

## **Chilled journalism? Defamation and public speech in US and Australian law and journalism**

*Andrew T. Kenyon and Tim Marjoribanks*

### **Abstract**

This article begins from an understanding of public speech as diverse and contesting in its views and genres and as being facilitated, in part at least, by media practices of journalism. Much speech of public value criticises, and critical speech can raise concerns about potential legal liability in defamation. With substantial differences between US and Australian defamation or libel law, academic commentary has long suggested that the more stringent Australian law must have a “chilling effect” on publications. Comparative research into media content is consistent with such an effect. Building on that research, the article draws from legal analysis and interviews with media practitioners and lawyers to compare how Australian and US defamation laws conceptualise public speech. It contrasts the breadth and strength of protection for publications under the US and Australian law to explain the different potential for speech that is left under each approach.

### **Public speech and diverse publics**

It is easy to see public speech as diverse in its content and genres, at times contesting popular understandings, and as being fostered in part by practices of journalism. From this quite modest claim about speech, defamation or libel law arises as an obvious point for investigation.

Legal analysis commonly provides three or four rationales for protecting speech. These can be illustrated by the work of Eric Barendt (2005), a leading English law professor and a commentator with particular relevance to Commonwealth defamation law. His work illustrates frequent legal rationales for protecting speech; namely, that speech is said to further a search for truth, further the operation of democracy, and further the development of autonomous subjects. Especially in the US, with its constitution’s First Amendment that “Congress shall make no law abridging” freedom of speech, these three justifications often intersect with a fourth: distrust of government action where it is seen to regulate speech. Law largely maintains these as the resources to deploy when arguing over, and making decisions about, laws affecting speech: truth, democracy, autonomy and perhaps distrust of government action. As well as their prominence in law, one could find similar rationales for speech within the media, particularly in the justifications offered by media workers for protecting and promoting their right to speech.

However, such approaches can downplay the contesting and challenging quality of much public speech—they can slide into an assumption that public speech is like a conversation involving spontaneous and open feedback, which is subject to egalitarian rules of engagement

and aimed at consensus formation (see the useful analysis by Peters, 2006). At least some public speech may be better thought of differently: to address a public is a particular kind of world-making project; such speech creates divergent and plural publics (e.g. Warner, 2002). This means we begin from a concept of speech slightly wider than is common in legal analysis, remembering that speech may be about different *forms of contest* as much as *agreement*. Of course, there is still a wager in this modest claim for speech: that the creation of such publics offers better potential for social life than their lack, but we do not want to be seen as simply equating the making of speech with effecting social change. That is a far larger issue.

Much speech of public value criticises, and critical speech can raise concerns about potential legal liability in defamation. There are substantial differences between US and Australian defamation law, and academic commentary has long suggested that the more stringent Australian law must “chill” publications. Comparative research into media content is consistent with defamation law having such a “chilling effect”. Here, that research is built on through investigating defamation law and media production practices in interviews with media practitioners and lawyers. From that work, some points are drawn relevant to a more developed understanding of how Australian and US defamation laws conceptualise public speech. We next outline the different legal situations in Australia and the US and note research that is consistent with Australian defamation law chilling journalistic speech, before moving to four key points that emerged from interviews. They concern the role that “local knowledge” plays for both lawyers and news producers, the importance of “fairness” in the journalistic conception of “truth”, the evidence that is wanted before defamatory allegations are published and the effects of working under each country’s defamation law.

Overall, the interviews support other research findings that traditional Australian defamation law has chilled journalism about political and business matters. This highlights the importance of the new defence for “reasonable” publication that exists in Australia and the significance of how courts interpret this defence. It appears to remain true that Australian journalism is “chilled” and the legal conceptions of public speech remain far apart in Australia and the US.

Although our research does not extend to New Zealand, it is worth noting that New Zealand defamation law has strong similarities to the Australian position. (A useful analysis of the New Zealand law is provided by Burrows and Cheer, 2005.) Combined with the broader resemblances in the countries’ media industries, this means one could expect similar findings from a comparison of New Zealand and US journalism, defamation law and public speech.

