

Criminal Defamation in Australia: Time to Go or Stay?

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Several jurisdictions have abolished the common law criminal defamation. The rationale for its abolition is that criminal defamation is not only antiquated but a dangerous restraint on free speech. While many would agree with the repealing of laws relating to sedition and obscenity, not all would be convinced the time is right for the complete abolition of criminal defamation. The disturbing rise in 'hate' speech on social networks and the seeming inability to regulate the trend means criminal defamation may still have a valuable role to play. Although remedies that include ordering web site owners to take down offending material, right of reply and apology all have their place for cases of civil defamation, they do not adequately address the extremely serious defamation, published with malicious intent. One advantage of the crime of criminal defamation is that it is already on the statute books and therefore there is no need to draft new laws to deal with defamation that satisfies the criteria of criminal.

Introduction

More than two years ago the United Kingdom Parliament voted to abolish common law criminal libel¹ offences.² These included seditious libel, defamatory libel and obscene libel.³ The demise of the offences was hailed by the media and civil rights groups as a welcome step.⁴ The old laws were described as a blight on free speech in the UK.⁵ It was said that one of the pleasing aspects of the repeal it was that it cleared a path for UK campaigners to argue for the abolition of criminal libel overseas and so enhance the shared human right to freedom of expression.⁶ The Italian Parliament is also facing calls to decriminalise the country's libel laws after a journalist and a former newspaper director were given gaol sentences.⁷ Critics noted that Italy, along with Belarus, is one of the last two remaining countries in Europe where journalists still receive prison sentences for defamation.⁸

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¹ This article uses the term 'criminal defamation', though some statutes and scholars use the term 'criminal libel'. The two terms are considered synonymous for purposes of this article.

² *Coroners and Justice Act 2009* s 73.

³ *Ibid.*

The following offences under the common law of England and Wales and the common law of Northern Ireland are abolished -

- (a) the offences of sedition and seditious libel;
- (b) the offence of defamatory libel; and
- (c) the offence of obscene libel.

Criminal defamation was also abolished in New Zealand with the enactment of the *Defamation Act 1992*. *Crimes Act 1961*, ss 211-16; repealed by s 56(2) *Defamation Act 1992*.

⁴ Jonathan Heawood, 'Let's Cheer the Demise of Criminal Libel', *The Guardian* (online), 27 October 2009 <<http://www.guardian.co.uk/commentisfree/libertycentral/2009/oct/27/criminal-libel-fr>>; Natasha Schmidt and Jacob Harbitz Niels, 'UK Government Abolishes Seditious Libel and Criminal Defamation', *Index on Censorship*, 13 July 2009

<<http://humanrightshouse.org/noop/page.php?p=Articles/11311.html&print=1>>.

⁵ *Ibid.*, Heawood 13 July 2009,

<<http://humanrightshouse.org/noop/page.php?p=Articles/11311.html&print=1>>.

⁶ *Ibid.*

⁷ 'Italy Faces Reform Calls as Journalists Jailed for Libel', *Press Gazette* (online), 9 August 2012

<<http://www.pressgazette.co.uk/node/49801>>.

⁸ *Ibid.*

While many would agree with the repealing of laws relating to sedition and obscenity, in Australia not all would be convinced the time is right for the abolition of defamatory libel or criminal defamation as it is known in most states of Australia.⁹

In fact, in view of the troubling phenomenon of defamatory slurs on social networking, there is a strong argument for the offence not only remain on the statute books but to be invoked more often especially in seriously malicious cases where defendants are often ‘judgment proof’ in the civil jurisdiction. That is, they either cannot be identified or they are impecunious and incapable of satisfying a judgment for damages, leaving plaintiffs without a remedy.

The analysis starts with an overview of criminal defamation laws as they are today and some of the cases that have attracted attention mainly because of their rarity in modern day litigation. It will also look at the history of criminal defamation from its beginnings in the Star Chamber and the elements that are required to prove that the defamatory matter in question should attract the purview of the criminal law and finally the arguments for and against the retention of this ancient offence which some have described as ‘the black sheep of communications law’.¹⁰

1. Overview of Criminal Defamation

There is a vast difference between the functions of the criminal law and that of the law of torts despite their common origin in revenge and deterrence. Professor Fleming describes it this way:

A crime is an offence against the State, as representative of the public, which will vindicate its interests by punishing the offender. A criminal prosecution is not concerned with repairing an injury that may have been done to an individual, but with exacting a penalty in order to protect society as a whole. Tort liability, on the other hand, exists primarily to compensate the victim by compelling the wrongdoer to pay for the damage he has done.¹¹

Applied to defamation the fundamental purpose of civil defamation is to vindicate and to protect the reputation of the person defamed¹² whereas that of criminal defamation is to punish the defamer and to protect the community.¹³

Nevertheless many Australians would be surprised to learn they could be convicted and imprisoned for publishing defamatory words. As David Rolph has written,¹⁴ “although defamation is overwhelmingly treated as a tort in contemporary Australia, it

⁹ Niloufer Selvadurai & Islam Rizwanul, ‘The Application of Criminal Defamation to Inflammatory Comments made on Social Networking Sites: A New Role for an Old Law?’ (2012) 36 *Criminal Law Journal* 48.

¹⁰ Greg Lisby, ‘No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence’ (2004) 9 *Communication Law and Policy* 433, 486.

¹¹ John Fleming, *The Law of Torts* (The Lawbook Co, 8th ed, 1998) 529.

¹² *R v Daily Mail (Editor); Ex Parte Factor* (1928) 44 TLR 303, 306.

¹³ *Wood v Cox* (1888) 4 TLR 652, 654.

¹⁴ David Rolph, ‘A Critique of the National, Uniform Defamation Laws’ (2008) 16 *Torts Law Journal* 4.

is still possible for criminal proceedings for defamation to be brought concerning a publication.”¹⁵

Three years ago an Adelaide man was convicted of criminal defamation after posting defamatory material about a country police officer on Facebook.¹⁶ Christopher James Cross, 19, pleaded guilty in the Kadina Magistrates Court to criminal defamation and became one of the few persons in South Australia ever convicted of the rarely used charge.¹⁷

A year before Cross’s case two child protection advocates escaped conviction for criminal defamation after a Supreme Court jury found them not guilty after they faxed documents to the media, naming four individuals involved in public office as alleged paedophiles.¹⁸ The pair was reportedly the third people in 48 years¹⁹ to go on trial in South Australia accused of criminal defamation. In 1993 in an unreported case, a conviction for criminal defamation was upheld where an accused sent a defamatory letter to the employer of her ex-lover, accusing him of having a heroin habit, being a liar and wishing to steal from the homes of aged residents where he worked as a security guard.²⁰

However, Australia-wide the numbers of prosecutions for criminal defamation have been few over the last 100 years.²¹ As one academic has noted, criminal defamation is practically insignificant in Australian society.²² Unfortunately, with the advent of the Internet,²³ actions like Cross’s in posting a defamatory Facebook page are becoming common and a criminal action would seemingly be appropriate in his case, largely because of his age, he is unlikely to have secured sufficient assets to be successfully sued civilly leaving his victim unsatisfied. Although a British student won a \$17,500 payout in a High Court ruling after a ‘friend’ branded him a paedophile and posted

¹⁵ *Crimes Act 1900* (ACT) s 439; *Crimes Act 1900* (NSW) s 529; *Criminal Code Act 1899* (Qld) s 365; *Criminal Law Consolidation Act 1935* (SA) s 257; *Criminal Code Act 1924* (Tas) s 196; *Wrongs Act 1958* (Vic) Pt I; *Criminal Code Act Compilation Act 1913* s 345; and see generally *Spautz v Williams* [1983] 2 NSWLR 506; *Gypsy Fire v Truth Newspapers Pty Ltd* (1987) 9 NSWLR 382; *Waterhouse v Gilmore* (1988) 12 NSWLR 270; and *Grassby v R* (1992) 62 A Crim R 351; BC9201671.

