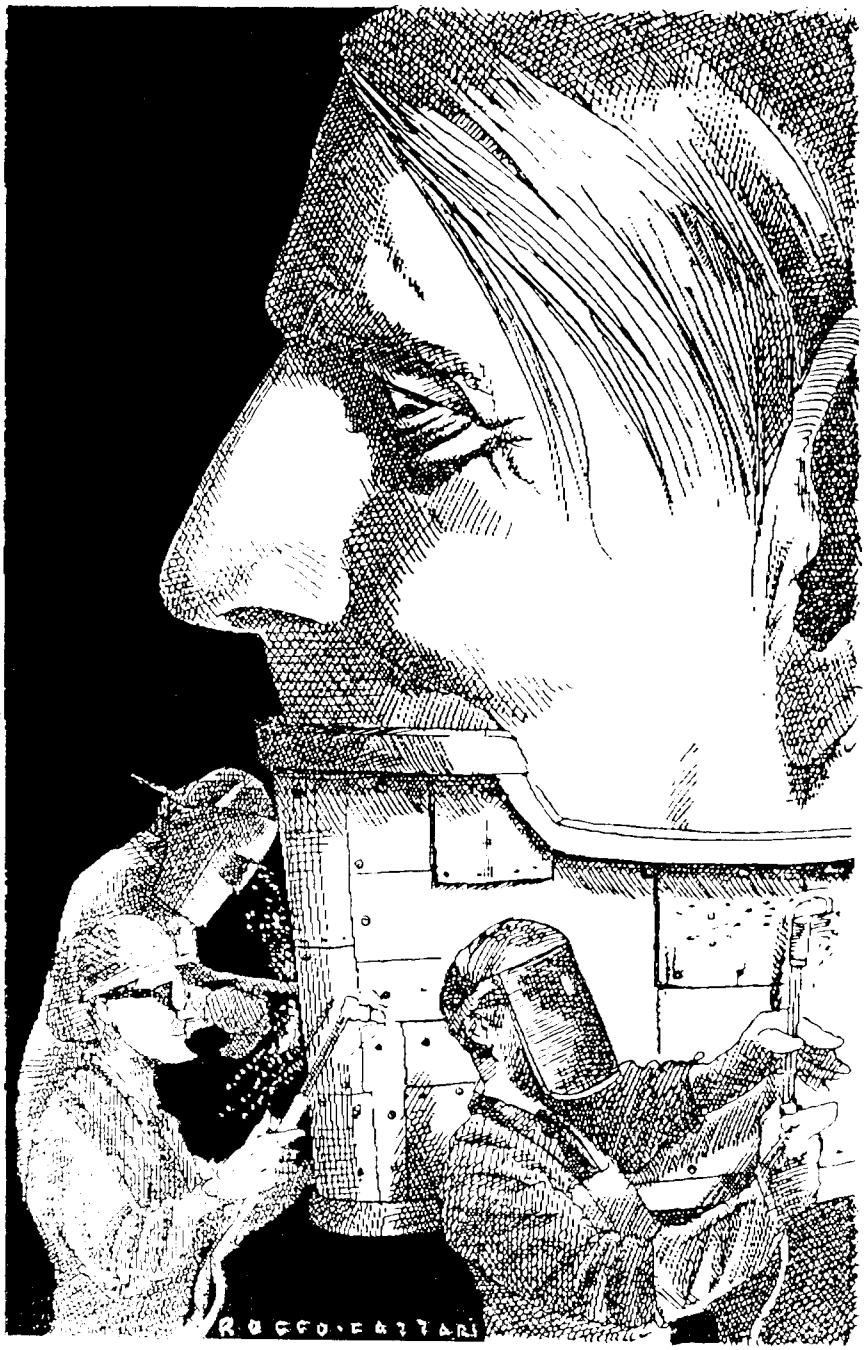
Defamation law and free speech

The law of defamation is supposed to protect people's reputations from unfair attack. In practice its main effect is to hinder free speech and protect powerful people from scrutiny. This leaflet provides information about legal rights and options for action for people who may be threatened by a legal action or who are worried about something they want to say or publish.



What it is

The basic idea of defamation law is simple. It is an attempt to balance the private right to protect one's reputation with the public right to freedom of speech. Defamation law allows people to sue those who say or publish false and malicious comments.

There are two types of defamation.

• Oral defamation—called *slander*—for example comments or stories told at a meeting or party.

• Published defamation—called *libel*—for example a newspaper article or television broadcast. Pictures as well as words can be libellous.

Anything that injures a person's reputation can be defamatory. If a comment brings a person into contempt, disrepute or ridicule, it is likely to be defamatory.

