/AE8A077E-3130-40BE-9F14-0DD177040D03/LevesonInquiry.

[9] David Rolph, "Defamation Law", 2015 at [1.40] ("Rolph").

[10] See also M Sweney, "Leveson 2: what was it meant to achieve?", *the Guardian*, 1 March 2018. Cambridge Analytica's parent company had been set up in 1990 and Cambridge Analytica was involved in the US election in 2012. The Leveson Inquiry also failed to secure documentation by allowing *News of the World* to simply shut down in 2012. Some US lawyers and journalists (e.g Reuters law reporter Alison Frankel) warned, in the same month it was shutting down, that spoliation and loss of e-discovery would result (e.g. Kate Paslin, "News of the World: Hacking into e-discovery", *e-discovery Insight*, 11 July 2011; Dawn Lomer, "Ediscovery and cyber-shredding at News of the World", *i-sight*, July 21, 2011; "The E-Discovery Implications of the. News of the World phone hacking scandal" *E-Discovery Beat*, 15 July 2011; "*News of the World* Buries the E-Discovery Lede: Spoliation", *e-Discovery Insights*, 12 July 2011). The Leveson Inquiry also failed to examine connections

7. This discussion paper does not examine the reasons for the defamation and media law reform challenges in other common law jurisdictions, but upon problems specific to amendment to the uniform legislation in Australia, and how ongoing legislative reform of the kind promised when the uniform legislation was before the Parliaments of the States and Territories around Australia should be resuscitated.

8. The principal problem is the total breakdown of the s 49 Review system set up to guarantee ongoing reform.

How the s 49 Review was intended to work

9. The principal reason for a five-year Review was acknowledged to be the impact of information technology and online publication on defamation law. Mr Debus MLA, the Attorney General for New South Wales, spelled out, in his Second Reading Speech, that the uniform legislation had come about because of "the most astounding developments in information technology" which "completely revolutionised the way we communicate".[11] The Standing Committee of Attorneys General (SCAG), the legislators and the politicians all wanted to ensure that, in a future dominated by the internet, the objectives of the legislation were met by provisions which were "appropriate", to use the language of s 49. The review process was designed to ensure that the uncertainties of future technology could be addressed five years into the future, by a report which would guide the Inter-Governmental committee whose blessing was necessary for all statutory reform.

10. One of the more significant problems this Review would have to face was that the "astounding developments in information technology" Mr Debus MLA was referring to appeared in the uniform legislation only in the most limited fashion. The uniform legislation contains only two references to "electronic" communication at all. The first is in the definitions section, where "electronic communication" is defined and included in the list of what kind of publications can be sued on ("the Internet or any other form of electronic communication") and the second is s 32(3)(f), where "electronic medium" and "electronic form" appear in lists which also include "librarian" and "news-vendor" (s 32(3)(a)). Other pre-technology terms include the quaint reference to "learned societies" (s 29(4) and (5)) and the permission of service by "facsimile transmission" (not "email") in s 44. The legislation drafters were leaving these issues to the draftsmen of the future.

11. However, that is not what happened. Defamation law reform cannot even start unless we understand why the Review did not take place. That requires an examination not only of the s 49 Review itself but also prior law reform proposals in Australia.

The s 49 Review's history

12. Section 49 (in the New South Wales *Defamation Act*) provides:

> "**49 Review of Act**

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between criminals, corrupt police and phone hacking, particularly in relation to the events following the 1987 murder of a private investigator, Daniel Morgan.

[11] *Hansard*, 13 September 2005, p. 17636.

> (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
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> (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
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> (3) **A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years**." [Emphasis added]

13. Who was in charge of this process? As reported in the 2005-06 Annual Report of the (then) Standing Committee on Attorneys-General, the uniform legislation was subject to an Inter-Governmental Agreement which also provided for amendments to the laws. Recommendations from this NSW s 49 Review would be an important part of any such amendments.

14. The Hon Henry Tsang MLC, in the course of the Second Reading of the uniform legislation in the Legislative Council on 19 October 2005, explained this "ongoing" law reform process as follows:

> "…I can confirm that the passage of the Defamation Bill is the first and most critical stage of an ongoing defamation law reform process. The State and Territory Attorneys General are keen to ensure that uniformity of defamation law is maintained into the future.
>
> They are also mindful of the need to ensure that the law keeps pace with developments in both society and communications technology. **That is why the Ministers have agreed to endorse an Inter-Governmental agreement to support the future development of defamation law in Australia. Under this agreement, any proposed amendments to the model defamation provisions must be referred to and considered by the Standing Committee of Attorneys General**. The passage of the Defamation Bill represents a major milestone in Australian legal history, and I commend the bill to the house." (*Hansard,* p. 18804). [Emphasis added]

15. The next problem is the desultory manner in which the s 49 Review was conducted. Where a review of legislation occurs, a consultation paper is often issued, such as the 2016 Consultation Paper[12] issued for the review of the *Right to Information Act 2009* and the *Information Privacy Act 2009.* This enables the body carrying out the review to put together information about amendments since the enactment of the legislation as well as to identify particular problems already drawn to the reviewers' attention (such as everyone's complaints about the drafting of s 26). No such paper was prepared, and only New South Wales set up any procedure for the reception of submissions; Andrew Kenyon notes that the review process seemed to be entirely NSW-focused, and that the Law Council of Australia "submitted comments well after the original deadline, apparently due to lack of earlier communication from the NSW Department of Attorney General and Justice."[13]

16. Those parties who did make submissions were only given effectively a two-month period to do so, with the result that some of the submissions (such as those of Professor Rolph) were put forward under cover of correspondence suggesting a further inquiry process was needed. Some of the bodies putting in submissions (the Law Council of Australia, the

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[12] This Consultation Paper is available online at: http://www.justice.qld.gov.au/__data/assets/pdf_file/0011/498233/consultation-paper-review-of-the-rti-act-and-ip-act.pdf.

[13] A Kenyon, "Six Years of Australian defamation Law" (2012) 31 *UNSW LJ* 31 at fn 36.

Law Society of New South Wales and the NSW Bar Association) were able to obtain an extension. The reason for such a short period being given for review of such a complex area of the law is unknown.

17. As the submissions listed as received[14] demonstrate, most covered fairly traditional topics, ranging from the generally acknowledged need to redraft s 26[15] to the abolition of juries[16] and the rights of corporations to bring defamation actions, but some squarely faced the issues of ISPs, search engines and the internet, such as the Communications Alliance submissions.

18. However, that was where the Review process stopped. There must have been continuing contact of some kind between the organisers of the Review and those who sent submissions, as a redraft of s 26 was prepared by the NSW Bar Association in about 2014 (but circulated so confidentially that few ever saw it) and, two years later (on 26 February 2016), the Joint Media Organisations provided a Briefing. There has been the occasional reference to the absence of any published Review in seminars and journal articles[17], but there has been no response from the Review or indeed anyone.

19. Nor has the Inter-Governmental agreement resulted in intervention in cases where important safeguards under the uniform legislation such as trial by jury were being challenged. None of the Attorneys-General sought leave to intervene when a Notice of a Constitutional matter under s 78B *Judiciary Act 1903* (Cth) was served upon them in *Wing v Fairfax Media Publications Pty Limited* [2017] FCAFC 191. The Full Court of the Federal Court, in this decision, deprived the publishers of the right to trial by jury, despite acknowledging that s 11 factors favoured New South Wales, on the basis, inter alia, that the right to a jury was procedural and not substantive, and the Federal Court Rules did not provide for juries.

20. There was no mention made of the Inter-Governmental agreement about amendments by the Full Court in this judgment, although the negotiation of the entitlement to judge/jury trial in each State had been a standard part of the agreement, with carve-outs only for special cases, as Mr Tsang MLC set out in his speech[18]:

> "The model defamation provisions allow parties to elect to have trial by jury unless the court orders otherwise. In those jurisdictions, such as South Australia, where civil juries were abolished many years

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[14] See the submissions to the s 49 Review in New South Wales set out at http://www.justice.nsw.gov.au/justicepolicy/Pages/lpclrd/lpclrd_consultation/lpclrd_stat_reviews.aspx#ReviewofDefamationAct2005.

[15] A copy of Simpson J's judgment in *Kermode v Fairfax Media Publications Pty Ltd* [2011] NSWSC 852 was apparently provided to the Attorney General of New South Wales but there was no response; an appeal was dismissed. The need for amendment of s 26 was addressed in a series of submissions, as noted by Phillip Beattie in "Putting Things in Context: Is Contextual Truth a Defence or a Distraction?" (2017) *CLB* 10 at 17.

[16] The jury issue was the sole matter raised by the Supreme and District Court submissions. These concerns were largely answered by the Solicitor-General in his submission.

[17] See, for example, Phillip Beattie, *loc. cit*. Additionally, in 2016, after the further submissions from the Joint Media Organisations were submitted to the Review, the *Gazette of Law and Journalism* published a series of short reports concerning defamation law reform issues. In the course of my contribution, and in a 2011 seminar paper now published on the District Court website (written shortly the Court of Appeal decision in *Kermode v Fairfax Media Publications Pty Ltd*), I referred to in particular to problems concerning the interpretation of s 26.