## **Traditional Australian defamation law**

A traditional Commonwealth approach to defamation law requires the plaintiff to prove only three things (for detailed analysis see, e.g., Price and Duodo, 2004; Milmo and Rogers, 2004; Gillooly, 2004; Kenyon, 2006; Milo, 2008). First, that the defendant *published* material. This just means that it was received by someone other than the plaintiff; media publications of any form meet this element. Second, the material must *identify* the plaintiff. It might be through direct naming, but the law asks merely whether someone who knows the plaintiff would think that he or she has been identified. This means oblique or inadvertent references can amount to identification, and the identification element is usually easily met. Third, the plaintiff must prove the material conveys a *defamatory meaning*; that is, it would harm the plaintiff's reputation and would make ordinary people think less of the plaintiff. Again, this is not a difficult test to meet. Basically anything that is critical will meet the test of "defamatory". And opinion—not just factual statements—can be defamatory under the traditional law.

Once the three elements of publication, identification, and defamatory meaning are established, the publisher of the statement will be liable unless it can establish a defence. Note what the plaintiff need not prove under the traditional approach: he or she need not prove that the publisher was careless or at fault in publishing the defamatory statement. The plaintiff need not prove that what was published was false. And the plaintiff need not prove that any harm was suffered; harm is presumed once a publication is shown to be defamatory. This is unusual compared with most civil actions (such as those about infringing copyright, breaching a contract, or being negligent) and it differs markedly from the US position, outlined below. Thus, key reasons for traditional defamation law being said to "chill" speech are that it takes very little for something to be defamatory, harm is then presumed to have occurred, and the potential damages are relatively unconstrained.

This means publishers of defamatory statements are quite easily found liable unless they can establish a defence. Apart from some defences such as those for fair reports of what is said in parliament or court, the main defences for the media have required it to prove that a publication is true, or that it is an honest opinion—but for traditional defamation law that means an opinion based on facts that are proven true. So for both truth and honest opinion, establishing the truth underlying the publication is a key requirement. Thus, many defendants will be liable in jurisdictions like Australia, if they cannot prove the publication true by evidence that is admissible in court. The development of wider "privilege" defences during the last 10 to 15 years (considered further below) has changed this position somewhat, but not nearly to the level of US protection for defamatory speech. Even this brief outline makes clear that a major part of the space that traditional law conceives of for public, critical speech is where that speech can be

proven true in court. As we will show when we discuss our results later in this paper, this requirement to prove truth in court according to legal standards has significant implications for journalistic practice, in particular in the Australian context.

### **US defamation law**

The situation outlined above was, in broad terms, also the US position until the 1960s. The current US approach to defamation developed in a series of cases from the 1964 Supreme Court decision of *New York Times v. Sullivan* (Sullivan, 1964). After these cases, it is more difficult to sue than under traditional law. Plaintiffs who are public officials or public figures must prove the three elements mentioned above: publication, identification, and defamatory meaning. But these plaintiffs must *also* establish that the defendant published with “actual malice”. This entails proving the publication conveys *factual material* (rather than opinion) that is *false*, and which the publisher *believed to be false* when it was published. The plaintiff must prove the publisher actually knew the material was false, or at least had a “high degree of awareness” of its “probable falsity” and recklessly disregarded that danger (St Amant, 1968, p. 731). In addition, the plaintiff must establish “actual malice” with “convincing clarity”, which is a standard of proof substantially higher than the usual standard in civil litigation of the balance of probabilities (Sullivan, 1964, p. 270). (There have also been changes to the burdens facing private defamation plaintiffs in the US; for detailed analysis, see Smolla, 1997; Sack, 1999).

The US law suggests public speech, whether in the institutional media, citizen media or elsewhere, can criticise public figures without liability for defamation, so long as the speaker does not know that the publication is false. The *Sullivan* rules support what the Supreme Court has called the country’s “profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open” (Sullivan, 1964, p. 270). This is quite a different legal conception of a space for public speech, and from a comparative perspective, it can be seen how the idea of the Australian law “chilling” speech could have currency.

### **Existing sociolegal research into chilling effect**

Empirically exploring these legal differences—including how they figure, if at all, in news production—has been a focus of recent sociolegal research, much of it based in Australia and New Zealand (e.g. Baker, 2003; Cheer, 2005). While extensive empirical material could be considered (for an overview, see Kenyon, 2006, pp. 9-20), here one illustrative point is sketched from the literature. It concerns the content of Australian and US newspapers. Using content analysis is unremarkable within media studies (Riffe and Freitag, 1997). While some

examples might suffer from the categorisations used, or from the implications they seek to extract from content, it is notable that content analysis very rarely focuses on law: studying media content in relation to media law is comparatively novel.