¹⁶ Nigel Hunt, ‘Teen Guilty of Facebook Slur’, *Sunday Mail*, (South Australia), 22 November 2009.

¹⁷ One of the more notorious cases was against Rohan Rivett, then editor of the now defunct Adelaide newspaper, *The News*. Prosecutors took action against Rivett over the newspaper’s campaign for an inquiry into the conviction of Aboriginal man Max Stuart, who had been sentenced to death for the murder of a young girl.

¹⁸ Gavin Lower, ‘Two Cleared of Defamation over Paedophile Claims’, *The Australian*, 13 December 2008 < <http://www.theaustralian.com.au/archive/news/two-cleared-over-paedophile-claims/story-e6frg6p6-1111118304340>>.

¹⁹ Rohan Rivett see n 17 was the first.

²⁰ *Duffy v Baehnk* (Unreported, Supreme Court of South Australia, Cox J, 4 March 1993).

²¹ See, *Australian Law Reform Commission Unfair Publication Report* 11 (AGPS, 1979) 103-4; *Byrnes v Barry* (2003) 151 ACTR 1; [2003] ACTSC 54; and *R v Ratcliff* (2007) 250 LSJS 226.

²² D Rolph, ‘A Critique of the National, Uniform Defamation Laws’ (2008) 16 *Torts Law Journal* 4.

²³ An American study has found that the Internet appeared to be the major factor in an increase in the annual number of criminal libel prosecutions over the 17 years under study. David Pritchard, ‘Rethinking Criminal Libel: An Empirical Study’ 14 *Communication Law & Policy* (2009) 316.

pictures of child pornography to his Facebook page²⁴ many others have not been so lucky.

For instance, a Melbourne finance executive discovered that a woman claiming to be his ex-partner had branded him in cyberspace as a dud lover and serial cheat.²⁵ The executive was one of hundreds of Australian men whose profiles have been posted on dontdatehimgirl.com or datingpsychos.com – US sites now being used by Australian women to post anonymous rants against men who have supposedly done them wrong, and to warn other prospective partners.

Unfortunately, the men named and shamed can find themselves without a remedy because they cannot prove the identity of the person who has posted their name on the sites and therefore have no one to sue. US laws protect the American sites from legal action.²⁶ Although in Brisbane two years ago, the Queensland Supreme Court ordered Google to release the name of a blogger who had defamed a Gold Coast author. Also two court decisions in England and in New York denied bloggers a right to anonymity.²⁷

Victims of defamatory blog sites may have other reasons however, not to take their own action. According to the Justinian legal magazine²⁸ Television personality Marieke Hardy was the victim of a defamatory blog for a period of more than five years. She then named and shamed a person who she believed was the blog author. Unfortunately she named an innocent party and was ordered to pay a reported \$13,000 in damages.²⁹

It might be thought a modest sum for a serious defamation – an accusation that someone is the author and publisher of a ‘hate campaign’. However, the offensive blog was taken down for a short while but reportedly returned with a vengeance. Perhaps if the person responsible for the blog knew that they could be charged with a criminal offence, and face possible incarceration, they would be less likely to continue this type of behaviour.

²⁴Louisa Hearn, ‘\$17,500 Payout for Facebook ‘Paedophile’ Slur’, *Sydney Morning Herald*, 29 July, 2010 <<http://www.smh.com.au/technology/technology-news/17500-payout-for-facebook-paedophile-slur-20100729-10wud.html>>.

²⁵Liz Porter, ‘Hell Hath no Fury Like the ‘ex’ Files’, *The Age*, 19 October 2008 <<http://www.theage.com.au/news/web/hell-hath-no-fury-like-the-ex-files/2008/10/18/1224351022106.html>>.

²⁶Section 230 (c) of the *Communications Decency Act* fundamentally states that Internet services like Google.com, Blogger, and many of Google’s other services, are re-publishers and not the publisher of that content. Therefore, these sites are not held liable for any allegedly defamatory, offensive or harassing content published on the site.

²⁷Alison Sandy and Alex Dickinson, ‘Supreme Court Orders Google Australia to Release Details of Creators of Website Labelling Self-help Guru Jamie McIntyre a ‘Thieving Scumbag’, *The Courier-Mail*, 7 October 2011 <<http://www.couriermail.com.au/archive/news/supreme-court-orders-google-australia-to-release-details-of-creators-of-website-labelling-self-help-guru-jamie-mcintyre-a-thieving-scumbag/story-e6frep1o-1226160676594>>; *The Author of Blog v Times Newspapers Ltd* [2009] EMLR 22; *In the Matter of Application of Liskula Cohen*, Supreme Court of New York, 17 August 2009.

²⁸*Justinian: Australian legal magazine*, ‘News on Lawyers and the Law-Bloggers’, 28 December 2011.

²⁹<<http://www.justinian.com.au/bloggers/hateful-blogging> html>.

So although some scholars conclude that criminal defamation has fallen into a state approaching extinction and should not be taken seriously,³⁰ the fact that it is still on the statute books indicates that it is.

2. History of Criminal Defamation

At common law, criminal defamation was one of four sub-crimes which together made up the offence of libel.³¹ The others are obscene libel, blasphemous libel and seditious libel. It is only criminal defamation which is the subject of this paper.

The earliest form of libel known to English law was an offence of a criminal nature known as *scandalum magnatum* (slander of magnates).³² This offence was created by a statute in 1275 in the reign of Edward I.³³ The mischief the statute sought to prevent was causing a loss of faith in the government or monarch. Thus the earliest form of libel was a seditious libel, and since it was punishable by imprisonment, it can be classified as a criminal offence. However, if a person was the victim of some other form of defamation, he was obliged to go to the Ecclesiastical Courts, for under medieval law, no remedy was offered concerning other forms of defamation.³⁴

Towards the beginning of the 16th century the common law courts began to develop a civil action for slander. The jurisdiction was gradually taken over from the Ecclesiastical Courts, whose jurisdiction began to wane after its peak towards the end of the 15th century.³⁵ Slander had not yet taken on its present-day meaning of spoken words. At this time the action was applicable to both spoken and written defamation.³⁶ The modern distinction between libel and slander was not introduced until after the Restoration.³⁷

In the common law courts, because the action was slander on the case, the gist of the action was damage to the victim of the slander. At this time, a number of other rules were developed, such as the requirement of publication to a third party, the rule that truth is a complete defence to the action and the rule that the action does not survive the death of the victim.³⁸

Criminal defamation had its beginnings in the Star Chamber. In the 16th and 17th centuries, the Star Chamber regarded with deepest suspicion, the printed word in general and anything which looked like criticism of the established institutions of Church or State in particular.³⁹ At the same time, the Star Chamber⁴⁰ was anxious to

³⁰ Mark W Freel, 'Grand Jury Subpoenas and the Threat to Free Speech: In re Grand Jury Matter (Gronowicz)' 18 *Conn. L. Rev* 665, (1986) 684, 109.

³¹ There was no offence of 'criminal slander'. *Defamation Act 1952* s 17(2) (UK).

³² The statutory offence of *scandalum magnatum* was abolished by the *Statute Law Revision Act 1887*.

³³ William Holdsworth, *History of English Law* (Little, Brown & Co, 1924) vol 5, 335.

³⁴ *Ibid.*

³⁵ The jurisdiction of the ecclesiastical courts in this area was at its height towards the end of the 15th century; thereafter it declined. The last vestiges of this jurisdiction were finally removed by the *Ecclesiastical Courts Act 1855*.