[18] *Hansard*, p. 18803.

> ago, they will not be reintroduced for the handful of defamation cases that come before those courts each year."

The s 49 Review process today

21. There is now anecdotal evidence that the NSW s 49 Review report has recently been either completed or tidied up. However, there has been no call for updated submissions, or for input from the profession or academics, over the past six years, let alone any research concerning the major changes to internet and social media use and their impact on the uniform legislation.

22. How likely is it that this Review, if it were to be handed down now, would deal effectively with emerging new issues such as the internet, social media, proportionality and the multiple publication rule?

23. Given the problems New South Wales legislators have had with other social media and internet-related reforms, such as the 2012 attempt by the NSW Government to ban smartphones, laptops and tweeting from the courts,[19] the likelihood of an accurate report demonstrating discerning the complexities of internet law and the cultural changes behind social media is not high. In addition, the Review's information sources are clearly well out of date. Any Review based on submissions made on the law as it was in 2011 faces formidable obstacles, as the list below of defamation law issues which have arisen since then will illustrate.

Defamation law issues from 2011 onwards

24. Defamation law reform is, like the missing s 49 Review, not merely "overdue"[20] but urgent.[21] Issues which were already a difficulty in 2011 have become more so. I have set out below some of the many legislation and policy issues, noting that many if not most of them have become identified as issues since the s 49 Review timeframe expired.

INTERNET AND INFORMATION TECHNOLOGY ISSUES

25. **The single publication rule and limitation issues:** The failure to enact a single publication rule undercuts the limitation period for online publications and also renders some defences (such as offer to make amends) unworkable. The multiple publication rule was known to be a problem as far back as 1974,[22] 1992[23] and 2010.[24] The failure to adopt

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[19] New South Wales, Parliamentary Debates, Legislative Assembly, 21 December 2012 (Greg Smith, Attorney General). See Chris Paver, "The Courts Versus Twitter", (2013) 32 *Communications Law Bulletin* 6. Mr Paver also points to "outdated security laws" and the need to ensure modern technology does not infringe the administration of justice.

[20] Rolph, at [1.10] – [1.50].

[21] See, for example: "Australian Press Council calls for urgent reform of defamation laws", ABC Radio National, 2 July 2015, http://www.abc.net.au/radionational/programs/breakfast/australian-press-council-calls-for-urgent-reform-of/6589058'; "Urgent actions needed to reform Australian defamation law, Professor Weisbrot urges", *The Filipino Australian,* 7 July 2015.

[22] When the 1974 Act was before the New South Wales Parliament, concern about the possibility of multiple actions resulted in a proposal for a "single publication" rule to permit only one action against a defendant

the single publication rule (in place in the United Kingdom since 1952) continues, thanks to the internet, to undermine not only limitation periods but many of the defences. Despite this long history of warnings, this was overlooked by the 2005 legislators as well as nearly all the 2011 submissions to the Review.

26. **Liability of internet service providers:** The liability of ISPs remains a controversial issue. It was addressed by the Communications Alliance submissions to the Review, which noted (at 3.14) that ISP liability had yet to be determined by an Australian court and (at 4.12) that it was "not clear" if a search engine operator could rely on s 32 if sued for a snippet. There is now a considerable body of case law, much of it conflicting, and the possibility of High Court consideration of these issues in 2018.

27. **State/Federal jurisdiction concerning publications on the internet:** While many acknowledge the absence of specific provisions for internet and electronic publications,[25] what justification can there be for a State-by-State consideration of defences to internet publications? Why cannot there be Commonwealth legislation under the *Constitution,* s 51(v) power, hopefully also dealing with related electronic communication issues such as serious breach of privacy (the subject of a review in New South Wales in 2015)[26]?

28. **Fake news, the dark web, criminal liability and criminal libel:** Similarly, what is the future of defamation law in a "fake news" world where "every American plutocrat will soon be fielding his or her own perfectly legal troll army"?[27] How are other countries[28] dealing with online abuse or defamatory publication on the "dark web", and could take-down orders for abuse extend to defamation? How does defamation legislation fit into these wider issues? The line between defamation, hate speech and vulgar abuse, in an internet world, has never been more uncertain. Reform of defamation law needs to be effected in concert with appropriate legislation for other internet publications which troll, harass or lie in circumstances which may go beyond (but still include) defamation and whether these should include criminal libel proceedings of any kind (including provisions which can be used to similar effect, such as the criminal charges the subject of *Monis v R; Droudis v R* (2013) 249 CLR 92.

(*Hansard* 27 February 1974, pp.848-850). There is a reference to s.9(6) as then becoming otiose (at page 849) and being able to be deleted. However, this proposed amendment was lost (*Hansard* at 850).

[23] In *Jones and Anor v TCN Channel 9 Pty Ltd* (1992) 26 NSWLR 732, the plaintiff sought to recover punitive damages for publication outside New South Wales, arguing that the "flexible exception" in *McKain v R W Miller & Co (South Australia) Ltd* (1991) 66 ALJR 189 had the effect of introducing a form of "single publication rule". Hunt J rejected this submission, noting that *McKain v Miller* had since been overruled.

[24] See Matthew Collins, "The Law of Defamation and the Internet", 3rd ed., 2010 ("Collins"), at [18.63] - [18.71].

[25] Dr Daniel Joyce, "Searching for defamation law reform", Australian Human Rights Centre Law, 17 August 2017, http://www.ahrcentre.org/news/2017/08/22/931.

[26] The overlap between defamation and serious invasion of privacy is clear from the statistics set out in the Arts Law Centre's 4 September 2015 submission to this inquiry: https://www.artslaw.com.au/images/uploads/Arts_Law_Centre_of_Australia_submission_Inquiry_into_remedies_for_the_serious_invasion_of_privacy_in_NSW.pdf.

[27] T Frank, "The hysteria over Russian bots has reached new levels", *the Guardian,* 23 February 2018.

[28] K Lyons & others, "Online abuse: how different countries deal with it", *the Guardian,* 12 April 2016, https://www.theguardian.com/technology/2016/apr/12/online-abuse-how-harrassment-revenge-pornography-different-countries-deal-with-it.

PROBLEM AREAS OF THE LAW FOR PLAINTIFFS

29. **Multiple attacks on plaintiffs:** The greatest single failure of defamation and reputation law remedies is to be found in the absence of effective relief for victims of internet/social media vilification campaigns. The publications in these cases can be professionally ruinous[29] or even life-threatening[30]. This is part of a much wider problem, namely a lack of understanding by politicians and bureaucrats, of the technology of the internet and the socio-political factors driving social media and web rage generally. Where attackers are anonymous and/or penniless, remedies other than damages are called for, whether the publication is a poison pen letter or an online trolling attack. In particular, consideration should be given to comprehensive legislation for easier take-down procedures as the traditional *Norwich Pharmacal* order (*Norwich Pharmacal Co & Ors v Commissioners of Customs & Excise* [1974] AC 133) is a cumbersome tool for dealing with "flame" or attack sites. This is one area where Australia can benefit from examination of legislation in the United Kingdom, much of which is helpfully explained by the Matrix Chambers publication "Online Publications Claims: A Practical Guide".[31]

30. **Injunctions:** The legislation fails to address difficulties with enforceability of injunctive relief[32] and non-publication or suppression orders[33] when confidential material is spread over the internet. In an internet world, does the test for balance of convenience in freedom of speech issues need to be reconsidered?

31. **Concerns notices and pre-discovery of identity:** The current tests for pre-discovery are inadequate to enable identification of anonymous posters of defamatory material. The commencement of such proceedings before suit can be cumbersome. Where the matter complained of is caught by a limitation provision, the delays caused by these slow procedures can create significant difficulties.

THE DEFENCES

32. **Justification:** Four major issues arise in relation to justification defences:

- The longstanding need to revise s 26 has been acknowledged since *Besser v Kermode* (2011) 282 ALR 314 was handed down.
- In the age of social media and the potential for worldwide publication of stolen or hacked private information, it seems hard to justify the removal of the public interest component.
- Inconsistent decisions concerning the availability of the Polly Peck/Hore-Lacy (*David Syme & Co v Hore-Lacy* [2000] 1 VR 667) imputation: *Bateman v Fairfax Media*

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[29] *Al Muderis v Duncan (No 3)* [2017] NSWSC 726.
[30] *Rothe v Scott (No 4)*[2016] NSWDC 160; *French v Fraser (No 3)* [2015] NSWSC 1807.
[31] Hugh Tomlinson QC and Guy Vassall-Adams QC, "Online Publication Claims: A Practical Guide", Matrix Chambers, 2017.
[32] Examples of flouted court orders include *Al Muderis v Duncan (No 3)* [2017] NSWSC 726.
[33] These problems have been noted for some time: see David Barnfield, "Effectiveness of Suppression Orders in the Face of Social Media" (2011) 33(4) *LSB* 16; B Fitzgerald and C Foong, "Suppression orders after *Fairfax v Ibrahim: Implications for Internet Publications*" (2013) 37 *Aust Bar Rev* 175.