One example of such work analysed more than 1,400 Australian and US newspaper articles (Dent and Kenyon, 2004). That research suggests that in the US—where, as described above, defamation plaintiffs face heavier burdens—defamatory allegations against political and corporate actors are published more frequently than in Australia. The study drew material from a similar number of mainstream newspapers in each country during periods in 2003 which were not dominated by any particular mediated scandal. Its purposive sample was constructed to retrieve material thought likely to criticise political or corporate actors. The US titles did not include the so-called supermarket tabloids; rather, they were the sorts of titles that appeared comparable to Australian newspapers. From this sample of general news articles and commentary, the US material was found to contain defamatory allegations at nearly three times the rate of the Australian articles. That is, the US sample contained far more allegations that appeared to defame someone without appearing to be protected, for example, by defences for reports of court proceedings or parliament. The Australian media appeared to be markedly less comfortable making allegations about corporate affairs than the US media. This appears consistent with a finding in New Zealand that commercial reporting raises concerns across different media (Cheer, 2005). The Australian media also appeared chilled in relation to political criticism. While that is just one analysis of content, there are not obvious reasons to suggest its sample is atypical, at least with regard to general newspaper reporting and commentary. Its results are also consistent with interview-based research into defamation and journalism, such as the studies led by Barendt and Weaver which suggest that altering media content due to concerns about potential defamation liability is common under non-US law (Barendt et al, 1997; Weaver et al, 2006).

### **Australian defence for “reasonable” publication**

A notable aspect of our interview research was that the description of law’s influence was strongly consistent with the media content study of Dent and Kenyon (2004). However, before considering the interviews, it is important to outline a legal change in Australia with the development of a defence for “reasonable” publication.

Since 1994, a series of constitutional cases have remodelled Australian defamation law, leading to what is called the *Lange* qualified privilege defence (named after the case of *Lange*, 1997). It protects “reasonable” publication about matters of government or electoral politics. (Broadly similar developments occurred in New Zealand; see, Burrows and Cheer, 2005.) More

recently, uniform defamation statutes have been enacted in all Australian states and territories, operating from the beginning of 2006. The uniform legislation leaves in place the general model described above. The plaintiff is still required to prove very little: harm is still presumed, establishing truth is still important for many defendants, and so forth. But the uniform law does one notable thing to privilege defences. It introduces a statutory privilege that can apply to media publications and is not limited to “political speech”, the scope of speech to which the *Lange* privilege is limited.

Under the uniform *Defamation Acts*, Australian law now provides a general defence for publications that cannot be proven true, if the publication is about what judges think of as a matter of proper public concern and the circumstances of publication were “reasonable” (e.g., *Defamation Act 2005* (NSW) s. 30). There are not yet significant case law determinations about the defence. But the Australian High Court has made comments about what is required to be “reasonable” for the purposes of the *Lange* defence. Under *Lange*, before publishing material the defendant generally must take proper steps to verify the material’s truth, have reasonable grounds to believe it is true, and not actually believe it is untrue. In addition, the publisher should usually have sought and published a response from the entity defamed. However, as commentators such as Michael Chesterman (2000, pp. 100-106) have pointed out, the courts may well apply these tests so that it is very hard for the media to show it acted “reasonably”. (That has certainly been true for a similar statutory defence for reasonable publication, which existed only in New South Wales before the uniform national law.)

Australian defamation law has moved from a concept of critical speech as needing to be proven true to be defended (apart from instances such as defamatory statements in parliament or court). Now the law has a defence for defamations published reasonably. The traditional law could be seen most easily to accord with rationales for public speech linked to truth and democracy, where democratic debate is understood in “conversational” terms. Similar concerns are reflected in the new Australian statutory privilege for “reasonable” publication. Such publication is thought to foster “quality” public discourse. This raises a conversational ideal, or the idea that mediated speech should model reciprocal engagement aimed at agreement. Unless the new Australian defence is treated quite robustly by courts, it would not seem to move far towards the US position under *Sullivan*.