• You tell your friends that the boss is unfair. That's slander of the boss.

• You write a letter to the newspaper saying a politician is corrupt. That's libel of the politician, even if it's not published.

• You say on television that a building was badly designed. That's libel due to the imputation that the architect is professionally incompetent, even if you didn't mention any names.

• You sell a book containing defamatory material. That's spreading of a defamation.

The fact is, nearly everyone makes defamatory statements almost every day. Only very rarely does someone use the law of defamation against such statements.

Defences

When threatened with a defamation suit, most people focus on whether or not something is defamatory. But there is another, more useful way to look at it. The important question is whether you have a right to say it. If you do, you have a legal defence.

If someone sues you because you made a defamatory statement, you can defend your speech or writing on various grounds. There are three main types of defence:

• what you said was true;

• you had a duty to provide information;

• you were expressing an opinion.

For example:

• You can defend yourself on the grounds that what you said is true.

• If you have a duty to make a statement, you may be protected under the defence of "qualified privilege." For example, if you are a teacher and make a comment about a student to the student's parents—for example, that the student has been naughty—a defamation action can only succeed if they can prove you were malicious. You are not protected if you comment about the student in the media.

• If you are expressing an opinion, for example on a film or restaurant, then you may be protected by the defence of "comment" or "fair comment," if the facts in your statement were reasonably accurate.

• There is an extra defence if you are a parliamentarian and speak under parliamentary privilege, in which case your speech is protected by "absolute privilege," which is a complete defence in law. The same defence applies to anything you say in court.

What can happen

• You are threatened with legal action for defamation. Someone might say to you that unless you issue an apology, they will sue you. There are numerous threats of defamation. Most of them are just bluffs; nothing happens. Even so, often a threat is enough to deter someone from speaking out, or enough to make them publish a retraction.

• You receive a letter from a lawyer—called a letter of demand—threatening legal action unless, for example, you remove

documents from the web, issue a retraction and/or make a payment. You don't have to reply, but you can if you want to. You might ask for more details about the allegations, or you might make an offer to apologise. At this stage, you may wish to consult a lawyer, but you don't have to.

• You receive a writ (an official court document). This is the first formal step in a legal action for defamation. Writs or summons shouldn't be ignored. If you receive one, you definitely should seek legal advice.

• The defamation case can go to court, with a hearing before a judge or jury. However, the majority of cases are abandoned or settled. Settlements sometimes include a published apology, sometimes no apology, sometimes a payment, sometimes no payment. Only a small fraction of cases goes to court.[1]

The problems

There are several fundamental flaws in the legal system, including cost, selective application and complexity. The result is that defamation law doesn't do much to protect most people, but it does operate to inhibit free speech.

• ***Cost***. If you are sued for defamation, you could end up paying tens of thousands of dollars in legal fees, even if you win. If you lose, you could face a massive pay-out on top of the fees.

The large costs, due especially to the cost of legal advice, mean that most people never sue for defamation. If you don't have much money, you don't have much chance against a rich opponent, whether you are suing them or they are suing you. Cases can go on for years. Judgements can be appealed. The costs become enormous. Only those with deep pockets can pursue such cases to the end.

The result is that defamation law is often used by the rich and powerful to deter criticisms. It is seldom helpful to ordinary people whose reputations are attacked unfairly.

• ***Unpredictability.*** People say and write defamatory things all the time, but only a very few are threatened with defamation. Sometimes gross libels pass unchallenged while comparatively innocuous comments lead to major court actions. This unpredictability has a chilling effect on free speech. Writers, worried about defamation, cut out anything that might offend. Publishers, knowing how much it can cost to lose a case, have lawyers go through articles to cut out anything that might lead to a legal action. The result is a tremendous inhibition of free speech.

• ***Complexity***. Defamation law is so complex that most writers and publishers prefer to be safe than sorry, and do not publish things that are quite safe because they're not sure. Judges and lawyers have excessive power because outsiders cannot understand how the law will be applied. Those who might desire to defend against a defamation suit without a lawyer are deterred by the complexities.

• ***Slowness***. Sometimes defamation cases are launched months after the statement in question. Cases often take years to resolve. This causes anxiety, especially for those sued, and deters free speech in the meantime. As the old saying goes, "Justice delayed is justice denied."

In Australia, a common sort of defamation case brought to silence critics is political figures suing, or threatening to sue, media organisations. The main purpose of these threats and suits is to prevent further discussion of material damaging to the politicians. Other keen suers are police and company directors. People with little money find it most difficult to sue.