Publications Pty Ltd (No 2) [2014] NSWSC 1380 – cf *Setka v Abbott* [2014] VSCA 287.

- The defendant bears the onus in the defence, which often results in summary strike-out applications, but should the defendant be entitled to require the plaintiff to plead a Reply?

33. **Qualified privilege:** The need to redraft or replace s 30 seems to be universally acknowledged. Unfortunately, discussion of this issue in Australia was still mired in using the *Reynolds* principle at the time of the Review, although this defence was replaced in 2013 by the *Defamation Act (UK)* 2013.There are now fewer journalists (and more "churnalism" as a result), the traditional media is under attack, and reportage/qualified privilege defences have increasingly less relevance to worldwide publications made on social media or by "citizen journalists". (On a practical level, there is uncertainty about whether a jury or a judge should determine this defence, but that is only one of many other difficulties with the s 30 defence).

34. **Honest opinion:** Several of the submissions to the s 49 Review, such as the Free TV and Australians' Right to Know submissions, pointed to the unsatisfactorily narrow way in which this defence is drafted and sought its replacement with the repealed Code provision. It is still uncertain whether it is necessary to join the journalist or other person holding the opinion and the joinder of these persons adds to the cost and stress level of proceedings.

35. **Triviality and serious harm:** The language of s 33 ("unlikely to sustain <u>any</u> harm") raises the bar considerably when compared to previous provisions. Of all the calls for reform, concerns about the disproportionate costs for a publication to one or a handful of people are amongst the most compelling. Triviality, serious harm and proportionality were not issues which were addressed by the submissions made to the Review in 2011, although proportionality had been squarely raised in case law at the time[34]. In their updating submissions in 2016, the Joint Media Alliance submission called for reforms to include the equivalents of ss 1 and 5 *Defamation Act 2013* (UK).

36. **Offer to make amends:** Although the Law Council of Australia's submission to the Review[35] described this procedure as being successfully used by media defendants, multiple concerns notices to multiple potential defendants are possible for online publications. The leave provision in s 23 is no bar because offers to make amends are not "proceedings". If the defence goes to trial, there is uncertainty as to whether the defence is a matter for the jury or (because of its quantum component and the language of the section) for the judge.

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[34] The farsighted submissions of the respondent on these issues in *Habib v Radio 2UE Pty Ltd* [2009] NSWCA 231 warrant further consideration. See also the authorities collected in *Calabro v Zappia* [2010] NSWDC 127. Judge-developed law in this area has moved very slowly. It was not until late 2017 (in *Farrow v Nationwide News Pty Ltd* [2017] NSWCA 246 that the New South Wales Court of Appeal (per Basten JA at [5]) gave any hint of potential approval of the important discussion of proportionality principles in defamation law set out by McCallum JA in *Bleyer v Google Inc* (2014) 88 NSWLR 670.

[35] Law Council of Australia, Submission to NSW Department of Attorney General and Justice, Review of the Defamation Act 2005 (NSW), 1 August 2011, 10 [5.5] http://www.lpclrd.lawlink.nsw.gov.au/lpclrd/lpclrd_consultation/lpclrd_stat_reviews.html.

37. **Absolute privilege and the complaints process:** The restriction of absolute privilege to courts means that many complaints bodies, such as the Financial Industry Ombudsman, are unprotected. This can be resolved by requiring the parties to enter into an agreement which precludes suit[36], but there is much to be said for statutory regulation of this process, and of the defence of consent generally. The use of an "eBay-style" process of regulating complaints online, where parties are obliged, as part of the terms of the use of the site, to agree not to sue, is a useful self-help procedure. Many complaints bodies, such as the Press Council, do so, but the potential for suit would benefit from statutory consideration. The definition of "learned society" should be replaced with a more generous set of exemptions for publications of an academic, scientific or economic character and allow for reports of their activities, not just disciplinary proceedings, to be excluded from suit (as is the case in the United Kingdom where s 6 *Defamation Act 2013* (UK) provides such immunities) .

38. **Fair report:** This is a narrow and under-utilised defence. Reports of court proceedings should be given greater flexibility.

39. **Libel tourism and forum shopping:** The 2016 submissions from the Communications Alliance to the s 49 Review warned of examples of "libel tourism" legislation in other jurisdictions (at 6.1 – 6.3),[37] noting that the law in this area has changed substantially since 2011. The *Defamation Act 2013* (UK), which post-dates the Review period, includes anti-libel tourism provisions.

DAMAGES ISSUES

40. **The cap on damages:** There are numerous problems:

- Damages awards are increasing in size as a result of judicial interpretation of the impact of the cap on damages and in dispensing with it where aggravated damages are awarded.

- There is an increasing gap between the CPI and the cap.[38]

- The applicability of the cap in multiple claims brought by a plaintiff/plaintiffs is unclear: *Buckley v Herald & Weekly Times Pty Ltd* [2009] VSCA 108.

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[36] See *Imielska v Morgan* [2017] NSWDC 329.

[37] See Tara Sturtevant, "Comment: Can the United States Talk the Talk & Walk the Walk When It Comes to Libel Tourism: How the Freedom to Sue Abroad Can Kill the Freedom of Speech At Home (2010) 22 *Pace International Law Review* 269 at pp. 280–82 (discussing libel tourism in Singapore and Australia). While the number of defamation cases has led to Australia being called the libel capital of the world, that is not because of foreign cases; London was always the preferred venue for the rich and famous. In 2008, it was estimated that celebrities had filed one-third of all libel suits in England and Wales that year: Robert Verkaik, "London Becomes Defamation Capital for World's Celebrities", *the Independent*, Oct. 13, 2008

[38] As to changing views of the cap on damages, see *Cripps v Vakras* [2015] VSC 193 per Kyrou J at [603]–[608]; *Carolan v Fairfax Media Publications Pty Ltd (No 6)* [2016] NSWSC 1091 per McCallum J at [127] and *Sheales v The Age Co Ltd* [2017] VSC 380 per John Dixon J at [70]. As to the history of the cap and the CPI, see J P Cashen "Defamation Cap Rising Well Above Inflation" (*Gazette of Law and Journalism*, 10 December 2014). As to the media response to the Rebel Wilson verdict, see B Kaye, "Australian media joins fight against Rebel Wilson's record defamation payout", *Sydney Morning Herald,* 26 February 2018.

PROBLEMS FOR COURTS

41. **Jurisdiction issues**: Does the Federal Court have jurisdiction to hear defamation actions merely on the basis that an online or mass media publication has been published around Australia and thus in the Australian Capital Territory, can that jurisdiction be used to deny a party the right to a jury and, if so, does s 11 require amendment to preserve this and other procedural rights? If the Federal Court is afforded jurisdiction by reason of publication in the Australian Capital Territory, do ss 6 and 12 *Human Rights Act* 2004 (ACT) give rights to a constitutionally guaranteed freedom of speech which entitles a defendant to demand, as part of that right, a jury, or a constitutionally protected right of freedom of speech in that (and perhaps other) jurisdictions?

42. **Evidentiary rules issues:** The obligation to discover social media and internet posts is largely unregulated and this has resulted in evidentiary problems in many areas of the law. There have been particular problems in defamation; for example, destruction of social media by one plaintiff led to loss of the whole case (*Palavi v Radio 2UE Sydney Pty Ltd* [2011] NSWCA 264), while evidence of destruction of social media by another plaintiff was allegedly rejected, in a recent defamation trial, pursuant to s 135 *Evidence Act 1995* (NSW). This is one of many internet-related areas of the law where court procedural rules need updating not only for defamation proceedings but generally. For example, in New South Wales, it is uncertain whether court rules such as UCPR r 31.10 apply to tender of a party's own social media against that party.

43. **Case management:** The case management sections of the uniform legislation need to catch up with modern technology. Any concerns notice or statement of claim sent by email without an order to this effect from the court (s 44(2)) has probably been invalidly served, as s 44 sets out the manner in which service may be effected and service by email is not included (although, curiously, "facsimile" machines are). The same is the case with many court procedural rules. For example, the Supreme Court of Victoria gives plaintiffs filing a statement of claim for any cause of action a whole year in which to serve it, with an option to extend time for service by another year, which could treble the limitation period for defamation claims.

44. **Jury issues:** Blaming the jury for case management and costs problems in courts was the sole topic of the two court submissions to the 2011 inquiry, although the longest trials in defamation have all been non-jury trials (e.g. *Marsden v Channel Seven Pty Ltd* [2001] NSWSC 520) and only one jury verdict under the uniform legislation has been set aside as perverse. While there was a lively debate in Review submissions about whether or not there should be a jury, none of the combatants dealt with the issue of jury use of social media. The *Skaf* jury direction (*R v Skaf* (2004) 60 NSWLR 86) was drafted before social media existed, and it is still undecided whether *Skaf* directions should be given at all in civil trials (*Dehsabzi v Nationwide News Pty Ltd (No 4)* [2008] NSWDC 274).