³⁶ See, for example, *Boughton v Bishop of Coventry & Lichfield* (1584) 1 Anderson 119; 123 ER 385.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ JR Spencer, 'Criminal Libel – A Skeleton in the Cupboard (1)', (1977) *Criminal Law Review* 383.

suppress duelling.⁴¹ To achieve this it would punish defamatory libels on private citizens who had suffered insult in the hope that this remedy would be more beneficial to the person insulted rather than a challenge to fight.⁴² A defamatory libel undoubtedly involved a greater risk of provoking a victim to violence than it does today. The 'threat to the peace' was always said to be the rationale of the offence.⁴³ This requirement was finally laid to rest in 1936⁴⁴ where the Court of Criminal Appeal decided that a threat to the peace was not an essential element of the crime of defamatory libel. Nor was it a defence, as was often thought, to show that the publication had no tendency to provoke a breach of the peace.⁴⁵ Two earlier cases also expressly rejected the requirement of a risk to the peace.⁴⁶

Nevertheless one could imagine that some of the bile that has been unleashed on Internet sites, as noted above, could easily lead to a breach of the peace. When the Court of the King's Bench inherited the prosecution of criminal defamation from the Star Chamber, it acknowledged the Star Chamber's rationale of the suit as a necessary brake on the practice of duelling.⁴⁷

The primary influence of the common law on this type of criminal defamation was the holding in *Penny's case*⁴⁸ that spoken words defamatory of a private person did not constitute a crime, which was limited to written defamatory statements. (This was the case in Australia until the introduction of the uniform defamation rules in 2005 which abolished the distinction between libel and slander).

But in 1884, *Labouchere's*⁴⁹ case severely limited the availability of criminal charges in defamation cases, holding that the court should in general exercise its discretion against the granting of an information at the suit of a private individual. Following this decision, the normal procedure was by way of indictment. Because the crime was for written defamation only it was not surprising that newspapers should feature prominently in private prosecutions.

As newspapers grew so did the private prosecutions. Spencer attributes this to a number of factors.⁵⁰ Defamatory attacks at the time tended to be extremely scurrilous, encouraging the victim to be more likely to prosecute than to sue. Also, the aristocracy tended to be the victims of defamatory attacks, and many of those were opposed to newspapers and advocated their suppression on principle.⁵¹ There is also the fact that, as a wealthy class the aristocracy would not have been attracted by

⁴⁰ The Star Chamber's criminal jurisdiction and jurisprudence was, after the Restoration, assumed by the common law Court of King's Bench.

⁴¹ J R Spencer, 'Criminal Libel – A Skeleton in the Cupboard (1)', (1977) *Criminal Law Review* 383.

⁴² Holdsworth, above n 33, 210.

⁴³ T Plucknett, *Concise History of the Common Law* (Butterworth & Co., 4th ed, 1948) 232.

⁴⁴ *Wicks* (1936) 25 Cr.App.R. 168.

⁴⁵ *R v Hardy* [1951] VLR 454, 455.

⁴⁶ *Brooke* (1856) 7 Cox 251 and *Palmer*, *The Times*, 23 September 1887.

⁴⁷ The Law Reform Commission of Ireland, *The Crime of Libel*, Consultation Paper (1991) 7.

⁴⁸ (1697) 1 Ld.Raym.153; 91 ER 999. Nevertheless, seditious or blasphemous spoken words or words likely to cause a breach of the peace were indictable.

⁴⁹ (1884) 12 QBD 320.

⁵⁰ J R Spencer, 'The Press and the Reform of Criminal Libel' in P R Glazebrook (ed) *Reshaping the Criminal Law* (Stevens, 1978) 267.

⁵¹ The Law Reform Commission of Ireland, *The Crime of Libel*, Consultation Paper (1991) 18.

money. Thirdly, a criminal court could order a libeller to be bound over on a good behaviour bond whereas the common law court could not order an injunction.⁵²

Perhaps, as the Irish Law Commission pointed out, one of the main attractions was the rule that truth was not a defence in criminal prosecution for libel.⁵³ As the saying goes (originally thought to be by Lord Mansfield), “the greater the truth, the greater the libel”.⁵⁴ If a person had something to hide, he was well-advised to bring a criminal prosecution rather than a civil action.

Spencer estimates that by the 1830s, although criminal prosecutions were still popular, they were becoming less frequent for political libel because of a more liberal political climate that prevailed after the Great Reform Act of 1832.⁵⁵

The attitude of journalists and editors was also changing, and instead of accepting criminal liability as part of the risk of the trade, they were voicing objections to details of the law. Their complaints included the following:

- (1) *Costs*. The fact that in an unsuccessful civil action the defendant would recover costs, whereas he would bear his own costs in a criminal prosecution even if he were acquitted.
- (2) *Vicarious Liability*. The rule that a master was liable for the acts of his servants, which had even been held to lead to the conviction of a bookseller, although he had expressly forbidden an assistant to sell the pamphlet in question in his absence.⁵⁶
- (3) *The rule that truth was not a defence*. As Spencer points out, this rule which originated from Coke was an absurdity and was based on fallacious reasoning. It assumed that the exposure of villains whose activities menace society is less important than the risk of unlawful violence by the villains, if they were annoyed at being found out.⁵⁷

3. *Actus Reus* of Criminal Defamation

According to *Gatley*, the *actus reus* of criminal libel is that the libel must vilify the subject.⁵⁸ Whoever is the victim, the libel must be shown beyond reasonable doubt to have attached to that target.⁵⁹ Like the tort of defamation the effect of the libel must be to bring the person into hatred, contempt and ridicule.⁶⁰ By definition, although ‘hatred’ is not defined, it is considered to be more damaging than ridicule or contempt.⁶¹

⁵² *Ibid.*

⁵³ *Ibid.*

⁵³ *Ibid.*

⁵⁴ Patrick Milmo and WVH Rogers, *Gatley on Libel and Slander* (Sweet & Maxwell, 11th ed, 2010) 762, 22.2.

⁵⁵ Freel, above n 30.

⁵⁶ Johnson (1797) quoted by Lord Denman Parl Deb vol 66, 408.

⁵⁷ Freel, above n 30.

⁵⁸ Milmo and Rogers, above n 54, 761, 24.2.

⁵⁹ *S v Gibson*, 4 SA 115 (D & CLD, 1979).

⁶⁰ *Thornley v Lord Kerry*, 4 Taunt 355, 364 (1812).

⁶¹ Milmo and Rogers, above n 54, 762, 24.18.

In *Gleaves v Deakin*⁶² the House of Lords confirmed that the word ‘vilify’ means a criminal libel must be ‘serious libel’ and not ‘trivial’⁶³, as judged by community standards. The standard of seriousness effectively shuts out more trivial cases which should be civil and not criminal matters. This is also the situation in defamation defendant-friendly countries like the US, where it has been ruled that criminal libel statutes may punish libellous statements on matters of public concern, only when those statements are made with knowledge of falsity or reckless disregard of the truth.⁶⁴ Another remedy might be that as with minor disturbances such as public nuisance offences, a trivial defamation could be dealt with by a peace and good behaviour bond. In *Goldsmith v Sperrings*⁶⁵ Lord Denning M.R. explained that:

A criminal libel is so serious that the offender should be punished for it by the State itself...Whereas a civil libel does not come up to that degree of enormity.

This description was described by Lord Widgery C.J. in *R v Wells St JJ. Ex p. Deakin*⁶⁶ as the most convenient, comprehensive and modern definition of criminal libel. The criteria of criminal libel in South Africa were listed in *South African Criminal Law and Procedure II* as; ‘the identity and position of the person defamed, the manner and extent of publication, the motive of the defamer and the nature of the defamatory matter and its likely impact upon the community’.⁶⁷ What this definition seems to suggest is that the accused should be liable for criminal defamation only if both the community’s esteem of the complainant and the latter’s self-esteem were diminished.