### **Interviews with media practitioners and lawyers**

But how, if at all, do the very different Australia and US laws affect media production? In studying defamation law and media content production—centred on news, current affairs and commentary—this paper draws on a larger research project in which we conducted more than

170 semi-structured interviews with journalists, editors and media managers and with lawyers in media companies or private practice in the US, UK and Australia. For this article, our focus is on approximately 90 interviews conducted in Australia and the US, with such a comparison being particularly important in exploring different conceptualisations of public speech and how they are regulated through the interaction between journalism and defamation law. The interviews considered participants' experiences of news production and defamation law and litigation and were conducted face to face by one or both of the authors (except for a handful conducted by Chris Dent, a researcher employed during part of the project). Almost all interviews were audio recorded and transcribed, with handwritten notes taken for several and the resulting material was coded thematically. All interviews were assigned a number to protect confidentiality; Australian interviews have numbers below 50, US ones above 50. Many themes are suggested by the interviews, including matters that appeared to be largely common across Australia and the US. We note three examples here, before moving to some particular, legally relevant aspects of the production process.

First, *relations with lawyers* were contrasted by interviewees. Interviewees appreciated "love", as an Australian respondent said:

There are defamation lawyers who truly love the media...and they see their job as saying "OK you have got the story, let's work out how we can get it in the paper" (1).

The key desire from media interviewees was for lawyers to see their role as assisting the publication happen, rather than focussing just on protecting the publisher. More experienced media lawyers were generally seen as broadly sympathetic to classically articulated aims of journalism, and to be very useful in helping investigative stories reach publication. This was equally evident in the US:

[T]he really good lawyers are like journalists, you know they want the magazine to hit as hard as possible...[They will say] wait a minute you have got the document, use it to hit a lot harder (54; similar 59).

Lawyers were commonly involved early and extensively in the development of classic investigative items (e.g. 3; similar 6, 18, 38, 49). This appeared to happen more in traditional broadcast media than in other forms, and the involvement was closer in Australia than the US. Such early involvement of lawyers was quite different than the situation for most of the items that received pre-publication legal attention; lawyers generally first saw material very close to publication.

Second, *relationships within media organisations* were noted by many interviewees as crucial to story development and placement, and appeared at least as important as any influence from law. Not surprisingly, experienced and respected staff could better navigate the

competition for space. For example, interviewees noted that “half of the art is selling it to the paper” (2, similar 6, 20, 35, 46). Similarly, editors’ personal interests and publications’ marketing aims were very relevant for specialised reporters, such as those covering science and the environment.

Third, and again of greater apparent significance than law, interviewees identified the *resources and time* that media organisations devoted to production as crucial to the style and scope of published items. This was particularly, but not only, the situation for major investigations. As an Australian interviewee noted:

[A]lways you must look at “is it achievable?” which means that some stories that should be written don’t get written. (1; similar 42, 46, 47).

The impact of resources was also raised frequently in the US, with the issue captured well by one respondent as being the “censorship of overwork” (70). While matters like these appeared to be largely similar across the two countries, next we explore matters which resonate more in law (and especially in Australian law).

### **Local knowledge: “as a clinical exercise you are frightened of almost everybody”**

One issue raised in both countries, but was given far greater weight in Australia, was the influence of lawyers’ and journalists’ “local knowledge”, including knowledge of what was called the plaintiff’s “form” (e.g. 1, 2, 6, 13, 32, 38). Particularly in Australia, defamation law’s role was underlined by the importance that interviewees placed on knowledge of background events and interests:

[I]n the end defamation law is about “who is this bugger and will he sue?” And well “he won’t, because we know he is a dirt-bag and he has all this on [a police] record...[Y]ou need to know that. If you don’t know that you are just approaching it as a clinical exercise and as a clinical exercise you’re frightened of almost everybody” (2).

This experienced print investigative journalist continued:

Look the shortlist of practical concerns are that if somebody tells me a story...I’d say: “Ok, has he got any form, has he ever done anything? Can we find anything?” (2).

Interviewees also linked such “form” to people’s relative ability and propensity to sue, which was seen as influencing decisions of what to publish (e.g. 6, 35, 38). However, concern with the practicalities of whether a suit might eventuate did not override the articulation by interviewees of concerns about whether the material is *appropriate* to publish. For example, one Australian interviewee said:

Can the person afford to take you to court? I have to be brutally honest about that... Would the person think twice about taking you to court hearing that other aspects of their lives might come out? (6).

But this interviewee immediately followed those factors with another: “how accurate is the story?” And that concern for journalistic standards was pronounced in the interviews.