45. **Litigants in person:** Examination of the 169 defamation judgments under the uniform legislation (see *Australian Defamation Law and Practice* at [60-000] ff; see also the

recent UTS study on defamation statistics between 2013 and 2017[39]) shows that around two-thirds of defamation actions brought against ordinary members of the community rather than the media. Of these, about one-fifth of plaintiffs and defendants are unrepresented. They are often angry or distressed. Dealing with these cases creates difficulties for the court in terms of the role of the judge and the use of court resources.[40]

46. Another layer of complexity is added by the unfortunate history of defamation law reform in Australia. The search for "appropriate" (to quote s 49) reform has never been an easy task because of State demarcation disputes and inability to adapt obsolete legal concepts to modern methods of communication, as the history of Australian law reform set out below demonstrates.

Before the s 49 Review: A short history of Australian defamation law reform

47. Many commentators have noted that, as defamation law fell within the jurisdiction of State and Territory legislation, it has been a victim of territoriality issues, as well as a lack of political will for co-operation.[41] I see the continued failure of the respective Governments to cooperate in, or to produce, the Review envisaged by s 49 as the latest example of a history of similar failures, as some of the following examples show.

- ***Defamation Act 1974* (NSW)**: Long before the internet had come to dominate worldwide communication, the legislators drafting the *Defamation Act 1974* (NSW) simply ignored the realities of Australia-wide mass media newspaper and television (leading to bizarre results, such as *Gorton v Australian Broadcasting Commission* (1974) 22 FLR 181) and favoured "excruciating and sterile technicalities"[42] as a way of deterring litigants. Despite this, the high number of litigants who commenced proceedings in New South Wales over this period was "sobering", to quote the Honourable Michael Kirby AO CBE.[43] Mr Kirby was similarly perturbed by the very high percentage of claims which were commenced and then abandoned, indicating abuse of process, unsatisfactory and dilatory court procedures, or both.

- **The ALRC 1979 report**: By comparison, the Australian Law Reform Commission's 1979 Report[44], the last large-scale review of defamation law in Australia, did see these issues. This important Report squarely confronted the need for uniform, Australia-wide legislation with speedy procedures, new and more effective remedies and the need for a limited right to injunct the publication of "sensitive private facts." The Report also noted (under the quaint heading "Posts and telegraphs power") the

[39] D McCauley, "Sharp rise in social media abuse calls for defamation law reform", *the Australian*, 12 March 2018.
[40] This is a worldwide problem: see Ursula Cheer's 2013 defamation report concerning New Zealand ((2013) 15 MALR 242 and Martin J's observations as to the issues in Canada in *Slipetz v Trudeau* [2013] MBQB 111. The number of litigants in person is increasing in most common law countries: see the 2014 report of the House of Commons: Litigants in person: the rise of the self-represented litigant in civil and family cases in England and Wales and the international studies noted in the New Zealand Research Report "Self-Represented Litigants", 2009 at p. 14.
[41] See the list of observations to this effect set out in Rolph at [1.50].
[42] The Honourable Justice David Levine, cited by the Attorney General, Mr Bob Debus, *Hansard*, 13 September 2005, p. 17636.
[43] "The Purest Treasure?" (1977) 8 *Federal Law Review* 110 at 116.
[44] "Unfair Publication: defamation and privacy", ALRC Report No 11 (June 1979).

Commonwealth power (*Constitution,* s 51(v)) to make laws with respect to broadcasting and television, but adding the concern that s 51(v) "might not authorise" the enactment of a law based solely on defamation and privacy (at [315]) but expressing the hope that telecommunications power (at [316]) would be a base for the regulation of "telex, telefacsimile, telephone, satellite and microwave links." This wise and far-seeing report was, however, consigned to the dustbin of history. To a country still hidebound by States' rights and reliant upon the common law doctrine of precedent, the concept of a single nationwide legislative code was horrifying (as made clear by the submissions "all from lawyers", noted at [67] – [69].)

- **Section 7A jury trials**: Calls for reform in New South Wales in the early 1990s led, not to a retrieval of the ALRC 1979 report from the dustbin, but to the enactment of a newfangled "section 7A" mini-trial by a jury on defamatory meaning, based on observations as to the desirability of such a procedure in *Parker v 2UE Pty Ltd* (1992) 29 NSWLR 449 at 474. This turned out to be an expensive disaster resulting in perverse verdicts[45]. None of the defamation law reform reports in the 1990s confronted the nature of mass media or the introduction of the internet, email and the world wide web. The ALRC's 1979 report remained resolutely ignored by all concerned.

- **Consideration of law reform issues by courts**: Despite the trust placed in the common law doctrine of precedent, as opposed to a code, by the lawyers who made their views felt in the 1979 ALRC report, there was little judge-made development of the main areas of concern by the development of principles at common law. Those few cases which survived the application for leave to appeal to the High Court did not result in the desired reconsiderations of these issues:

  (a) While the High Court identified an implied freedom of political communication as emerging from the rubric of the Constitution (*Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1), this has been a limited and unsuccessful defence[46] since *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 was handed down.

  (b) The last decision relevant to the internet is *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575; 194 ALR 433, where the High Court called it "a considerable technological advance" in terms of mass communication, but added that radio and television created "the same kind of problem" (at [38])[47] or to international trade

[45] Section 7A *Defamation Act 1974* (NSW) restricted the role of the jury to answering questions about meaning, following which the trial judge determined all issues. Its drafters overlooked the artificiality of the process, which resulted in perverse verdicts and the doubling of costs caused by the separate jury trial. Its drafters also overlooked the District Court, which for nearly 10 years enjoyed a s 7A-free trial environment. Worst of all, its drafters also overlooked the need for the trial judge to determine contextual and (in other jurisdictions) "Polly Peck" imputations which meant s 7A was arguably *ultra vires* (*Fierravanti-Wells v Channel Seven Sydney Pty Ltd* [2011] NSWDC 201 at [17] – [18]). In the course of the Second Reading Speech in Parliament, the Attorney-General, Mr Debus, noted that the s 7A trial was "increasingly unpopular" with everyone from judges to lawyers to litigants (*Hansard*, p. 17638).

[46] Professor George Williams called it a "frail shield" in "Anti-Terrorism Laws and Human Rights" (2015) 19 *Review of Constitutional Studies* 127 at 140.

[47] This was contrary to the expert evidence of Dr Roger Clarke, the expert retained by Dow-Jones, whose 2001 advice to the public on the internet is still available online at http://www.rogerclarke.com/II/DefWeb01.html.

for the purchase of motor vehicles. While leave was granted from the decision in *Trkulja v Google Inc* [2017] VSCA 333, it appears likely that this appeal will largely deal with issues of defamatory meaning.

(c) The High Court of Australia has not taken the opportunity to consider the *Reynolds* reportage defence (*Reynolds v Times Newspapers Limited* [2001] 2 AC 127). In the course of refusing leave in *Skalkos v Assaf* [2002] HCA Trans 649 the High Court left the door open for future consideration of these issues but, as Simpson J noted *Megna v Marshall* [2010] NSWSC 686 at [113], this never occurred. While it may be that the High Court would have rejected the defence on the same basis as occurred in *Lange v Atkinson* [2000] 3 NZLR 385, the absence of High Court authority on this central defence has led to a significant gap in Australian defamation jurisprudence.

(d) For over 80 years, the High Court has refused leave in actions where a defence of triviality is pleaded, including *Skalkos v Assaf*, *Jones v Sutton* (2004) 61 NSWLR 614; (No 2) [2005] NSWCA 203 and *King & Mergen Holdings Pty Ltd v McKenzie* (1991) 24 NSWLR 305. The issue of trivial defamation (or its more modern equivalent in the United Kingdom, namely "serious harm") is a central problem in defamation law. The triviality defence had failed at first instance in *Cush v Dillon; Boland v Dillon* [2010] NSWCA 165; (2011) 243 CLR 298 ; (2011) 279 ALR 631 ; (2011) 85 ALJR 865 ; [2011] HCA 30 (damages of $5,000 for a slander to one person that the plaintiffs might be having an affair) but the Court of Appeal and High Court dealt only with the qualified privilege defence – an unfortunate missed opportunity. Although Brennan J referred to issues of "proportionality" in *Australian Capital Television v Commonwealth (No 2*) (1992) 177 CLR 106 at 159 (and see also his judgments in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 162 – 3 and *Levy v State of Victoria* (1997) 189 CLR 579), this refers to the margin of appreciation, another internationally employed doctrine the High Court was also reluctant to apply (Leask v Commonwealth (1996) 187 CLR 579; see C Ward, "The Margin of Appreciation in Australian Jurisprudence" (2003) *Aust Bar Rev* 189).

(e) While the High Court did consider issues of privacy in *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199, the parameters of the right to privacy remain nebulous and the better view is that such a right does not exist, as a cause of action, in Australia.