The fact that the interests of the community are involved also creates the impression that the test for seriousness is objective, not subjective. Seriousness is an express element of the offence but it also has another procedural function. For as *Gatley* states, the element of seriousness can be seen as an attempt by the courts to deter and dismiss cases which need not entail the weight of state condemnation and sanction.⁶⁸ In this respect seriousness is arguably a procedural device which in effect avoids an abuse of process, whereby private prosecutors might be tempted to act in a vindictive way by wearing down a defendant before an action for damages.

4. Mens Rea

There is no clear statement in any of the modern authorities as to the precise extent to which *mens rea* is required in criminal defamation.⁶⁹ While some authorities during the 18th and 19th centuries can be read as supporting the view that criminal libel is an

⁶² [1980] AC 477, HL.

⁶³ Per Viscount Dilhorne, *ibid* 487.

⁶⁴ *Garrison v Louisiana*, 379 US 64, 69 (1964).

⁶⁵ 1 WLR 478, 485 (CA, 1977).

⁶⁶ 1 WLR 1008, 1011 (DC 1978).

⁶⁷ P M A Hunt, *South African Criminal Law and Procedure II* (Juta, 1970).

⁶⁸ *Ibid* 656.

⁶⁹ The point, for example, was not discussed in *Gleaves v Deakin* (1980) AC 477.

offence of strict liability⁷⁰, others suggest that a *mens rea* of an intent to defame is a requirement.⁷¹

It is clear however, that the defendant must have intended to publish the materials which contain the defamation.⁷² The defendant must also have intended to publish the *words* which are alleged to be defamatory. According to Gately the careless misplacement of a criminally libellous *aide-memoire* intended for oneself would not result in liability.⁷³ It is not enough that he or she intentionally published a book or paper in which they were contained.⁷⁴

It has been held, for example, that a newspaper boy was not guilty where he sold a newspaper containing a defamatory statement which he did not know was there.⁷⁵ This defence of innocent dissemination only applies to a person who has taken a subordinate part in disseminating the publication, and not the author, printer or first or primary distributor of the matter.⁷⁶

5. Criminal Defamation in Australia

In the reform of the national defamation laws in Australia, the states and territories produced a model provision on criminal defamation.⁷⁷ All jurisdictions, except the Northern Territory and Victoria⁷⁸, adopted a version of the model provision.⁷⁹ The model version bears a close resemblance to a recommendation by the Australian Law Reform Commission's report into 'Unfair Publication: Defamation and Privacy' more than 30 years ago.⁸⁰ The model provision in Queensland for instance, provides that:

S 365 Criminal Defamation

- (1) Any person who, without lawful excuse, publishes matter defamatory of a another living person (the *relevant person*) -
- (a) Knowing the matter to be false or without having regard to whether the matter is true or false; and

⁷⁰ *R v Hunt* (1824) 2 St. Tr. NS 69; *R v Harvey & Chapman* (1832) 2 B & C 257; 107 ER 379; *R v Munslow* (1895) 1 QB 758.

⁷¹ See *R v Lord Abingdon* (1794) 1 Esp 226; 170 ER 337; *R v Creevey* (1813) 1 M & S 373; 105 ER 102; *R v Evans* (1821) 3 Stark 35; 171 ER 759; *R v Ensor* (1887) 3 TLR 366.

⁷² See for example, s 365 Criminal defamation *Queensland Criminal Code 1899*.

⁷³ Milmo and Rogers, above n 54, 765, 24.3.

⁷⁴ David Omerod, *Smith and Hogan's Criminal Law* (Oxford University Press, 10th ed, 2002) 738, quoting *R v Munslow* [1985] 1 QB 758, 765.

⁷⁵ An unreported decision of Wills J referred to by Smith J in *R v Allison* (1888) 16 Cox CC 559, 563.

⁷⁶ S 32 Defence of innocent dissemination *Defamation Act 2005* (Qld), (NSW), (Victoria), (Western Australia), (Tasmania); s 30 *Defamation Act 2005* (SA); s 29 *Defamation Act 2006* (NT); s 139c *Civil Law (Wrongs) Act 2002* (ACT).

⁷⁷ *States and Territories Model Defamation Provisions* cl. 46.

⁷⁸ As to the position in the Northern Territory, see *Criminal Code* (NT) ss 203-208; Victoria, *Wrongs Act* (Vic) Pt 1.

⁷⁹ *Crimes Act 1900* (ACT) s 439; *Crimes Act 1900* (NSW) s 529; *Criminal Code Act 1899* (Qld) s 365; *Criminal Law Consolidation Act 1935* (SA) s 257; *Criminal Code Act 1924* (Tas) s 196; *Criminal Code* (WA) s 345.

⁸⁰ Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979).

- (b) Intending to cause serious harm to the relevant person or any other person or without having regard to whether serious harm to the relevant person or any other person is caused:

Commits a misdemeanour.

Maximum penalty – 3 years imprisonment.⁸¹

In New South Wales, the offence carries a prison term of up to three years or a fine not exceeding \$110,000 on an individual instead of, or in addition to, any term of imprisonment.⁸² Similar offences exist under s 257(1) of the *Criminal Law Consolidation Act 1935* (SA), s 345(1) of the *Criminal Code Act Compilation Act 1913* (WA) and s 196(1) of the *Criminal Code Act 1924* (Tas). An important distinction is that in s 345(6) of the Western Australia Act, there is provision for summary conviction that may extend up to 12 months imprisonment or a fine of \$12,000.

Victoria is slightly different. Under s 10 of the *Wrongs Act 1958* (Vic) a person who maliciously publishes any defamatory libel knowing it to be false, is liable for criminal defamation. Unlike the position in other Australian jurisdictions the prosecution needs to prove that the accused had knowledge of the falsehood of the matter, but also that the accused had a malicious intent in publishing the alleged defamatory statement.

Criminal defamation is an indictable offence and proceedings may only be instituted with the written consent of the Director of Public Prosecutions in most jurisdictions. In the ACT however, a person may be arrested for and charged with criminal defamation without the consent of the DPP.⁸³ This anomaly is a good argument for harmonising criminal defamation laws, in the same way the national uniform defamation legislation has been.

Criminal defamation is unlike civil defamation as it requires a particular mental state (that is, knowledge or intention) to be proved against the accused (not the equivalent of malice).⁸⁴ The reference to a living person is to overcome any suggestion that there could be liability for defamation of the dead. The meanings of the words 'publish' and 'defamatory' under the criminal law are the same as in the law of tort, as modified by the *Defamation Act* (2005). The commencement of criminal proceedings for an offence of criminal defamation does not prevent the commencement of civil proceedings for defamation against the accused.

The prosecution must show either an intention on the part of the defendant to cause serious harm to another person by the publication, and knowing the matter to be false, or be at least recklessly indifferent to whether the defamatory matter is true or false. As one commentator has pointed out, it is important to note the strong prospective nature of this offence. It cannot be established by proving from the vantage point of hindsight that the publication did in fact cause serious harm.⁸⁵

⁸¹ *Criminal Code 1899* (Qld) s 365.

⁸² *Crimes (Sentencing Procedure) Act 1999* (NSW) s 15.

⁸³ *Crimes Act 1900* (ACT) s 439(5).

⁸⁴ *Waterhouse v Gilmore* (1988) 12 NSWLR 270, 288.

⁸⁵ Des A Butler and Sharon Rodrick, *Australian Media Law* (Lawbook Company, 2nd ed, 2004) 117.