### **Truth is “fair truth”**

This question of what journalists are warranted to publish was a second legally resonant aspect of the interviews. In part, it could be seen as a question of truth. But it is not the truth arrived at in court, the particular version of truth that can be established by evidence in a juridical process. It is an understandable question to ask, as interviewees did, why should that be the valid test for public speech? Journalists are not so much concerned with “truth” as with “fair truth”. An Australian assistant editor said:

[Truth is] a multilayered question, because one person’s truth is another person’s rubbish... I constantly get stories come in front of me that reporters believe are true. And they are, but they’re not fully true, they’re half the truth. They don’t have the proper context, so yeah, truth is obviously what we’re aiming for, but it’s also got to be fair truth (36).

Similarly, an investigative radio producer in Australia said:

[I]t’s very difficult to be completely objective... but you can be fair. It’s a do-able thing to be fair, whereas it’s not really do-able to be objective or to be disinterested or unengaged. So I work very hard at being fair. Is this fair to that person? Have we given him or her the chance to rebut what’s being said? (42; similar 38).

Similarly, an experienced US freelance reporter emphasised how journalists seek any sort of document to help establish truth before they defame someone. They “owe it to that party... that’s fair journalism, practising fair journalism” (80).

A similar concern was seen in how verification is sought for defamatory material before publication. In trying to verify material—part of the process of arriving at fair truth—journalists recognised the contested nature of claims to truth. In Australia, it was put this way:

[With a] lot of things you can’t ever know the truth, so the best you can do just have both sides have their say and let the reader make up their own mind... [The] resources and the amount of time [required] to find out what the truth actually is, is quite often way beyond what you can devote to the story (35; similar 3, 38).

As a US respondent with extensive investigative experience said:

I think that journalists are a little more cautious [now] about a term like “the truth.” You know... truth is a relative term... [W]e’re living in a very diverse society... [and] how it looks to you... may depend on where you sit... where you live, and to what group you

belong. So I think there's probably more caution in that regard...although I think the best journalists are still trying to get the most empirically valid and reliable array of facts and opinions that they can about a particular topic (70).

It is worth noting, however, that the approach described by this US interviewee would still expose publishers to legal liability under traditional defamation law, and it will do so under current Australian law unless "reasonable" publication is treated robustly by courts.

### **The evidence of "documents and people"**

It is interesting to consider what evidence journalists wanted when searching for "fair truth" because that process *might* be comparable to the process required by law for "reasonable" publication. Existing Australian case law under *Lange* suggests that steps taken to verify material will generally be central in determining whether publication was "reasonable". What do journalists, editors and their lawyers want? In short, documents and people (e.g. 6, 17, 19, 35, 36, 43, 44, 46). An investigative newspaper journalist, speaking about allegations of poor (and probably illegal) corporate behaviour in relation to the environment, said:

[T]he original source was somebody I'd dealt with before, and...they're a very reasonable, credible person. Secondly I spoke to several other people who corroborated that. Thirdly, I'd been out to [the company] before so I know that it has the potential to do what's been said of it. [The company] also admitted that they were having an impact, but not as large as what's claimed...[T]here was some element of doubt...but there was enough certainty to warrant running the story (35).

Interviewees, however, recognised that law's standards as to "truth" were different (e.g., 18, 35, 36, 37, 43, 47). An investigative television journalist in Australia, in discussing an upcoming program about allegations of rape, said:

[T]his relates to...football and rape...it's been a running issue...[W]e are going into three of those cases in some detail, we will be...at this stage, naming players, and going further than other media outlets have. Now, we are still to make the judgment whether we can afford to do that from a legal point of view. Ultimately, there is going to be some risk in that program...[I]t'll be a balance of whether we can predict which subjects of the program are likely to sue and if they are likely to sue, what kind of evidence we'll be able to corral...But for precisely the same reason that it's difficult to make rape charges stick in a court of law, it's going to be difficult...to defend [such] defamation actions [even though the standard of proof required in civil defamation is lower than for the crime of rape] (43 first interviewee).

It's worth noting that the above quote only arises where the reporters and producers *believe* they have ample material to warrant airing the allegations. They simply recognise that proving truth in court is a different matter. And the risks that flow from that may prevent publication. The same respondent noted:

[W]e're aware...that hearsay is a problem in a court of law, but sometimes...hearsay can be good enough for us journalistically to believe that it stands the story up. So that's important where there's a conflict [of statements] (43 first interviewee).