(f) The interaction between freedom of speech and the use of the internet to harass or vilify is a complex area, as the divided bench in *Monis v R; Droudis v R* (2013) 249 CLR 92 demonstrates. The use of the internet and social media to publish statements within that subject of proceedings is one of the major difficulties confronting not only the criminal law but defamation law. In retrospect, the vivid language of Heydon J concerning the 'sadistic, wantonly cruel and deeply wounding blows [the mothers of the dead soldiers received] during the most painful days of their lives', although much criticised at the time, may have been closer to the mark than the more conventional approach to freedom of speech taken by Crennan, Kiefel and Bell JJ.

48. The common law has not developed freedom of speech concepts any further. Although the High Court expressly stated (*Lange v ABC* (1997) 189 CLR 520 at 566 (implication of the existence of a right of freedom of speech on political and governmental issues) and *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 540 (common law choice of law rules for torts with an interstate element) that the common law must conform to the Constitution, there has been little development of implied rights of freedom of speech or reference to international covenants. In addition, as Kim Gould notes,[48] despite the principle of "one common law in Australia"[49], maintaining the uniformity of the common law component of the national scheme is even less certain than maintaining the statutory provisions, not least because of the rarity with which defamation appeals reach the High Court.

49. The combination of these unsatisfactory legislative reforms, the failure of precedent to fill the gap and the disproportionately high number of Australian defamation trials, compared to other countries, has continued to result in claims that Australia remains "the libel capital of the world"[50] and languishes at the bottom end of the freedom of speech scale.[51] Those complaints have remained constant over this period of law reform.

Is it just all too difficult?

50. The two principal issues of explanations given for defamation law reform problems are the asserted complexity of defamation law and the impact of the internet and information technology on the law generally.

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[48] Kim Gould, "Locating a 'Threshold of Seriousness' in the Australian Tests of Defamation" [2017] *Syd Law Rev* 15; (2017) 39(3) Sydney Law Review 333. See also Iain Stewart, "Structure of the Australian Legal System" in Convergence of Legal Systems in the 21st Century: XVIth Congress of the International Academy of Comparative Law, 2004, p. 181, arguing (at p.192) that there is no constitutional right to liberty and security of the person and that under the Constitution "genocide would be legal" (citing *Nulyarimma v Thompson* (1999) 165 ALR 621.

[49] *Lange v Australian Broadcasting Corporation* at 563.

[50] In "The Purest Treasure?" (1977) 8 *Federal Law Review*, the Hon Michael Kirby AC CMG noted 777 defamation proceedings commenced between 1972 and 1976, of which only 25 ever went to trial: (https://www.michaelkirby.com.au/images/stories/speeches/1970s/vol2/1977/24-Federal_Law_Review_-_The_Purest_Treasure_-_National_Defamation_Law_Reform_in_Australia.pdf). Professor Newcity's 1990 study "The Sociology of Defamation in Australia and America" (summarised by John Slee (1990) 2 *Press Council News* under the heading "Sydney as World Libel Capital") first made this claim. In another 2003 study, the author noted that there was one defamation writ for every 128,000 Sydneysiders, compared to 1 for every 200,000 UK residents, and the number of defamation actions in Sydney alone was equal to 60% of US defamation actions. For further reference to these studies, see Roy Baker, "Third Person Singular?" 17 October 2003, http://www.law.uts.edu.au/comslaw/pdfs/publications/Third-Person-Singular-Instructing-the-Defamation-Jury.pdf. During the second reading speech in the Legislative Council of NSW Mr Henry Tsang MLC described Sydney as "the libel capital of Australia" (*Hansard*, p. 18803) and hoped that the uniform legislation would change this. However, in 2010, the United Kingdom website *Inforrm* said that New South Wales was still "the libel capital of the world": *http://inforrm.wordpress.com/2010/09/19/defamation-in-new-south-wales-lots-of-cases-and-more-judges/#comments* ; http://inforrm.wordpress.com/2010/10/12/defamation-in-new-south-wales-part-2-the-libel-capital-of-the-world/#more-4760 . The basis for this claim was that, when compared to the number of American libel cases proceeding to verdict in 2009 and 2010 (11 cases), New South Wales courts are handing down more defamation judgments than England and Wales and the United States combined.

[51] M Gillooly, "The Third Man", Sydney, 2004, at p. 15; Brian Walters, "Slapping on the Writs", cited on this point by Lee Rhiannon MLC during the Second Reading of the uniform legislation in the Legislative Council (*Hansard*, p. 18802, 19 October 2005).

(a) Blaming defamation law

51. The history of defamation law reform has, more than other areas of the law, been complicated as a result of political pressures resulting from the inherently seditious nature of propagation of ideas[52]. There are numerous judicial observations to this effect. In particular, there are the observations made by Diplock LJ in *Gleaves v Deakin* [1980] AC 477 at 484 (cited by Professor Rolph at [1.50]) that:

> "…the law of defamation, civil as well as criminal, has proved an intractable subject for law reform".

52. What was it about Roger Gleaves's case that made the determination of the law so difficult even for so eminent a jurist as Lord Diplock? This is a case worthy of study, because Roger Gleaves' storm wave of criminal libel actions led to changes in the law (in relation to criminal libel and vexatious litigants) which were intended to ensure that no such misuse of the legal process could happen again.

53. Roger Gleaves was one of the most dangerous paedophiles in Britain until, in the best traditions of investigative journalism, his activities were exposed by John Willis and his team in the 1975 documentary "Johnny Go Home", which revealed the problems of child runaways and sex abuse in children's homes. Since the establishment this century of a series of inquiries into institutional abuse of children (such as the Royal Commission into Child Sexual Abuse) this has become a recognised social problem, but in 1975 this kind of story was a complete shock to the public; even more so when, on the last day of filming, it was discovered that a 20-year-old man staying in a hostel run by Gleaves had been murdered. The documentary's transmission had to be delayed while Gleaves and three of his employees were on trial for the murder of a 20-year-old man staying in a hostel run by Gleaves (the employees were convicted; Gleaves was acquitted). When eventually shown on television, the documentary caused widespread concern and there were calls for government action.

54. Gleaves studied law in gaol and sued the 13-member documentary team for libel and breach of copyright in 1977. All were acquitted but it cost the taxpayer £75,000. However, Gleaves was only just getting started. He next reported three journalists for contempt and had them (briefly) imprisoned, issued four criminal summonses on the editor and news editor of *People* and then turned to the *Sunday Times*, the police and prison officials, resulting in over 50 pending private prosecutions by 1982, at which time he was declared a vexatious litigant.

55. Gleaves was able to go on a five-year litigation frenzy because of his ability to take advantage of legislative loopholes and inadequate criminal libel legislation. Even though he was in and out of gaol on child sex abuse and other offences (including a sentence of 15 years in 1998 for rape), he was still bringing court proceedings (e.g. *Gleaves v Insall*

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[52]Van Vechten Veeder, "The History of Defamation Law" (1903) 3 *Columbia Law Review* 546. Cobbett's *Parliamentary History of England*, 1737 – 39, Vol 10 (at p. 1331) notes the collapse of information regulation because "when printing was discovered, these restrictions fell of course, and then every man was at liberty to communicate, at an easy expence [sic], his labours and thoughts on any subject, to the whole world."

and other appeals; QBD, Div Ct (Kennedy LJ, Blofeld J) 9 March 1999) as recently as 2011 (*Grant & Gleaves v Ministry of Justice* [2011] EWHC 3379 (QB), despite his status as a vexatious litigant. The fact that these were unmeritorious actions brought by a seasoned criminal did not make them any the less distressing – or expensive.

56. The extent of the chilling effect caused by the court's inability to stop Gleaves is uncertain, but it must have been considerable. For example, there were attempts (generally unsuccessful) made during the 1980s to investigate allegations of paedophile activity of the kind covered by "Johnny Go Home", particularly by Geoffrey Dickens MP, but even when there were inquiries, these were not covered by the press. In "Flat Earth News", Nick Davies describes being the only journalist in the room covering the North Wales child sex abuse scandal in the1990s; Davies's reports were scathingly attacked by cultural historian Richard Webster, who published books and articles claiming the allegations were mainly false claims made for compensation[53]. It would not be until an inquiry 20 years later, following the Jimmy Savile scandal, that proof of the offences was found. Those convicted included Police Superintendent Gordon Anglesea, who had been awarded £375,000 damages in defamation proceedings in 1994[54] against *the Observer*, *the Independent, Private Eye* and HTV (Wales ITV).

57. Despite their contributions to the history of vexatious litigation in general and libel law in particular, Roger Gleaves and his associates[55] are now forgotten. They should not be, because although criminal libel actions now require leave, the same risks – vexatious litigants and the chilling effect of inadequate defences - may still protect high-profile abusers, as has been noted recently in the #metoo movement. The huge Anglesea verdict was a crushing blow for those investigating child sex abuse, especially when one of the defence witnesses hanged himself shortly after the verdict was announced.