In the absence of admissions, each fact must be proved by inference.⁸⁶ The *Cross* case is a good example of someone setting out to cause serious harm. Cross created a Facebook page entitled: 'Piss off Mark Stuart'. This related to one of two police officers in a small town in South Australia. The page contained photographs of Senior Constable Stuart, his children, the location of his house and had many posts from visitors who had left incorrect, offensive and defamatory statements about the officer. Some encouraged acts of violence and aggression towards him.⁸⁷ The matter was heard summarily in the Magistrate's Court (Cross pleaded guilty). He was convicted and placed on a two year, \$500 good behaviour bond. Because the matter proceeded by way of a guilty plea the prosecution's arguments as to seriousness were not tested. However, it would appear most reasonable persons would come to the conclusion that Cross had set out to intentionally cause serious harm.

It is this type of case that should convince victims that retaining criminal defamation is a good thing in that it reinforces the law's abhorrence of people who engage in modern day versions of 'poison pen' letters with the intention of causing serious harm to an individual, while knowing the matter to be false. Also the Internet makes these matters much more serious than in the past where publication may have been limited to a few. Furthermore, material posted on the Internet has the potential to remain viewable for many years and in some cases has the potential to go 'viral', being viewed repeatedly on various web sites.⁸⁸

As some American commentators have written about the dissemination of defamation on the Internet: "People's reputations are sullied in a very new way, and it's very hard for them to recover from that".⁸⁹ Criminal defamatory acts are to be distinguished from most civil defamatory actions where defendants often have a belief that their words are true, but are found to be false or at least come within the ambit of a legal defence, for example, qualified privilege. Criminal defamatory acts are where the defendant knows the matter published is false and intends to cause serious harm to the relevant person.⁹⁰

6. Defences

Under the modified defamation laws in Australia all defences contained in the uniform rules of defamation are available.⁹¹ Formerly in Queensland there was a major difference to the defence of justification for criminal defamation. A defendant had not only to prove that the defamatory imputations complained of were substantially true, but they must have been made for the public benefit.⁹² The public

⁸⁶ *Waterhouse v Gilmore* (1988) 12 NSWLR 270, 290.

⁸⁷ Hunt, above n 16.

⁸⁸ Anita Allen, 'Dredging Up the Past: Lifelogging, Memory and Surveillance' (2008) 75 *University of Chicago Law Review* 47-48.

⁸⁹ Lisa Sink and Linda Spice, 'Man charged with Defamation: Disgruntled Fired Employee accused of Posting Ad with Ex-boss' Name on Internet', *Milwaukee J. Sentinel*, June 7, 2000, at B1 (quoting state representative Marlin Schneider).

⁹⁰ *Criminal Code 1899* (Qld) s 365.

⁹¹ *Crimes Act* (ACT) s 439(2); *Crimes Act 1900* (NSW) s 529 (4); *Criminal Code 1899* (Qld) s 365(3); *Criminal Code 1913* (WA) s 345(3).

⁹² s 365(8)(a)(b).

benefit criterion was satisfied where the publication discussed or raised for public discussion or information, matters which were properly of public concern.⁹³ To be 'for the public benefit' the discussion must have been seen as relevant, or promoting the public good, rather than simply pandering to a desire for scandal or invading the privacy of an individual.⁹⁴ It was not enough for a publication to be 'for the public benefit' because the material was of interest to the public. Whether a publication was 'for the public benefit' depended upon an assessment of the circumstances of the case.⁹⁵ It was therefore a question for the jury or a judge. This extra requirement of public benefit was presumably recognition that, where criminal defamation was identified, it must have satisfied a stronger test than in civil defamation because of its seriousness.

Furthermore, the publisher was required to justify all defamatory imputations in the publication. This means the defendant must have established the truth, not only of the natural and ordinary meaning of the material published, but also any innuendo meanings which were pleaded. If a publisher in a criminal defamation action in Queensland could not establish justification for the public benefit, then the other defences such as Qualified Privilege and Honest Opinion were unlikely to be available. Clearly a defence of justification was not available in *Cross's* case, nor would it be in other cases of similar ilk.

It could be argued, criminal defamation should only be brought when there is no defence available to the accused. That is, when a person deliberately sets out to defame another so as to inflict damage upon them, knowing full well there is no truth to the matter. Defences like Qualified Privilege⁹⁶ or Honest Opinion⁹⁷ would not be available because they would be defeated by the element of malice.

For example, a Queensland couple had their lives upturned when cheaply printed leaflets of lies about them were stuffed into the mailboxes of friends and neighbours. The subsequent court case (believed to be the only successful criminal defamation prosecution case in Queensland) revealed that the leaflets were printed by a rival business operator in a bid to run them out of town. In the words of District Court Judge Fred McGuire, the leaflets, which included accusations of criminal convictions for child sex offences, were 'a farrago of filth and fiction. From beginning to end, it is a monstrous lie'.⁹⁸ It is difficult to see why accused in those circumstances should have access to civil action defences.

⁹³ *Allworth v John Fairfax Group Pty Ltd* (1993) 113 FLR 254, 263.

⁹⁴ *Rofe v Smith's Newspapers Ltd* (1924) 25 SR (NSW) 4, 21-22.

⁹⁵ *Crowley v Glissan (No. 2)* (1905) 2 CLR 744, 756 per Griffith CJ.

⁹⁶ S 30 Defence of Qualified Privilege for provision of certain information *Defamation Act 2005*(Qld), (NSW), (Victoria), (Western Australia), (Tasmania); s 28 *Defamation Act 2005* (SA); s 27 *Defamation Act 2006* (NT); s 139a *Civil Law (Wrongs) Act 2002* (ACT).

⁹⁷ S 31 Defences of Honest Opinion *Defamation Act 2005*(Qld), (NSW), (Victoria), (Western Australia), (Tasmania); s 29 *Defamation Act 2005* (SA); s 28 *Defamation Act 2006* (NT); s 139b *Civil Law (Wrongs) Act 2002* (ACT).

⁹⁸ Leisa Scott, 'Unique Victory for Defamed Couple', *The Australian*, (date unknown) copy held by author.

7. Leave to Prosecute

The fact that leave is required by the Director of Public Prosecutions in the various jurisdictions to prosecute a criminal defamation is a necessary safeguard against frivolous or vexatious actions. Between at least 1909 and 1974, such a prosecution could not be started in New South Wales without the leave of a judge of either the Supreme Court or the District Court.⁹⁹ Leave was difficult to obtain for an applicant was obliged to demonstrate that a matter of public welfare was involved, as distinct from a dispute between individuals.¹⁰⁰

According to Hunt J¹⁰¹ the only prosecution for which leave was granted pursuant to such a provision between the Second World War and 1974 was in the ACT. Before that the last prosecution was in 1928.¹⁰² In 1974 the requirement of leave was removed when the offence itself was changed from the mere publication of defamatory matter to such a publication with either intent to cause serious harm or with the knowledge that it is probable that such harm will be caused.¹⁰³

The requirement that matters of public welfare be considered when deciding on a criminal action was recognised in Australia in the States and Territories Model Provisions.¹⁰⁴ When deciding whether consent should be granted, relevant questions include: whether there is a *prima facie* case that the defamatory statements were made, whether lawful excuses may be negated, and whether the intervention of the criminal law is called for.¹⁰⁵ The intervention of the criminal law will be called for where the defamation is so serious it requires both punishment of the offender and protection of the community, and it is required in the public interest as distinct from the private interest.¹⁰⁶

Because seriousness is an express element of the offence it is for the DPP to consider whether cases should be pursued. If the granting of leave to prosecute would stifle discussion of matters of public interest, leave may be refused on this ground.¹⁰⁷ According to Wanstall J when discussing the nature of the procedure in *Ex parte Marsh*¹⁰⁸ the granting of leave to prosecute should be regarded as unusual and extraordinary and the court should not countenance its use unless the case presents some unusual, if not extraordinary, feature.