Journalists say they are after "fair truth" and can discuss the process of seeking to verify material at some length:

I think you've got to be able to prove that all reasonable efforts were [made]...people have to have a right of reply...There has to be a balance and a weighting in a story...If people can't be contacted...genuinely...you've got to give them the benefit of the doubt...I accept all that, but...there has to be a public interest test [or approach in the law]...[I]f you've made...reasonable efforts to contact another party...to check the facts...to put the facts to them...you have to have some latitude, there has to be some latitude afforded to the person who has acted responsibly. (37).

With the development of a "reasonable" publication defence, how law perceives and evaluates this process of verification by journalists becomes particularly significant. The new defence might mirror these journalistic aims. However, this can be doubted because of the extremely strict approach to "reasonableness" that courts in New South Wales took to a similar defence that existed in that state since the mid-1970s (see e.g. Chesterman, 2000). Some interviewees were aware of these difficulties. As an environment and science reporter said:

[C]ourts have this sort of black and white view of journalism. They think journalists basically are...lazy, disingenuous...[W]hen a journalist says "I relied on a source, then I checked the information with fifteen other people and it involved months of work", courts have trouble believing that. They seem to think that journalists just wait for the bus to pass and someone throws the documents off it (35).

Similarly, a very experienced television current affairs reporter and producer commented that Australian judges appear to expect journalists to "walk on water" to satisfy the "reasonable" defence. They must show "that they've done everything possible to investigate the proof of the allegations." (47).

Matters of evidence and verification were also prominent in US interviews. For example, a newspaper business editor emphasised a process of "reasonable" investigation:

Well, if it's something that's going to be controversial...I want original documents...if there's any documentation that backs it up...I make sure the reporter has it...[And] all parties have been contacted...I've done a lot of investigative reporting and often you have sources [i.e. the subjects of stories], they don't want to talk to you because they know the story's going to be negative and we have to make every effort to get their side...I've done investigations where the person won't talk to me and I fax them a list of questions so they saw what's really going to be in the story, they call back up and [put their] side in...I think we have to make every effort to be fair (81; similar 83).

However, two differences with regard to evidence and verification were notable in the US. The first concerned the greater degree to which documents were referred to by

interviewees, which appeared linked to the far greater accessibility of many US public records. (This was consistent with comments by interviewees with experience in both countries.) The second involved the degree to which the speakers' reputation—journalist and media outlet—was seen as linked with the accuracy of publications. The US law may not require proof of truth in the same manner as traditional in Australia, but US media appears very concerned about publishing falsities. A newspaper editor said:

I want to know from the reporter...that what they are writing about is accurate, that's the most important thing. So I will go over it with them and I will question, well how do you know this how do you know that? Who is this source? What do you know about this source? How long have you known this source? What other sources do you have to verify this information? We have no interest in printing anything that is not fully accurate, that can only hurt people and it can hurt us. So that is the primary thing (52; similar 56, 62).

As a US business editor commented succinctly: "I'm more concerned about the credibility of the story than the...potential for a libel suit" (81).

### **Working under defamation law: "But you don't know the truth on some things"**

What about working under the other country's approach to defamation law, which was a hypothetical question for all but a handful of our interviewees. Interviewees often related this to the effects, if any, of defamation law on critical publications.

Australian respondents were divided as to whether the US law would be preferable. Some certainly saw benefits in the US approach, especially for investigative work (e.g. 19, 37, 42). Others thought the current Australian law was a useful discipline that pushed journalists to find more evidence (34) and improved their investigations (38) and were happy with having the burden of proving truth (44). However, even for such interviewees, a loosening of traditional law was strongly supported (e.g. 49). That is, the new Australian defence for "reasonable" publication was seen as vital to promote their capacity to work effectively as journalists.

The varied opinion in Australia was strikingly different to the US view on this issue. In the US, respondents were horrified at the thought of the Australian-style law. As two TV journalists said: "I think it would limit, I think it would change the story selection that we do. Absolutely" (61). A newspaper journalist commented:

[I]t would be impossible for [journalists] to operate...[impossible for] journalism to work. They would be overly cautious, and gratuitously flattering, and pull all their punches, especially with powerful people...[I]t wouldn't do anything about the maligning of poor people...but it would mean that any powerful person would have the upper hand...That would make editors not only think twice...it would make some

editors stop, because news organisations can't afford to be paying out settlements for libel on a regular basis (71).

And another TV producer exclaimed:

But you don't know the truth on some things. You don't know! I mean, we don't know exactly what happened with Enron, we don't know exactly what happened...just speaking from a producer's standpoint, I would say it would be horrible! It would be horrible! (62).