58. Whether the abuser of the legal system is a plutocrat or a pauper, the point of the Roger Gleaves story is that legislators and courts have to be alert to misuse of the litigation process and to ensure that legislation is properly and fully the subject of review to ensure it adequately responds to the tension between reputation rights and freedom of speech.

59. Courts and legislators must also be alert to the added potential for online defamatory publications to inflict irreparable damage on the victims of false and scurrilous attacks. Plaintiffs like Associate Professor Al Muderis are particularly disadvantaged in an electronic world where fake news campaigns, trolling and the facility for anonymous attacks give defamers almost unimaginable power to destroy a reputation instantaneously and worldwide, and this needs to be at the centre of any further s 49 Review.

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[53] Nick Davies, "Flat Earth News" (Vintage Books, 2009, at p. 118) and Richard Webster, "The Secret of Bryn Estyn: the making of a modern witch hunt", 2005, Orwell Books. Webster's book, shortlisted for the Orwell award and admired by politicians, claimed that most institutional claims, including those against the Catholic Church, were false. Jimmy Savile obtained libel damages for allegations of abuse, such as the claim by the *Sun* that he was connected to the Jersey children's home scandal. In fact Savile was a regular visitor not only to Jersey but also to Bryn Estyn, among other hospitals and homes where this predatory offender abused hundreds of vulnerable children.

[54] See the *Rebecca* interview with the trial judge at https://paddyfrench1.wordpress.com/2013/11/11/the-trials-of-gordon-anglesea/.

[55] See https://www.societyofeditors.org/soe-news/21-november-2014/Courtroom-travels-of-a-vexatious-litigant and https://cathyfox.wordpress.com/?s=Roger+Gleaves.

60. The inability of legislators to find answers to this kind of online publication is frequently blamed, not only on defamation law complexities, but on technology.

(b) Blaming technology

61. The excitement generated by the internet, with its capacity for the exchange of information and learning, led to most of its early users to regard it as a scientific miracle.[56] Even researchers who warned that enthusiasm for this new means of communication should be tempered by awareness of the potential for its misuse by "authoritarian governments" foresaw only problems of the "good kind", such as the "Arab Spring" movement[57], not the "fake news" which now dominates internet discussions. Although the potential for trolling, computer hacking and campaigns of misinformation should have been recognised, it took the Brexit and US presidential results to make governments aware that the addictive and pervasive nature of internet communication was not only a serious problem, but an unregulated one.

62. Lack of understanding of the profound impact technology has had on the law is not a problem restricted to defamation, or even to Australia. Whole areas of the law, and even methods of publishing judgments, have been transformed or swept away by electronic publication, without any concerted attempt by legislators to keep up; Sir Tim Berners-Lee,[58] Wikipedia founder Jimmy Wales[59] and the Information Technology Innovation Foundation are only a few of the persons and bodies critical of technology legislation.[60] There is insufficient space in this discussion paper to deal with these problems, which affect areas of the law as diverse as contemporary financial instruments[61] to the "tsunami" of child pornography prosecutions,[62] but the common thread is there: information technology has completely changed the way that people communicate.

63. The uniform legislation, with its journalist-based defences and absence of a serious harm provision or single publication rule, is out of touch with a media scene which one of the *Sydney Morning Herald* journalists (covering the Barnaby Joyce story) recently described as follows:

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[56] See B Etling, R Faris and J Palfrey, "Political Change in the Digital Age: the fragility and promise of online organising", *SAIS Review,* Summer-Fall 2010, at 37: https://dash.harvard.edu/bitstream/handle/1/4609956/SAIS%20online%20organizing%20paper%20final.pdf?sequence=1%0BAu%C3%9Ferdem.

[57] Ibid; note that there is no reference to Russian or Chinese hacking in this very early discussion of political misuse of the internet.

[58] Sir Tim Berners-Lee, speaking at the "Every Second Counts" forum in the Rolex Awards for Young Laureates (2014) as reported in the *Guardian:* http://www.theguardian.com/technology/media-network-blog/2014/nov/17/sir-tim-berners-lee-we-need-more-mps-who-know-how-to-code.

[59] Mr Wales' objections related to the security and terror legislation known as "deep packet inspection": http://en.wikipedia.org/wiki/Draft_Communications_Data_Bill.

[60] http://www2.itif.org/2015-luddite-awards.pdf .

[61] See R Low and L Griggs' review of the "tsunami" of litigation on forged documents at (2011) 19 *APLJ* 222.

[62] "Sentencing Offenders convicted of child pornography and child abuse material offences", JCR Monograph 34, September 2010, p. 5, citing *R v Sharpe* [2001] 1 SCR 45 at [166].

> "The social media rumour mill, bloggers, and dodgy start-up "news" websites which publish unsourced defamatory material represent the contemporary working environment for both politicians and journalists."[63]

64. Courts seem similarly out of touch, showing a preoccupation with procedural changes such as the removal of juries (the principal preoccupation of the Supreme and District Courts' submissions to the s 49 review), or leaving all those tiresome interlocutory applications to the trial: *Goodfellow v Fairfax Media Publications Pty Ltd* [2017] FCA 1152. However, in *Rush v Nationwide News Pty Ltd* [2018] FCA 357, the same judge (Wigney J) struck out a justification defence and a subpoena seeking documents relating to an investigation into the incident the subject of the matter complained of. As a sideline to this case, the applicant sought a non-publication order which included stopping the court making the defence available on its website, an interesting example of courts needing to reconsider the implications of online publications of this kind.[64]

65. Another difficulty is that, when drafting appropriate legislation for defamation actions, it will be necessary that these provisions be seen in the context of use (or perhaps misuse) of the internet and social media for the propagation of what has now come to be called "fake news," particularly of the "trial by media" variety. Even nations who have successfully dealt with defamation law reform issues such as libel tourism and freedom of speech entitlements are engulfed with "fake news" publications of all kinds, and to legislate about fake news without impacting in some way on defamation law will be difficult.

66. The potential combination of authoritarian politics, platform monopolies and rising inequality are issues of not merely national but international concern. As a result, proposals for legislation to prevent "fake news", generally imposing criminal penalties, may run beside, or even swamp, defamation litigation. Only in exceptional non-electronic defamation cases did a publication escalate to violence, but viral online conspiracies (particularly in relation to mass shootings such as Sandy Hook and Sutherland Springs and alleged Democrat paedophile rings such as "Pizzagate"[65]) or, for that matter, the publications about the plaintiff in *Rothe v Scott*, show an extraordinarily different reaction. The difference is the degree of access the internet gives to persons who would not otherwise be heard, and the consequences of release of the "monsters from the id"[66] has not yet fully been understood by internet regulators and legislators.

67. The same lack of understanding of the impact of modern technology can be seen in many of the popular proposals for defamation law reform which predate internet technology, such as the public figure test and Reynolds-style defences.

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[63] Jacqueline Maley, "The Canberra awards night that came back to haunt Barnaby Joyce", 13 February 2018.
[64] M McGowan, "Geoffrey Rush obtains orders suppressing News Corp's "scandalous" defamation defence", *the Guardian,* 7 February 2018. Whether publication of court pleadings by a court on its website is protected by absolute privilege nor protected report, if published on social media or a website, may be a complex issue.
[65] M Haag and M Salam, "Gunman in 'Pizzagate' shooting is sentenced to 4 years in prison", *New York Times*, 22 June 2017, https://www.nytimes.com/2017/06/22/us/pizzagate-attack-sentence.html; S Levin, "Conspiracy theorists arrested for alleged threats at site of Texas mass shooting", *the Guardian,* 6 March 2018, https://www.theguardian.com/us-news/2018/mar/06/texas-church-shooting-conspiracy-theorists-arrested.
[66] "Monsters from the id" was the term used in the film "Forbidden Planet" to describe the forces of destruction in the subconscious mind which were released when an alien civilisation set up a worldwide computer; see also Jim Griesemer, "Have we unleashed the monsters?", *Digital Culturist,* 7 March 2017.

Popular proposals for defamation reform

68. Much of the law reform debate in Australia is still stuck in a pre-technology loop. Some law reform advocates remaining convinced that the solution lies in adopting remedies predating modern technology, such as a Bill of Rights containing a First Amendment-style right to freedom of speech. Others, notably judges and courts, are convinced that procedural reforms, such as abolishing (or insisting upon) jury trials, or leaving all of the interlocutory issues to trial, or having a "mini-hearing" of a conciliation or offer of amends nature will be the answer. Less popular proposals include mini-trials for small claims (unrealistically believed to be simpler) or alternatives to damages such as declarations of falsity (showing a pleasing but misplaced belief in the degree to which judicial pronouncements are valued by the community).

69. The views of many of these legislators and law reform proponents are generally based on inductive reasoning and rarely refer to the "legal culture" and "legal transplant"[67] problems which often arise when foreign legislation is adopted to fix local problems. In a country still suffering from the introduction of the cane toad by persons failing to make sufficient inquiries of this nature, this is not a procedure to be encouraged.