⁹⁹ *Defamation Amendment Act 1909* s 4; *Defamation Act, 1912* s 25; *Defamation Act 1958* s 33.

¹⁰⁰ *Shapowloff v John Fairfax & Sons Ltd* (1966) 84 WN (Part 1) (NSW) 546, 553; leave to appeal refused: (1966) 40 ALJR 234; *Uren v John Fairfax & Sons Ltd* (1966) 117 CLR 118, 150.

¹⁰¹ *Spautz v Williams* (1983) NSWLR 506, 528. At that time the ACT still applied the provisions of the New South Wales *Defamation Act 1901*, and the *Defamation Amendment Act 1909*.

¹⁰² *Ex Parte Narme; Re Leong Wen Joe* (1928) 45 WN (NSW) 78.

¹⁰³ *Defamation Act 1974* s 50.

¹⁰⁴ S 46(5) **Consent of Director of Public Prosecutions/Attorney General**

Proceedings for an offence under this section may not be instituted without the written consent of the Director of Public Prosecutions*[or Attorney General].

¹⁰⁵ Des A Butler and Sharon Rodrick, *Australian Media Law* (Thomson Reuters, 4th ed, 2012) 131.

¹⁰⁶ *Burton v Parker* [1998] TASSC 104.

¹⁰⁷ *Shapowloff v Fitzgerald* [1966] 2 NSWLR 244, 251-252.

¹⁰⁸ (1966) QdR 357.

In *Gouldham v Sharrett*¹⁰⁹ it was held that there is no definite rule that the court will refuse to give leave to a private prosecutor because the Attorney-General or Minister for Justice has refused to file an indictment, but such a refusal is to be taken into account by the court as a matter of great weight.¹¹⁰ The defendant may also oppose leave. The applicant's inability to fund or manage civil litigation is not a significant reason for prosecution.¹¹¹ As Butler has noted, the requirement that consent first be obtained is essential, in view of the threat to free speech posed in some cases by the possibility of private prosecutions for criminal defamation.¹¹²

8. Alternatives to Criminal Defamation

Critics of criminal defamation point out that there are other remedies both civil and criminal available to those who have been unfairly defamed. For example, breach of confidence which has now been extended to protection for personal secrets, such as domestic confidences passing between a husband and wife during marriage¹¹³ and sexual affairs.¹¹⁴ Also, unlawful stalking where harassment is an element of the crime.¹¹⁵

The Commonwealth *Criminal Code Act 1995* contains a number of offences which may be effective means of redress against misuse of telecommunication services to menace, threaten or hoax other persons. Section 474.17 makes it an offence to use telecommunication services to menace, harass or cause offence (punishable by 3 years jail). It does not matter whether the menace or threat is caused by the type of use (such as multiple postings on a website) or by the content of the communication or both, provided reasonable persons would regard the use as being menacing, harassing or offensive in all the circumstances. A charge of using an online information service to publish offensive material was preferred recently against the creator of a Facebook page set up to rate the sexual performance of the residents of Bendigo, some of them as young as 13.¹¹⁶ The 25-year-old offender was sentenced to a suspended jail term, placed on a community corrections order for 15 months, including 150 hours of community work and a sex offender assessment.¹¹⁷

The New Zealand Law Reform Commission in its issues paper on the reform of news media, and new media regulations, recognises the harm that is done by rogue bloggers tweeters and social media posters.¹¹⁸ In essence, it says it is a bit hard to tell how much harm is being done, but finds plenty of evidence that there is a significant amount. It has three recommendations: First, the courts should be empowered to

¹⁰⁹ [1966] WAR 129. Wolff CJ at 137 said that 'private prosecutions have become practically otiose'.

¹¹⁰ As a general rule any person has the right at common law to institute a prosecution for a breach of the criminal law. That right is recognised in section 13 of the *Crimes Act 1914* (Clth).

¹¹¹ *Burton v Parker* [1998] TASSC 104; *Walsh v Jewell* [19998] WASC 304.

¹¹² Butler and Rodrick, above n 105.

¹¹³ *Argyll v Argyll* [1967] 1 Ch 302.

¹¹⁴ *Stephens v Avery* [1988] 1 CH 449; *A v B Plc* [2002] 2 All ER 545 (CA).

¹¹⁵ S 359B *Queensland Criminal Code 1899*.

¹¹⁶ Elise Snashall-Woodhams, 'Fail: Josh's 'Benders' Page Backfires', *The Bendigo Advertiser*, (online) August 1 2012 <<http://www.smh.com.au/action/print/Article?id=3517398>>.

¹¹⁷ *Ibid.*

¹¹⁸ New Zealand Law Reform Commission, *The News Media meets 'New Media': Rights Responsibilities and Regulation in the Digital Age*, Issues Paper 27 (2011).

require Internet Service Providers and website hosts to take down material if it is established that it is unlawful and harmful and that other measures have not worked. Second, they suggest tweaking the criminal law to ensure that it applies properly online, and thirdly, there should be a new mechanism for speedy, low-cost and effective remedies for online harm against anyone.

The remedies would include compensation, take-down orders, right of reply, and apology. The Commission raises two options. First: a new tribunal to hear such claims. It could make orders, but only when it could be shown that the law had been broken. Effectively, it turns the relevant criminal law into statutory torts and makes it subject to a more accessible, informal and cheap complaints process. New Zealand media lawyer Steve Price sees some problems with this recommendation.¹¹⁹ For instance, he argues it would be difficult to quickly and cheaply establish whether or not someone has been defamed, as it is an incredibly complex area of law. It could also be difficult to resolve a matter quickly if a defendant raised some defences, and, how the Tribunal's powers would dovetail with the rules laid down by the courts for injunctions.

The other recommendation by the NZLC is for a Communications Commissioner. The Commissioner would have some powers to obtain information and an investigatory role, but would not be able to order take-downs, compensation, etc. This may lead to the perception that the office of Commissioner could become a 'toothless tiger'. In any event both recommendations do not, I would argue, offer a suitable remedy in the case of a criminal defamation, notwithstanding the fact New Zealand abolished the crime 20 years ago.

This is because the penalties recommended do not truly address the criminality involved in someone purposefully setting out to do another harm as is the case with criminal defamation.

On the other hand, some jurisdictions question whether online defamation is harmful at all. For instance, in the UK, Eady J said in a judgment that bulletin board postings were 'often uninhibited, casual and ill-thought out; those who participate know this and expect a certain amount of repartee or, give and take'.¹²⁰ These remarks were echoed in a Canadian case where a superior court judge granted summary judgment against a plaintiff for an attack made against him on a website.¹²¹

Baglow, a prominent political blogger, argued that a Canadian national captured by US forces in Afghanistan and imprisoned in Guantanamo Bay, should be repatriated. A right-wing blogger accused Baglow of being 'one of the Taliban's more vocal supporters'. In fact, Baglow had frequently criticised the Taliban as dangerous, theocratic and tyrannical. The Judge found that the offending words were protected by the defence of fair comment (Honest Opinion in Australia). But another reason for his conclusion was that he described Internet blogging as a form of public conversation:

Internet blogging is a form of public conversation. By the back and forth character it provides an opportunity for each party to respond to disparaging

¹¹⁹ Steven Price, 'Law Commission's New Media Paper', *Media Law Journal* (12 December 2011) <<http://www.medialawjournal.co.nz/>>.

¹²⁰ *Smith v ADVFN Plc* [2008] EWHC 1797 (QB).

