In the Me Too era, America sets the gold standard for defamation law

Defamation law in Australia continues to deny the public from hearing the truth. In this, Australia could take a page from the US Supreme Court.

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ACTOR ERYN JEAN NORVILL (CENTRE) ARRIVES AT FEDERAL COURT FOR GEOFFREY RUSH'S DEFAMATION ACTION AGAINST NATIONWIDE NEWS.

We are yet to see the social change that Me Too demands; powerful men continue to sexually abuse women, and the institutions from which they derive their power continue to reflexively protect them from the consequences.

What we are seeing is a sharpened focus on a badly broken piece of our socio-legal structure: the law of defamation. Once alleged perpetrators started being called out, it was inevitable that some would sue. And so they are, or at least threatening to.

As the Geoffrey Rush circus plays out, new allegations are waiting in the wings.

New South Wales Greens MP Jeremy Buckingham, accused of a drunken sexual assault, has been threatening defamation suits and demanding large sums from various people, as *New Matilda* has been reporting. Meanwhile, the NSW opposition leader, Luke Foley, is fighting an allegation of sexual harassment at a party in 2016. The media, in the post-Rush environment, is gun-shy; nobody else has picked up the Buckingham story, and nobody is running more about Foley's story than they can do risk-free because they're just repeating what's been said under parliamentary privilege.

The Foley saga is instructive. All the public knows is that he allegedly harassed an ABC reporter at a Christmas party. We are told that she hasn't made an official complaint. The ABC is, apparently, investigating. The Labor Party, apparently, is not. We also know that there's more to know. If it happened, then there was an alleged victim. There may have been witnesses. There may have been recipients of a formal or informal complaint. Somebody told somebody who told the media. All of this could be investigated and reported upon.

The reason it hasn't been and won't be, why media outlets are instead passively waiting and hoping that the alleged victim will self-identify and either confirm or deny the report, is that they don't want to be sued.

If this were America, no such hesitation would exist. The US Supreme Court settled the law regarding defamation of public officials in 1964: they cannot sue for defamation unless they prove that what was said about them was motivated by "actual malice", an almost impossibly high standard to reach.

The court was defending the constitutional protection of free speech; it accepted that, when we're talking about matters of proper public interest, that freedom requires the erection of a high fence against attempts to shut down debate. Defamation law undermines free speech, appropriately so, but it should only go so far.
Explaining the philosophical rationale, one of the judges noted that the US had been founded on the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open", even to the extent of protecting the ability of a free press to make mistakes in pursuing the truth: "erroneous statement is inevitable in free debate, and … it must be protected if the freedoms of expression are to have the 'breathing space' that they need to survive".
The principle in the US has been progressively extended from public officials to public figures more generally, so that anyone with a degree of notoriety is shut out from trying to shut down public conversation about their actions or reputation, always with the proviso of the absence of malice.

In Australia, no such thing. For starters, we have no constitutionally protected freedom of speech. We do have the implied freedom of communication on government and political matters, which the High Court recognised and upheld quite robustly for a while — even to the extent of briefly allowing it as the basis of a direct defence to defamation suits, before backtracking on that idea. In the defamation context today, it's not much use at all.

More importantly, the media has very little scope for defending itself against defamation claims by anyone, including public figures, unless it can prove the objective truth of what it has published. The other theoretically available defences, under the obscure heading of "qualified privilege", have been largely neutered by judicial interpretation.

The onus is, therefore, reversed. Media report allegations of wrongdoing against a public figure, of high legitimate public interest. The public figure sues for defamation (the allegations are undoubtedly harmful to their reputation). The media must then prove the truth of the allegations, or they lose and face massive damages.

Among other consequences, this means that the Australian media cannot run a story with an anonymous “Deep Throat” source, without taking on unacceptably high legal risk. It means that Watergate-type stories are far less likely to get aired here.
The dominant principle in Australian defamation law, as it stands, is protection of the reputation of the individual. No distinction is drawn as to who that individual is or what public trust or influence they may hold. Free speech is not a consideration, nor is the motivation of the publisher.

This is clearly wrong. Reputation is a personal right; free speech is too, but it is more importantly also a communal right and a foundation stone of a free society. In the balance, there should be no real contest between these competing rights.
If the Royal Commission into Institutional Child Sexual Abuse has taught us anything, it is that institutions will prioritise reputation over truth and everything else. Interestingly, the 1964 Supreme Court case came up because officials in the US southern states were using defamation suits to try to shut down debate over the civil rights movement. The court was wise to this, and closed down their avenue of attack on freedom instead.

We need a big dose of the same, here, soon.