70. It is not possible to consider all of these, so I shall simply select the most popular, namely the proposals of American-style law reform such as the public figure test and First Amendment rights. The observations below are only some of the many differences which have been set out by others, notably by Vincent R Johnson in his lengthy comparison of United States and English defamation law in "Comparative Defamation Law: England and the United States"[68].

The "Bill of Rights" and "public figure" test in today's online world

71. The First Amendment's guarantee of freedom of speech and the reliance upon the public figure test and absence of malice are generally regarded as the high point of freedom of speech by defamation law reformers[69]. Proponents of a Bill of Rights, which would include a right of freedom of speech, consider that this would be a robust defence for all, and not merely journalists.

72. However, even in the United States, First Amendment rights are under challenge, and a record number of appeals to the Supreme Court are to be heard during 2018 where the grounds include consideration of these rights, in an era where judicial conservatism appears to be a factor in future judgments of the Supreme and Federal Courts. This potential uncertainty concerning judicial interpretation of the First Amendment may undermine the "gold standard" reputation of the First Amendment. In addition, as the internet trumps territoriality, "libel tourism" laws have had to be enacted, as well as obstacles being placed in the path of enforcement of overseas libel judgments. More recently, gaps have opened up in relation to freedom of speech and "gag agreements" and

[67] A Watson, "Legal Transplants: An Approach to Comparative Law", Athens, Georgia, 1993.
[68] (2016) *University of Miami International and Comparative Law Review* 1 ("Johnson").
[69] See for example Kyou Ho Youm, "Liberalising British Amendment Law: A Case of Importing the First Amendment?" (2008) *Communication Law and Policy* 415.

with the potential for large awards for breach of privacy of the "Hulk Hogan[70]" and/or "false light" variety.

73. The adoption of a First Amendment-style defence in Australia , whether as part of a Bill of Rights or in the uniform legislation, could face the following "legal transplant" hurdles:

(a) The First Amendment defence comes with arm armoury of procedural reforms which require significant changes to the Court system. Where First Amendment constitutional issues are raised, a heightened standard of review is employed, and an independent, *de novo*, procedure of appeals by referral to a federal court, set up under federal constitutional law, must occur. This federal court must ensure that the entire court record is independently reviewed to make sure that the judgment of the lower court "does not constitute a forbidden intrusion into the field of free expression". This procedural step is an essential pre-requisite for specialist judicial consideration of freedom of speech issues by judges familiar with the relevant principles.

(b) The First Amendment defence is part of a legal system based upon jury verdicts. The move in Australia has been away from juries in defamation trials.

(c) Two jurisdictions in Australia have a Bill of Rights,[71] and it has made no difference to defamation defences. It is an interesting question, as to defamation cases brought in the Federal Court based on its ACT jurisdiction, whether a constitutionally-based freedom of speech defence is available as a result, not to mention a human rights-based entitlement to a jury. Unfortunately, any constitutionally guaranteed right of freedom of speech in a Constitution generally depends upon how it is interpreted, as can be seen in decisions concerning the ambit of freedom of speech in Russia.[72]

(d) The limited nature of the summary judgment procedure in Australia (unlike the United States) would mean that defences of this kind would almost always have to be determined at the trial.

(e) American jurisprudence has been much less willing to accept what Johnson calls "the opportunity that new technology offers for embracing 'the discursive remedies of apology, correction, and right of reply'" (at 76). In other words, the First Amendment may have some of the same technology-based difficulties that Australian law reform currently suffers from.

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[70] M Kosoff, "Peter Thiel: Crushing Gawker is one of the best things I've done", *Vanity Fair*, 26 May 2016.
[71] These are the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 13 and 15 and the *Human Rights Act 2004* (ACT), ss 6 and 12.
[72] See Human Rights Watch, "Online and on all fronts: Russia's Assault on Freedom of Expression", *loc cit*, fn 6.

(f) The American system of damages awards and legal costs, a corollary of freedom of speech legislation, could itself have a significant chilling effect upon freedom of speech.

(g) It remains to be seen where the future of the First Amendment lies in relation to issues of "fake news".

74. There are similar problems with the introduction of a "public figure" test:

(a) The public figure test was appropriate at a time when public figures were rather fewer in number and the only persons likely to be rich enough to sue. The public figure test has struggled for some time with whether such varied persons as rape victims, football coaches and social media users are public figures. In an era when a "BBC dad" can become internationally famous for his children coming into his office during an interview (as opposed to the insightful commentary on Korean politics he was providing at the time), it may be that this test will be a casualty of the internet age. The Solicitor-General's proposal to the 2011 Review to limit the "public figure" to politicians is not consistent with a world where public figures of a different kind abound, and where very few politicians sue for defamation because it is much easier to respond on social media.

(b) In addition, determining whether a person is a "public figure" adds another stage to what is already a complicated fact-finding process and may lengthen pre-trial and discovery processes, adding to legal costs (which proceed under a different basis to the system in the United States) which would place impecunious defendants, as well as plaintiffs, at a serious disadvantage.

(c) The public figure tests shifts the fact-finding focus from the allegations in the publication to the plaintiff's status.

75. Finally, and most tellingly, the whole "fake news" debate demonstrates that the degree to which freedom of speech can be abused by the financially or politically motivated. How freedom of speech is interpreted in the courtroom may depend, for example, upon rulings as to what amounts to evidence of truth, an issue capable of political interpretation.[73]

76. Australia was one of eight nations which drafted the *Universal Declaration of Human Rights*. It is, however, one thing for courts to opine on a right implied into the Constitution for freedom of speech and another for there to be legislation to protect fundamental freedoms. It is not simply a matter of "transplanting" provisions from the *European Convention for the Protection of Human Rights*, the *Human Rights Act 1988* (UK), the *Canadian Charter of Rights and Freedoms*, the *Constitution* of the United

[73] This is best illustrated by looking at admissibility of evidence in jurisdictions where the political implications of freedom of speech are more obviously under threat. For example, Russian Opposition politician Alexei Navalny failed in his defence of justification in defamation proceedings when the Lyublinsky District Court held that proof of a bribe could only be established "through a special procedure provided for by the criminal and criminally-remedial law, and should be directly established by a court verdict" (http://tass.com/economy/949979). For a review of admissibility issues in six Chinese defamation actions concerning the "Mount Langya Five" see Yingjie Guo and John Garrick's forthcoming journal article "China's Socialist Rule of Law and the "Five Heroes of Mount Langya", currently under review by "China Perspectives", Hong Kong.

States and/or the New Zealand *Bill of Rights Act 1990*. The *International Covenant on Civil and Political Rights*, to which Australia is a party may be a logical starting point but the discussion to date has been little more than empirical comparisons with one or more overseas models, followed by concerns about the form and content which the legislation would take.

77. Not surprisingly, the "Bill of Rights" approach to defamation law reform has always been viewed with caution by Australian commentators.[74] Those views are underlined by the obvious irrelevancy of such freedoms to "pub talk" (*Clift v Clarke* [2011] EWHC 1164 at [36]) social media posts and similar publications which are increasingly the subject of defamation claims. The defence, if pleaded, would end up being just another issue at the trial. The fact remains, however, that in common law countries where there is a Bill of Rights or human rights issues to take into account, such as Canada, New Zealand and the United Kingdom, freedom of speech issues have resulted, by comparison with Australia, in significantly advanced consideration of human rights issues.

Back to the future

78. The failure of the s 49 Review process and the cancelling of the Leveson 2 inquiry demonstrate different facets of a common problem, namely the gap between law reform and technology. The s 49 Review required all the jurisdictions, not just New South Wales, to participate, and for the Review to be produced by 1 January 2012. Not only is that no longer possible, but the uniform legislation is one of a series of statutes which no longer correspond to the fast-changing world of information technology. These need to be reviewed together as part of an ongoing process of ensuring that the law adequately reflects technological change.

79. First, all the States (not just New South Wales) must participate, and they should also consider the redrafting of legislation capable of responding to internet generally, not merely the uniform legislation. These laws need not only to be "appropriate" to the claim as well as to the damage, but consistent with each other, to avoid future problems of the *Monis v R; Droudis v R* kind. This is the sort of "global" approach to internet legislation that the UK Secretary of State for Digital, Culture, Media and Sport was referring to on 1 March 2018 when explaining why Leveson 2 would not proceed and s 40 would be repealed. If SCAG and/or the State law reform bodies are not prepared to take on this task, it should be taken over as an ongoing watching brief by the Australian Law Reform Commission. It has to be an Australia-wide initiative.

80. Second, given the notoriety of the defamation "stop writ" or "SLAPP suit", courts and legislators need to be more acutely aware of the potential of abuse of process concerning defamation claims. Traditionally, this has been answered by provisions to prevent multiplicity of actions (see ss.3(d), 9(3) and 9(6)(b) *Defamation Act* 1974 (NSW) and paragraphs 51-55 of the 1971 Report of the Law Reform Commission on Defamation).