¹²¹ *Bagalow v Smith* [2011] ONSC 5131.

comments before the same audience in an immediate or a relatively contemporaneous time frame.¹²²

Furthermore, he said in many online environments, readers expect ‘cut and thrust’. They expect a defamatory statement to be parried. He said a ‘simple rejoinder’ could have ‘nipped in the bud’ the risk to the plaintiff’s reputation.¹²³ In any event this example has more to do with extreme political speech than criminal defamation.

A US judge last year also refused to recognise online attacks as harmful. A bankruptcy specialist working at Obsidian Finance sued the author of *obsidianfinancesucks.com* for calling him a fraudster, thief and liar who had engaged in corruption, pay-offs and cover-ups.¹²⁴ The judge said that blogs ‘are a subspecies of online speech which inherently suggests that statements made there are not likely provable assertions of fact’.¹²⁵

While in Australia these statements in the Obsidian case would almost certainly be regarded as defamatory the judgment must, of course, be read with the First Amendment in mind where expressions of opinion are protected from defamation suits.¹²⁶ Under the First Amendment, statements which “do not imply facts capable of being proved true or false” are protected.¹²⁷ Whether a statement is a statement of opinion or one of fact is a question of law.¹²⁸

Criminal defamation arises where a defendant maliciously sets out to publish information about a person they know to be untrue in a transparent desire to inflict harm on that person. In that sense, criminal defamation is far more serious.

Furthermore, the assumption by some judges that inflammatory blogs are so ‘over the top’ as to be self-evidently harmless to a person’s reputation, is questionable. The victims of these blogs would undoubtedly have a different view and would not welcome a situation whereby they are left without a remedy.

9. A US Experience

Since 1964, sixteen states and the District of Columbia have repealed criminal libel laws.¹²⁹ Courts in ten other states struck down criminal libel statutes¹³⁰ and 17 states still have criminal defamation laws in place.¹³¹ The prevailing view of criminal libel among communication law scholars in the United States is, that there are very few prosecutions, that most of the prosecutions are about politics or public issues, and that

¹²² Ibid 59.

¹²³ Ibid 65.

¹²⁴ *Obsidian Finance Group, LLC & Kevin D. Padrick v Crystal Cox*, (2011) USDC, Oregon.

¹²⁵ Ibid.

¹²⁶ *Partington v Bugliosi*, 56 F3d 1147, 1153 (9th Cir, 1995).

¹²⁷ *Reesman*, 327 Or 605, 965 P2d, 1035.

¹²⁸ *Dworkin v Hustler Magazine Inc.*, 867 F2d 1188, 1193 (9th Cir. 1989).

¹²⁹ Jane E Kirtley, ‘Criminal Defamation: An Instrument of Destruction’, in Ana Karlsreiter and Hanna Vuokko (eds) *Ending the Chilling Effect: Working To Repeal Criminal Libel and Insult Laws* (Organization for Security and Co-operation in Europe (OSCE), 2003) 89-101.

¹³⁰ Although the Montana Supreme Court struck down the state’s criminal libel statute in 1996, the state legislature amended that statute in 1997, and it remains in force.

¹³¹ Media Law Resource Center, *MLRC Bulletin*, (March, 2003) 15.

none of the prosecutions are necessary because victims of defamation can sue for libel.¹³²

An article by Professor David Pritchard of the Department of Journalism and Mass Communication, University of Wisconsin-Milwaukee, reports the results of a page-by-page review of trial court files from 61 criminal libel prosecutions in Wisconsin from 1991 to 2007.¹³³ The study documents a reality of criminal libel that is stunningly different from the prevailing view. Among other things, the Wisconsin data shows:

- Criminal libel is prosecuted far more often than communication law textbooks assert;
- Most criminal libel prosecutions have nothing to do with political or public issues;
- On the rare occasions when criminal libel is used in an attempt to punish dissent, First Amendment arguments by defendants tend to be successful;
- Most criminal libel cases never reach an appellate court or attract coverage from major newspapers.

Overall, according to Professor Pritchard, the Wisconsin data suggests that criminal libel can be a legitimate way for the law to deal with expressive deviance that harms the reputations of private figures in cases that have nothing to do with public issues. This, he writes, is especially true when a defamed person cannot afford to hire a lawyer to file a lawsuit for civil libel, or when a potential defendant is so poor that a plaintiff's lawyer working on a contingent fee basis would decline to take the case because the lawyer would see no realistic hope of collecting any damages a court might award.¹³⁴ Although no precise information was ascertainable in the review about defendants' income or social class, information in the case files indicated that a majority of defendants were either students, unemployed, incarcerated, or working in low-paying jobs.¹³⁵ No defendants appeared to be wealthy.

In 1998 a student at the University of North Dakota published an article entitled 'Kinky Torrid Romance by a Randy Physics Professor' on a website that exposes alleged wrongdoing at the University.¹³⁶ The student accused the Professor of being a paedophile and of having odd sexual habits.¹³⁷ The Professor sued the student and eventually won a judgment requiring the student to pay him \$3 million and apologise for the story.¹³⁸ The student declared she could never pay such a sum and that she would not apologise. To add insult to injury the story was available online long after

¹³² David Pritchard, 'Rethinking Criminal Libel: An Empirical Study' 14 *Communication Law & Policy* (2009) 303.

¹³³ *Ibid.*

¹³⁴ *Ibid.*, 305.

¹³⁵ *Ibid.*, 316.

¹³⁶ Scott Carlson, 'Former Student's Online Accusations Against Professor Prompt Libel Suit', *Chronicle of Higher Education*, 7 December 2000.

¹³⁷ *Ibid.*

¹³⁸ Thomas Bartlett, 'Physics Professor Wins \$3 Million Judgment in Libel Suit Against Ex-Student', *Chronicle of Higher Education*, 4 April 2002.

the jury returned its verdict.¹³⁹ The Professor paid his own legal fees recovering nothing from the student.

This situation is unsatisfactory as it leaves the plaintiff without an effective remedy against accusations that have been published with the sole purpose of destroying the plaintiff's reputation in the full knowledge that they were untrue. If the defendant, especially an impecunious one, knew that they could expose themselves to a jail term for such reckless behaviour then they might think twice about going ahead.

10. The Case Against Criminal Defamation

As noted above, the main objection to the retention of criminal defamation is the threat to freedom of speech. This is a legitimate concern, especially in countries under the grip of repressive regimes. Earlier this year Ecuador's highest court upheld a ruling sentencing three newspaper directors to jail and setting damages at \$40 million for libelling leftist President Rafael Correa.¹⁴⁰ News organisations in that country claim Correa has been trying to censor critics ever since he took office in 2007. This is a point noted by Mendel, who has stated that criminal libel laws are unsatisfactory because they generally function to protect public officials from public censure.¹⁴¹ According to Lisby: 'Even the mere threat of prosecution, results in the suppression of freedom of speech'.¹⁴² He also noted that there is no justification for criminal libel in a democracy, and affirmed the audience's own responsibility for its reaction to material, violent or not. The Freedom of Expression campaign group Article 19 in calling on Italy's Parliament to repeal the Penal Code's provisions on defamation said they were 'incompatible with basic democratic ideals, as well as international guarantees of freedom of expression'.¹⁴³

These are powerful arguments yet I would argue this is not the Australian experience. I would suggest an Australian public official who attempted to silence the media through criminal defamation laws would commit political suicide. For example, the conviction of two political journalists on contempt charges in Melbourne in 2007 caused a vigorous national debate about freedom of the press.¹⁴⁴ The journalists' convictions, for refusing to name the sources for a story critical of the government, led to the then Federal government introducing shield laws to increase the protection of journalists and their sources. Also the recent strong political condemnation of the Finkelstein report¹⁴⁵ calling for the introduction of tighter media controls in Australia

¹³⁹ Ibid.