On the related issue of the perceived impact of defamation law, the material from interviews was strongly consistent with the earlier study of media content: that is, Australian speech appears to be chilled by defamation and particularly so in relation to criticising business.

An Australian newspaper editor said:

[E]ven things that you know to be true or appear to be true, from the best of your knowledge...a lot of stuff has to be curtailed...I can think of dozens of...examples where...official reports came out six months later and fairly much matched what we'd had six months earlier, but we couldn't publish... (37; similar 43).

Notably, defamation law was seen to affect whether some types of stories would be published at all. Defamation concerns underlay the "stories we can't tell" (47). A very experienced investigative reporter continued:

[I]n terms of the sort of stories that we can't run [there are] a lot of business stories. This is a real problem. One of the big areas that we're not covering properly in Australia...is business. And probably the best example is dodgy insurance companies. I and others throughout the nineties, were getting tips about [companies that later collapsed]...And essentially the weaknesses in corporate disclosure laws, the weaknesses in terms of statutory obligation to auditors, the weaknesses in terms of the media's understanding of business, meant that we just couldn't get the evidence to satisfy what we knew was a real, looming concern in the insurance industry (47).

In relation to such problems in business reporting, it is important to note that Australian law now prevents most corporations from suing in defamation (e.g. *Defamation Act 2005* (NSW) s. 9). Often, however, they can sue in other actions that place heavier burdens on the plaintiff and generally allow recovery only for proven loss (see, e.g. *Collins forthcoming*). Of at least equal continuing relevance is that individuals associated with companies can still sue in defamation, and criticisms of a corporation may well be held to identify and defame individuals involved in that company.

Concerns about business reporting were also evident when journalists were asked if particular areas of content or potential plaintiffs concerned them. Illustrative comments included developers, major businesses and those with commercial interests at stake (34, 35, 45).

Such concerns were said to affect the tone and strength of some stories. As a television current affairs producer said:

Often it weakens, diminishes what you're trying to say in a story, and it can diminish it, not just about the particular person...but the whole story...becomes less than the total truth...[S]upposedly in the interests of preserving the truth, you're actually distorting it (19).

It is important to note that several contrary views about the impact of defamation law were expressed in Australia. Some interviewees said defamation law did not limit publicly important speech to any major extent. However, these comments generally came from people not involved in classic investigative styles of journalism, who explicitly qualified their comments in that regard.

Again, the situation was markedly different in the US, where no interviewees recognised any substantial impact from defamation law. Here are a few illustrative quotes:

[I]f a good story came up I have never heard of anyone saying, "Oh we have to be careful because he's litigious or maybe we shouldn't do it" (53).

[Legal factors are] not something I'm thinking about. I'm thinking about...getting the information to prove or present my...points...and making sure that it's accurate, that I'm accurate, that I'm not making a mistake in either the reasoning or just the name of something (68).

[T]here's no sense in which, you know, when you get up in the morning and you come to work and think about—whether you're a reporter or an editor—thinking about the libel laws, as if they're sort of leaning over your shoulder, they do not. Most days, you know, ninety-nine days in a hundred, it's hardly a consideration (90).

In short, journalism—within the constraints of resources, marketing and so forth—drives stories for these US interviewees rather than defamation law.

### **Conclusions: to speak without knowing the truth?**

Four notable points emerge from this study. And, as suggested above, the similarities between New Zealand and Australian defamation law suggest that many of the experiences and perspectives discussed here in the Australian context are likely to resonate in the New Zealand context. First, the interviews support existing media content research, which suggests that traditional Australian defamation law chilled political and especially corporate-related speech. This was particularly notable in comparison to the US experience. It warrants further consideration and the careful evaluation of both developing approaches to political and business reporting in the media, and of defamation defences in Australian courts. Second, the defence for reasonable publication under Australia's uniform defamation law, on its face, raises matters that

could track journalists' concerns about what is warranted to be published. However, cases under earlier law suggest that courts may continue to require journalists to "walk on water" in order to be judged "reasonable". The aims and experiences of journalists reported here deserve consideration when Australian courts say more about the reasonable publication defence. Third, the relative availability of evidence—especially the public availability of documents, corporate and political reports, and so forth—is a significant factor in allowing media investigations to occur and to be published. Documents being available are particularly important to allay legal concerns about potential defamation liability, but it is also important for journalists own standards of verification. Fourth, the legal conceptions of public speech in Australia and the US appear to remain far apart. For speech by the media or others, in Australia only the "reasonable"—and perhaps in practice often only that which can be proven true in court—is legally safe to add to public debate. Seeking to say what one believes is not enough. The US, however, allows one to speak without knowing the truth. And in that it does appear closer to a model that imagines speech as diverse, contesting and challenging.