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[74] Many Australian studies reflect this uncertainty by having question marks in their title. See for example the Hon Anthony Mason, "A Bill of Rights for Australia?" (1989) 5 Aust Bar Rev 79; J L Hiebert, "Why Must a Bill of rights be a Contest of Political and Judicial Wills? The Canadian alternative" (1999) 10 Pub L Rev 22; the Hon Justice David Malcolm AC, "Does Australia Need a Bill of Rights?" (1998) Murdoch University Electronic Journal of Law, vol 5, no. 3; Anon, "Should Australia Have a Bill of Rights?", NSW Bar Association, www.nswbar.asn.au.

However, the nature of internet publication defeats many of these longstanding print-based principles. Some problem areas are the following:

(a) **Obviously vexatious claims:** Multiple actions by obviously vexatious litigants often include claims for defamation.[75] However, the test for having a person declared a vexatious litigant is high, and legislation in some States and Territories such as the *Vexatious Proceedings Act 2008* (NSW) is limited to "proceedings", as opposed to vexatious conduct on the internet which accompanies litigation.

(b) **False claims:** A claim which may appear on its face to be genuine may be a false claim against fake defendants, designed to have online material removed by a court order entered as some form of consent: (https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/05/17/more-apparently-fake-defendant-libel-lawsuits-aimed-at-vanishing-material-from-google/?utm_term=.3055d8d20d27).

(c) **"Twibel":** So-called "Twibel" claims, brought to silence critics, are really just another form of SLAPP writ (http://fortune.com/2015/09/27/celebrity-lawsuits-defamation/).

(d) **Claims aimed at generating legal costs:** Trivial claims brought principally to generate legal costs may amount to an abuse of process in proceedings of a non-defamation character (*Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd (No 2)* [2017] FCAFC 116). However, trivial defamation cases can be brought without the court imposing any costs sanctions; the damages cap applying to other causes of action in the Supreme Court does not apply to defamation proceedings (see UCPR Pt 42 rr 34 and 35). The practice in some courts of leaving all interlocutory issues to the trial adds to the "huge"[76] costs burden on defendants, most of whom are uninsured.

(e) **Huge damages claims:** The plaintiff in *McGrane v BTQ Channel Seven Pty Ltd* [2011] QSC 290 was a convicted murderer who commenced proceedings in relation for a documentary about the crime. He claimed damages of $95 million. The proceedings could not be summarily dismissed because of the defective drafting of s 26 (they were later dismissed due to pleading errors). While claims for billions of dollars for damage to business reputation are not unknown,[77] claims for billions of dollars for reputational damage have not as yet occurred in Australia. However, the very substantial damages sought in proceedings brought by Melania Trump in the United Kingdom suggests that such claims are possible in the future, especially where the publication in question is made in overseas jurisdictions where punitive damages claims can be made.

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[75] See *Mahmoud v Australian Broadcasting Corporation (No 3)* [2017] NSWSC 764; *Cooper v Mbuzi* [2012] QSC 190; *Bahonko v Attorney-General (Vic)* [2011] VSCA; *Attorney-General v Wilson* [2010] NSWSC 1008; *Markisic v Middletons Lawyers* [2007] NSWSC 1147).

[76] M Grattan, "Hockey left with no regrets but huge bill in 'treasurer for sale' case", *The Conversation,* 22 July 2015.

[77] Currently Kim Dotcom is suing the New Zealand Government for $10 billion for personal and business losses, but this claim does not appear to include a claim for personal defamation.

(f) **"Trial by media" complaints:** Where any proceedings are commenced apparently for publicity only, the proceedings may be struck out for abuse of process. However, the test is a very high one; the first instance judgment in *Ashby v Commonwealth of Australia (No 4)* [2012] FCA 1411 (a claim for sexual harassment) was set aside on appeal. Although there are frequent complaints that defamation proceedings of this kind have been commenced for this purpose, no proceedings have been struck out for such a reason.

(g) **Court-related abuse and harassment:** Use of court proceedings to abuse and harass another person, often in a family law context but also in litigation generally, has been the subject of research and advice from organisations as varied as the YWCA[78] to the Privacy Rights Clearing House.[79] Surreptitious filming[80], cyberstalking and computer-hacking in the course of litigation is a recognised and serious ongoing issue, and defamation litigation can form part of this arsenal. Some of the viler social media posts leading up to and following the 2016 Presidential election eerily resemble the call to arms (on the radio, in those pre-Internet days) in the Rwandan genocide.

Celebrities seem to be particularly vulnerable to these attacks. As the many thousands of privacy breaches investigated in the Leveson Inquiry show there is a huge market for celebrity personal information, and obsessive admirers now have new tools to obtain everything from home addresses to security weaknesses. Social media platforms such as Facebook and Twitter can be used to disclose home addresses or other personal information to incite personal attack on the victim's family (*Burns v Sunol* [2018] NSWCATAD 10).

81. Third, there must be changes to the court system to enable plaintiffs and defendants alike to obtain effective relief.

82. Fourth, rather than nostalgic returns to pre-internet law reform proposals, the Review should give greater weight to objective evidence such as court trial statistics and analysis of those statistics, such as the UTS Centre for Media Transition report of 12 March 2018 and the table of 169 uniform legislation defamation trial judgments regularly updated by *Australian Defamation Law and Practice* (at [60.000])[81] and pay greater attention to effective case management. Particular attention needs to be paid to costs, libel tourism, proportionality and protection of uninsured or vulnerable parties.

83. Fifth, instead of harking back to pre-internet concepts of news being written by actual journalists about people who were famous because they did something important,

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[78] YWCA Vancouver, "Court-Related Abuse and Harassment", https://ywcavan.org/sites/default/files/resources/downloads/Litigation%20Abuse%20FINAL.pdf.

[79] "Online Harassment and Cyberstalking", https://www.privacyrights.org/consumer-guides/online-harassment-cyberstalking.

[80] J Carter, "Illegal secret recordings flooding in as evidence to Family Court trials", ABC *Radio National*, 30 June 2016 http://www.abc.net.au/radionational/programs/lawreport/secret-recordings-flooding-into-family-courts/7557232.

[81] As to the benefits of examining judgment statistics, see Andrew Kenyon, "Six years of Australian defamation Law" (2012) 31 *UNSW LJ* 31. This article was published after the s 49 Review, and refers to some of the submissions made to it (see footnote 34) but does not refer to the Review itself.

defamation law reform needs to adapt to the modern interconnected world. One of the casualties of the destruction of the traditional media is likely to be a qualified privilege/reportage defence, and legislators should be aware of the need for other defences, notably justification, to be stronger. Reportage-style defences may now be of questionable use in relation to internet and social media publications. The future of reportage defences in an era of citizen journalists, or of qualified privilege or other defences for limited publications, is now open to doubt. Many online blogs (particularly those of the far right) boast that they are the "new media"; some politicians, such as ACT Chief Minister Andre Barr[82], take the same view. These new arbiters of online truth and falsity are not going to abide by journalists' codes of ethics or Press Council rulings; most of the time, they are not even journalists.

Yesterday, today and tomorrow

84. At the end of his submissions (dated 28 March 2011) to the s 49 Review, Professor David Rolph stated:

> "The last, thorough review of defamation law was undertaken by the Australian Law Reform Commission in 1979. Since that time, there has been, in addition to a significant volume of case law, the development of internet technologies and the identification of the implied freedom of political communication from the text and structure of the Commonwealth Constitution. Given the changes that have occurred in recent decades and the problems these pose to substantive defamation law, I strongly recommend a further, more detailed review of defamation law to inform future development and refinement of this area of law."

85. On the occasion of the tenth anniversary of the enactment of the uniform legislation in 2016, the Joint Media Organisations sent a further submission dealing with issues previously unconsidered by the NSW Review (such as serious harm), but adding a warning of a similar kind, and emphasizing the importance of balanced regulation of freedom of speech in a civilised society.

86. The NSW s 49 Review process failed at the first hurdle, namely to produce the five-year report. Six years later, defamation law reform in Australia cannot be permitted to continue to stagnate. Redrafting the uniform defamation law requires more than rearranging the deckchairs on the Titanic by adding extra phrases to provisions that have outlived their usefulness, or limiting reform issues to journalist ethics rather than online publication generally, in the same technologically limited way as the Leveson Report did. Whether this is achieved by a revitalised s 49 Review and/or some other law reform process, such as Australian Law Reform Commission involvement and Commonwealth-based internet legislation based on the *Constitution* s 51(v), Australian defamation law reform must face present and future law reform problems rather than continuing to be hidebound by the territorial and political battles of the past.[83]

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[82] K Lawson "I hate journalists and I'm over the mainstream media", *Sydney Morning Herald,* 11 March 2018, https://www.smh.com.au/politics/act/i-hate-journalists-and-im-over-the-mainstream-media-act-chief-minister-andrew-barr-20180309-h0x9xk.html.

[83] Thanks to Alexandra Gilley (UNSW) and to my associate, Vincent Mok, for assistance with the preparation of this discussion paper.