In the United States, there are hundreds of cases where companies sue individuals who

1. In one study of Australian defamation cases, only one out of five suits went to trial: Michael Newcity, "The sociology of defamation in Australia and the United States," *Texas International Law Journal*, Vol. 26, No. 1, Winter 1991, pp. 1–69.

oppose them. For example, citizens who write letters to government bodies opposing a real estate development may be sued by the developer. Also sued are citizens who sign petitions or speak at public meetings. Defamation is the most common law used against citizen protest, but others are used such as business torts, conspiracy and judicial process abuse. These uses of the law have been dubbed "Strategic Lawsuits Against Public Participation" or SLAPPs. Companies have little chance of success in these suits, but that doesn't matter. The main object in a SLAPP is to intimidate citizens, discouraging them from speaking out. SLAPPs are increasingly common in Australia too.

Media power and defamation

One of the best responses to defamatory comments is a careful rebuttal. If people who make defamatory comments are shown to have gotten their facts wrong, they will lose credibility. But this only works if people have roughly the same capacity to broadcast their views.

Only a few people own or manage a newspaper or television station. Therefore it is difficult to rebut prominent defamatory statements made in the mass media. Free speech is not much use in the face of media power. There are cases where people's reputations have been destroyed by media attacks. Defamation law doesn't provide a satisfactory remedy. Apologies are usually too late and too little to restore reputation, and monetary pay-outs do little for reputation.

Most media organisations avoid making retractions. Sometimes they will defend a defamation case and pay out lots of money rather than openly admit being wrong. Media owners have resisted law reforms that would require retractions of equal prominence to defamatory stories.

In contrast, if you are defamed on an online discussion group, it is quite easy to write a detailed refutation and send it to all concerned the next hour, day or week. Use of defamation law is ponderous and ineffectual compared to the ability to respond promptly. Social media make it easier to publish defamatory material but also easier to post rebuttals and apologies.

Examples

• Physicist Alan Roberts wrote a review of a book by Lennard Bickel entitled *The Deadly Element: The Men and Women Behind the Story of Uranium*. The review was published in the *National Times* in 1980. Bickel sued the publishers. He was particularly upset by Roberts' statement that "I object to the author's lack of moral concern." There was a trial, an appeal, a second trial, a second appeal and a settlement. Bickel won $180,000 in the second trial but received a somewhat smaller amount in the settlement.[2]

• Sir Robert Askin was Premier of the state of New South Wales for a decade beginning in 1965. It was widely rumoured that he was involved with corrupt police and organised crime, collecting vast amounts of money through bribes. But this was never dealt with openly because media outlets knew he would sue for defamation. Immediately after Askin died in 1981, the *National*

2. David Bowman, "The story of a review and its $180,000 consequence," *Australian Society*, Vol. 2, No. 6, 1 July 1983, pp. 28–30.

Times ran a front-page story entitled "Askin: friend to organised crime."[3] It was safe to publish the story because, in Australia, dead people cannot sue. (In some countries families of the dead can sue.)

• In 1992, students in a law class at the Australian National University made a formal complaint about lecturer Peter Waight's use of hypothetical examples concerning sexual assault. Waight threatened to sue 24 students for defamation. Six of them apologised. Waight then sued the remaining 18 for $50,000 for sending their letter to three authorised officials of the university. He later withdrew his suit. Subsequently the students' original letter of complaint was published in the *Canberra Times* without repercussions.[4]

• In 1989, Tony Katsigiannis, as president of the Free Speech Committee, wrote a letter published in the Melbourne *Age* and the *Newcastle Herald* discussing ownership of the media. Among other things, he said of a review of the Broadcasting Act "that its main concern will be to save the necks of the Government's rich mates." Although he mentioned no names, he and the newspaper owners were sued for defamation by Michael Hutchinson, a public servant who headed the review of the Broadcasting Act. Hutchinson sued on the basis of imputations in the letter, which can be judged defamatory even when not intended by the writer. Hutchinson said he wouldn't accept just an apology; he wanted a damages payment and his legal costs covered. Katsigiannis received $20,000 worth of free legal support from friends, but after three exhausting years of struggle he agreed to a settlement in which he apologised but Hutchinson received no money.[5]

• In 1985 Avon Lovell published a book entitled *The Mickelberg Stitch*. It argued that the prosecution case against Ray, Peter and Brian Mickelberg—sentenced to prison for swindling gold from the Perth Mint—was based on questionable evidence. The book sold rapidly in Perth until police threatened to sue the book's distributor and any bookseller or other business offering it for sale. The Police Union introduced a levy on its members to fund dozens of legal actions against Lovell, the distributor and retailers. The defamation threats and actions effectively suppressed any general availability of the book. Over a decade later, none of the suits against Lovell had reached trial, but remained active despite repeated attempts to strike them out for lack of prosecution.[6]