## References

- Baker, R. (2003). *Defining the moral community: the "ordinary reasonable person" in defamation law*. Paper presented at Communications Research Forum, 2 Oct., Canberra: Australia.
- Barendt, E. (2005). *Freedom of speech*. New York: Oxford University Press.
- Barendt, E., Lustgarten, L., Norrie, K. and Stephenson, H. (1997). *Libel and the media: the chilling effect*. Oxford: Clarendon Press.
- Burrows, J.F. and Cheer, U. (2005). *Media law in New Zealand*. South Melbourne, Victoria: Oxford University Press.
- Cheer, U. (2005). Myths and realities about the chilling effect: the New Zealand media's experience of defamation law. *Torts Law Journal*, 13, 259-301.
- Chesterman, M. (2000). *Freedom of speech in Australian law: a delicate plant?* Aldershot: Ashgate.
- Collins, M. (forthcoming). *Media and Arts Law Review*. 13(4).
- Dent, C. and Kenyon, A.T. (2004). Defamation Law's Chilling Effect: A Comparative Content Analysis of Australian and US Newspapers. *Media and Arts Law Review*, 9, 89–111.
- Gillooly, M. (2004). *The third man: reform of the Australasian defamation defences*. Annandale, NSW: Federation Press.
- Kenyon, A.T. (2006). *Defamation: comparative law and practice*. London: UCL Press.
- Lange, (1997). *Lange v. Australian Broadcasting Corporation*. 189 CLR 520.
- Milmo, P. and Rogers, W. V. H. (Eds.). (2004). *Gatley on libel and slander*. London: Sweet and Maxwell.
- Milo, D. (2008). *Defamation and freedom of speech*. Oxford: Oxford University Press.
- Peters, J.D. (2006). Media as Conversation, Conversation as Media. In J. Curran and D. Morley (Eds.), *Media and Cultural Theory* (pp 115-126). Abingdon: Routledge.
- Price, D. and Duodu, K. (2004). *Defamation: law, procedure and practice*. London: Sweet and Maxwell.
- Riffe, D. and Freitag, A. (1997). A Content Analysis of Content Analyses: Twenty Five Years of Journalism Quarterly. *Journalism and Mass Communication Quarterly*, 74, 515-524.
- St Amant. (1968). *St Amant v. Thompson*, 390 US 727.
- Sack, R.D. (1999). *Sack on defamation: libel, slander and related problems*. New York: PLI Press.
- Smolla, R.A. (1997). *Law of defamation*. New York: Thomson.
- Sullivan, (1964). *New York Times v. Sullivan*, 376 US 254.

Warner, M. (2002). *Publics and counterpublics*. New York: Zone Books.

Weaver, R.L., Kenyon, A.T., Partlett, D.F. and Walker, C.P. (2006). *The right to speak ill: defamation, reputation and free speech*. Durham, NC: Carolina Academic Press.

**Andrew T Kenyon** is Director of the CMCL-Centre for Media and Communications Law and Professor in the University of Melbourne Law School. He researches in comparative media and communications law, including defamation, privacy, free speech and copyright. He is editor of the *Media and Arts Law Review* and a participant in the Australian Research Council Cultural Research Network. Recent books include *Defamation: Comparative Law and Practice* (UCL Press, 2006), *New Dimensions in Privacy Law* (co-edited with Megan Richardson, Cambridge UP, 2006) and the edited collection *TV Futures: Digital Television Policy in Australia* (Melbourne UP, 2007). Email: a.kenyon@unimelb.edu.au

**Tim Marjoribanks** is TR Ashworth Senior Lecturer in Sociology, and Discipline Head of Sociology, in the School of Social and Political Sciences at the University of Melbourne. His media-related research focuses on areas including the relationship between defamation law and news production, debates around professional practice, new technology and media, and media-sport relations. His work has been published in journals including *Media, Culture and Society*, *Journal of Sociology*, and *Australian Journalism Review*, and in book form with *News Corporation, Technology and the Workplace* (Cambridge UP, 2000). Email tkmarj@unimelb.edu.au