¹⁴⁰ Business & Financial News, *Breaking US & International News*, (online) February 16 2012 <<http://www.reuters.com/assets/print?aid>>.

¹⁴¹ T Mendel, 'The Case Against Criminal Defamation Law' in Karlsreter A and Vuokka H, *Ending the Chilling Effect: Working to Repeal Criminal Libel and Insult Laws* (OSCE, 2003).

¹⁴² G C Lisby, 'No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence' (2004) 9 *Communication Law and Policy* 433.

¹⁴³ 'Italy Faces Reform Calls as Journalists Jailed for Libel', *Press Gazette* (online), 9 August 2012 <http://www.pressgazette.co.uk/node/49801>>.

¹⁴⁴ Matt Brown, 'Contempt Conviction Raises Press Freedom Questions', *ABC News*, June 25 2007 <<http://www.abc.net.au/news/2007-06-25/contempt-conviction-raises-press-freedom-questions/80268>>

¹⁴⁵ Cameron Stewart, 'Finkelstein Report: Media's Great Divide', *The Australian*, 10 March, 2012 <<http://www.theaustralian.com.au/media/finkelstein-report-medias-great-divide/story-e6frg996-1226295437607#mm-premium>>.

is another indication that any threat to the freedom of the press attracts powerful opposition.

Some might say the successful prosecution of conservative columnist Andrew Bolt for breaching the *Racial Discrimination Act* 1975 (Clth) by publishing two controversial articles on racial identity is contrary to the above examples.¹⁴⁶ But this action was not launched by the government and the subsequent outcry from some politicians and sections of the media indicate that this sort of prosecution does not avoid intense public scrutiny and criticism.

In any event, Australia's experience with criminal defamation mirrors that of the US, where most criminal libel prosecutions have had nothing to do with political or public issues.¹⁴⁷ Those who would abolish criminal defamation also reject the argument that criminal defamation is needed to take effective action against impecunious defendants. They claim this would lead to the monstrous result of having one law for the rich, who can afford to pay damages and another for the poor, who should be sent to prison.¹⁴⁸

On the other hand, the fact that an action for criminal defamation requires the leave of the prosecution and its test of seriousness, would act as a safeguard to this unappealing potential development. Also, the fact that this leave is granted in only the most serious of cases is another bar to the frivolous or vexatious litigant.

11. The Future of Criminal Defamation

While abuses of free speech like defamation and hate speech predated the Internet, its architecture has introduced significant new dimensions to these problems. In many cases they amplify their harmful consequences and force us to rethink what might constitute an effective remedy.

It is well established that a criminal prosecution for criminal libel, is only warranted where the public welfare is involved.¹⁴⁹ It is no longer the case that the public welfare is involved if there is a tendency for the defamation to create a breach of the peace.¹⁵⁰ It is however still the case, that where the defamatory language is of a vile intemperate nature and is totally unfounded, a criminal action will lie. In the past, the action has been brought about when the defendant is a 'man of straw' or, where public people such as Magistrates, Ministers of the Crown or high officers in the public service are defamed, since that can tend to destroy confidence and respect for those responsible for government and due order.¹⁵¹

¹⁴⁶ 'Andrew Bolt Says Free Speech Lost as Court Finds he Breached Racial Discrimination Act', *Herald Sun* (online) 28 September 2011 < <http://www.news.com.au/national/andrew-bolt-breached-discrimination-act-court/story-e6frfkvr-1226148978809>>.

¹⁴⁷ For example, *Spautz v Williams* [1983] 2 NSWLR 506; *Gypsy Fire v Truth Newspapers Pty Ltd* (1987) 9 NSWLR 382; *Waterhouse v Gilmore* (1988) 12 NSWLR 270; have mainly been about personal issues.

¹⁴⁸ J R Spencer, 'Criminal Libel – A Skeleton in the Cupboard (1)', 1977 *Criminal Law Review* 471; C Walker, 'Reforming the Crime of Libel', (2005-2006) 50 *New York Law School Law Review* 180.

¹⁴⁹ *R v Labouchere* (1884) 12 QBD 320.

¹⁵⁰ *R v Wicks* [1936] 1 All ER 384.

¹⁵¹ *Shapowloff v Fitzgerald* [1966] 2 NSWLR 244.

However, Gatley maintains that as a result of the House of Lords' decision in *Gleaves v Deakin*¹⁵² there is no longer an automatic requirement that the victims be public figures nor does the subject matter need to engage the public interest other than through its seriousness as justifying state intervention and punishment.¹⁵³

As noted above, since the advent of the Internet and the various social network sites it has spawned, the amount of intemperate abuse appears to have grown. For example, a leading Melbourne defamation lawyer recently claimed that the number of anonymous 'hate blogs' on the web has increased 100-fold over the past five years.¹⁵⁴

While lawyers have been successful in some instances in having the offending blogs taken down, those without the funds to pursue such an action or, who are fighting 'men of straw', are often left without a remedy. It is in these situations where the defamatory matter satisfies the test of 'seriousness' that recourse to the criminal law is justified. Certainly, the New Zealand Law Reform Commission recommendations have merit. Their recommendation that courts should be empowered to require Internet Service Providers and website hosts to take down material if it is established that it is unlawful and harmful, and that other measures have not worked, has already been put into practice.¹⁵⁵

Their other suggestion that there should be a new mechanism for speedy, low-cost and effective remedies for online harm against anyone is also worth considering. The remedies would include compensation, take-down orders, right of reply and apology.

Injurious falsehood is one such remedy and it was successfully pleaded in the *Go Daddy*¹⁵⁶ case where a disgruntled customer set up a blog website making unsubstantiated claims of fraud and theft, with the domain name 'hunterholden sucks'.

In another recent instance, the *Racial Discrimination Act 1975* (Cth) was successfully invoked in Western Australia, where an Aboriginal family was insulted, offended and humiliated by reportage in a newspaper, and comments made on its website.¹⁵⁷

However, while these remedies are suitable and indeed welcomed for cases of civil defamation, they do not adequately address the extremely serious defamation published with malicious intent where defendants are impecunious, defiant or both and seemingly outside jurisdictional reach. In these cases criminal defamation seems most appropriate because it ensures those guilty of criminal acts can be adequately and appropriately punished.

¹⁵² (1980) AC 477, HL.

¹⁵³ Milmo and Rogers, above n 54, 764, 24.2.

¹⁵⁴ Lawrence Money, 'Payback for the Internet's Creepy Cowboys', *Sydney Morning Herald*, 30 January 2012 <<http://www.smh.com.au/technology/technology-news/payback-for-the-internets-creepy-cowboys-20120129-1qznb.html>>.

¹⁵⁵ New Zealand Law Reform Commission, *The News Media meets 'New Media': Rights Responsibilities and Regulation in the Digital Age*, Issues Paper 27 (12 December 2011).

¹⁵⁶ *Kaplan v Go Daddy Group & Ors* [2005] NSWSC 636.

¹⁵⁷ *Clarke v Nationwide News Pty Ltd trading as The Sunday Times* [2012] FCA 307.

Also, one advantage of criminal defamation is that it is already on the statute books and therefore there is no need to draft new laws to deal with defamation that satisfies the criteria of criminal.

While it is far from convincing what role deterrence plays in preventing crime, it seems to have had an effect on at least one person found guilty of criminal defamation. Cross, the young South Australian man convicted of putting up a defamatory blog about a police officer, was asked if he would contemplate putting up a defamatory blog site again. He replied: 'no, of course not, no'.¹⁵⁸

Perhaps if the authors of other hate blogs (such as some of the ones referred to in this article) are identified and successfully prosecuted, their victims would not have to endure the continuing torment they suffer today, from people who know they are virtually free from punishment.

¹⁵⁸ Hunt, above n 16.