• In the late 1970s, fisherman Mick Skrijel spoke out about drug-running in South Australia. Afterwards, he and his family suffered a series of attacks. The National Crime Authority (NCA) investigated Skrijel's allegations but in 1985 ended up charging Skrijel for various offences. Skrijel went to jail but was later freed and his sentence set aside. In 1993, the federal government asked David Quick QC to review the case; Quick recommended calling a royal commission into the NCA, but Duncan Kerr, federal Minister for Justice, declined to do so. Skrijel prepared a leaflet about the issue and distributed it in Kerr's electorate in Tasmania during the 1996 federal election campaign. Kerr wrote to the Tasmanian media saying he would not sue Skrijel but that he would sue any media outlet that repeated Skrijel's "false and defamatory allegations." The story was reported in the *Financial Review* but the

3. David Hickie, "Askin: friend to organised crime," *National Times*, 13–19 September 1981, pp. 1, 8

4. Graeme Leech, "Lecturer drops suits against students," *Australian*, 28 April 1993, p. 13; Andrea Malone and Sarah Todd, "Facts and fiction of the Waight saga," *Australian*, 5 May 1993, p. 14.

5. Robert Pullan, *Guilty Secrets: Free Speech and Defamation in Australia* (Sydney: Pascal Press, 1994), pp. 27–28.

6. Avon Lovell, *The Mickelberg Stitch* (Perth: Creative Research, 1985); Avon Lovell, *Split Image: International Mystery of the Mickelberg Affair* (Perth: Creative Research, 1990).

Tasmanian media kept quiet.[7] Skrijel's view is that most media wouldn't have published much on his case no matter what and that defamation law provides a convenient excuse for media not to publish.

Options

In practice, the structure of the court system and the media serve the powerful while doing little to protect the reputation of ordinary people. They undermine the open dialogue needed in a democracy. There are various options for responding to uses of defamation law to silence free speech. Each has strengths and weaknesses.

Avoid defamation

Writers can learn simple steps to avoid triggering defamation threats and actions. The most important rule is to *state the facts, not the conclusion*. Let readers draw their own conclusions.

- Instead of saying "The politician is corrupt," it is safer to say "The politician failed to reply to my letter" or "The politician received a payment of $100,000 from the developer."

- Instead of saying "The chemical is hazardous," it is safer to say "The chemical in sufficient quantities can cause nerve damage."

- Instead of saying, "There has been a cover-up," it is safer to say "The police never finalised their inquiry and the file has remained dormant for nine years."

Be sure that you have documents to back up statements that you make. Sometimes understatement—saying less than everything you believe to be true—is more effective than wide claims.

If you are writing something that might be defamatory, it's wise to obtain an opinion from someone knowledgeable. (Remember, though, that lawyers usually recommend that you *don't* say something if there's even the slightest risk of being sued.)

Another way to avoid being sued for defamation is to produce and distribute material anonymously. Some individuals produce leaflets. They are careful to use printers and photocopiers that cannot be traced. At times when few people will notice them, they distribute the leaflets in letterboxes, ready to dump the remainder if challenged. Gloves of course—no fingerprints. For those using electronic mail, it's possible to send messages through anonymous remailers, so the receivers can't trace the sender.

These techniques of avoiding defamation law may get around the problem, but don't do much to eliminate it. They illustrate that defamation law does more to inhibit the search for truth than foster it. If an anonymous person circulates defamatory material about you, you can't contact them to sort out discrepancies.

Say it to the person

Send a copy of what you propose to publish to people who might sue. If they don't respond, it will be harder for them to sue successfully later, since they haven't acted to stop spreading of the statement. If they say that what you've written is defamatory, ask for specifics: which particular statements or claims are defamatory and why? Then you can judge whether their objections are valid.

It's not defamatory to criticise a person to their face or to send them a letter criticising them. It's only defamation when your comments are heard or read by someone else—a "third party."

Keep a copy for posterity

If you have to censor your writing or speech to avoid defamation, keep a copy of the original, uncensored version—in several very safe places. Save it for later and for others, perhaps after all concerned are dead. You might also inform relevant people, especially those who might threaten defa-

7. Richard Ackland, "Policing a citizen's right to expression," *Financial Review*, 9 February 1996, p. 30.

mation, that you have saved the uncensored version.[8]

Defamation law distorts history. How nice it would be to read the uncensored versions of old newspapers, if only they existed! By saving the unexpurgated versions, you can help challenge this whitewashing of history.

Call the bluff

If you are threatened with a defamation action, one strategy is to just ignore it and carry on as before. Alternatively, invite the threatener to send the writ to your solicitor. Most threats are bluffs and should be called. The main thing is not to be deterred from speaking out. The more people who call bluffs, the less effective they become.

If you receive a defamation writ, try to find a solicitor who is willing to defend free speech cases at a small fee or, if you have little money, no cost. Shop around for someone to defend you.

Use publicity

Just because you are sued doesn't mean you can't say anything more. (Many organisations avoid making comment by saying that an issue is *sub judice*—under judicial consideration—but that's just an excuse.) You can still speak. In particular, you can comment on the defamation action itself and its impact on free speech. It's also helpful to get others to make statements about your case.

A powerful response to a defamation suit is to expand the original criticism. Defamation threats and suits aim to shut down comment. If enough people respond by asserting their original claims more forcefully and widely, this will make defamation threats counterproductive.

Helen Steel and Dave Morris, members of London Greenpeace, produced a leaflet critical of McDonald's. McDonald's sued. Steel and Morris, with no income, defended themselves. They used the trial to generate lots of publicity. Because of the trial, their leaflet has reached a far greater audience than would have been possible otherwise. The whole exercise was a public relations disaster for McDonald's.

Recommend law reform

Law reform commissions have been advocating reform of defamation law for decades. Possible changes include:

- public figure defence so that it's possible to make stronger criticisms of those with more prominence and power;
- adjudication outside courts, to reduce court costs;
- putting a modest limit on the legal costs incurred by either the plaintiff or defendant, maybe $5000;
- elimination of monetary pay-outs, requiring instead apologies published of equal prominence to the original defamatory statements.

In spite of widespread support for reform among those familiar with the issues, Australian law remains much the same. That's because it serves those with the greatest power, especially politicians who make the law and groups that use it most often.

Fixing the law is at most part of the solution. It's also necessary to change the way the legal system operates.

Campaign to reform the legal system

Any change that makes the system cheaper, speedier and fairer is worth pursuing. The sorts of changes required are:

- reducing court awards that are much greater than the damage done or large compared to a party's income;
- making laws simpler;
- introducing compulsory conciliation;
- speeding up legal processes.

There's a much better chance of change when concerned individuals and groups organise to push for change. This involves lobbying, writing letters, organising peti-

8. Be aware, though, that you might be called to produce this material as part of the discovery process in a defamation action!

tions, holding protests, and many other tactics. In the United States, campaigning by opponents of SLAPPs has resulted in some states passing laws against SLAPPs.

Speak out

Petitions, street stalls and public meetings can be used to directly challenge the use of defamation law against free speech. One possibility is to circulate materials that have been subject to defamation threats or writs. Another is to protest directly against those who attempt to use defamation law to suppress legitimate comment. If enough people directly challenge inappropriate uses of the law, it will become harder for it to be used.

Conclusion

Defamation law doesn't work well to protect reputations. It prevents the dialogue and debate necessary to seek the truth. More speech and more writing is the answer to the problem rather than defamation law, which discourages speech and writing and suppresses even information that probably wouldn't be found defamatory if it went to court. Published statements—including libellous ones—are open, available to be criticised and refuted. The worst part of defamation law is its chilling effect on free speech.

The most effective penalty for telling lies and untruths is loss of credibility. Systems of communication should be set up so that people take responsibility for their statements, have the opportunity to make corrections and apologies, and lose credibility if they are repeatedly exposed as untrustworthy. Defamation law, with its reliance on complex and costly court actions for a tiny fraction of cases, doesn't work.

Defamation actions and threats to sue for defamation are often used to try to silence those who criticise people with money and power. The law and the legal system need to be changed, but in the meantime, being aware of your rights and observing some simple guidelines can help you make informed choices about what to say and publish.

Further reading

Brian Martin and Truda Gray, "How to make defamation threats and actions backfire," *Australian Journalism Review,* vol. 27, no. 1, July 2005, pp. 157–166.

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Robert Pullan, *Guilty Secrets: Free Speech and Defamation in Australia* (Sydney: Pascal Press, 1994).

Brian Walters, *Slapping on the Writs: Defamation, Developers and Community Activism* (Sydney: University of New South Wales Press, 2003).

The principal author of this document is Brian Martin, with extensive advice and comment on drafts from Richard Blake, Sharon Callaghan, Michael Curtis, Don Eldridge, Chris Fox, Judith Gibson, Jack Goldring, Mary Heath and Mick Skrijel. Rocco Fazzari and Jenny Coopes kindly granted permission to reproduce their cartoons.