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Gagging the writer: The implicit censorship of non-fiction trade book publishing in Australia

Abstract:

Australian readers have a thirst for non-fiction books. A growing preference for autobiographies and biographies, true stories and criticism, investigative journalism and narrative journalism (Thompson, 2017, p. 204) showcases a trend towards “real” content that piques readers’ curiosity and offers deeper insight into the lives of public persons, and sometimes a perspective that might otherwise be considered private. But writing the tell-all or exposé is not without consequences, particularly with Australia’s defamation laws notorious for casting a “chilling effect” on freedom of speech (Dent and Kenyon, 2004, p. 3; Amponsah, 2005, p. 1) by regarding reputation above publications with a public interest element. This paper explores non-fiction trade book publishing alongside a *contemporary* construction of reputation and argues that in Australia “reputational interests” (Partlett, 2016, p. 67) in defamation law have created a practice of implicit censorship through legalling manuscripts, avoiding publication entirely, or even intercepting book distribution. In comparing the Australian legal framework with recent UK developments, this paper also asks if law reform can correct the balance between reputation and freedom of speech, thereby allowing authors more autonomy and allowing literary culture to thrive in the contemporary Australian publishing landscape.

Biographical note:

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Keywords: Publishing studies, non-fiction, defamation, editors, censorship

Introduction

Australian readers have a thirst for non-fiction books. In particular, literary non-fiction, celebrity memoir, biography and autobiography, but investigative journalism and narrative journalism also remain popular genres (Thompson, 2017, p. 204). The preference for autobiographies, biographies, true stories and criticism showcases a trend towards “real” content that piques readers’ curiosity and offers deeper insight into the lives of public persons, and sometimes a perspective that might otherwise be considered private. But writing the tell-all or exposé is not without consequences, particularly with Australia’s defamation laws notorious for casting a “chilling effect” on freedom of speech (Dent and Kenyon, 2004, p. 3; Amponsah, 2005, p. 1) by regarding reputation above publications with a *public interest* element.

This paper explores non-fiction trade book publishing alongside a *contemporary* construction of reputation and argues that in Australia “reputational interests” (Partlett, 2016, p. 67) in defamation law have created a practice of implicit censorship through legalling manuscripts, avoiding publication entirely, or even intercepting book distribution. Given the current reading trends towards non-fiction, the chilling effect appears counterintuitive to readers’ tastes and gags authors’ autonomy. In comparing the Australian legal framework with recent UK developments, this paper asks if law reform can correct the balance between reputation and freedom of speech, thereby allowing authors more autonomy and allowing literary culture to thrive in the contemporary Australian publishing landscape.

The growth of non-fiction in the literary landscape

An Australian study of non-fiction book sales in the first decade of the 2000s shows “narrative non-fiction sales as nearly 40% of the volume of trade non-fiction book sales” and “biographies and autobiographies compris[ing] roughly 18.8%–21.5% of the total top 5000” (Zwar, 2013, p. 4). A continuation of this study of Australia’s reading habits in 2016 (Throsby, Zwar and Morgan, 2017) saw the trend continue with autobiography at number 4 on a list of top 10 preferred genre categories. According to Nielsen Book, the leading provider of search, commerce, consumer research and retail sales analysis services for the book industry:

Biographies & Autobiographies has had a compound annual growth rate (CAGR) of +6.5% in value over the past 5 years (2016-2020). From 2017 to 2019, Non Fiction overall grew by +10.6% in volume and +6.2% in value while Adult Fiction saw growth of +3.6% in volume and +5.1% in value. In 2020 to the week ending 1st August, BookScan recorded value growth of +6.1% and volume growth of +6.5% in the Australian market. Non Fiction in August had a strong showing of new Biography and Autobiography titles such as *A Bigger Bigger Picture* (Malcolm Turnbull, Hardie Grant) and *Phosphorescence* (Julia Baird, HarperCollins) alongside Food and Drink new releases of *Slow Cooker Central* (Paulene Christie, HarperCollins) and *The Pie Maker* (Are Media). (Nielsen Book, 2020) [1]

The strength of non-fiction can also be evidenced by the Readings top 100 titles in 2018, in which six of the top 10 titles were non-fiction and almost half of the top 100 titles were non-fiction. And in

2019, 32 non-fiction titles, 13 biographies and memoir and three cookbooks made it into the top 100. (Readings, 2020)

Whilst Throsby, Zwar and Morgan's research and the Nielsen Book and Readings data collected do not explore the reasons for a trend towards non-fiction, or why it exhibits such strong growth and resilience even in stressful times such as a pandemic, this condensed snapshot nevertheless illustrates that the literary landscape now displays a breadth of content comprising public figures or content that claims to provide "true stories", or commentary and criticism of people and topics arguably in the public interest.

True stories or tall tales?

While there is no Australian legal definition of what constitutes "public interest", it has been referred to as "the free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country" (*Campbell v MGM Limited*, 2004) and "a broad concept that is flexible enough to respond to the facts and circumstances of any particular case" (Law Institute of Victoria, 2014). Scholarly literature acknowledges these vague interpretations. Chis Dent and Andrew Kenyon note that they are often based on identifying the public figure being commented on, but that "who qualifies as a public figure can differ" (Dent & Kenyon, 2004, p. 14). In addition, the criteria for assessing what is in the public interest, at least in terms of defamation cases, has traditionally been confined to political matters only, which means that readers' current penchant for true stories and autobiographies (Blair, 2006, p. 16) is perhaps not certifiably of public interest in a legal sense. Stepping away from the legalese for a moment; however, the categories of popular non-fiction trends display a breadth of content that could be deemed to be both of significant interest to the public, and in our interests to be educated about – factors verified at least in part by strong sales. In focusing on autobiography, John Thompson notes the rise of celebrity publishing where "the media are the milieu in which ... an author creates a platform ... and becomes to some extent – however modestly – a visible and identifiable person in the public domain" (Thompson, 2017, p. 204). Mark Davis states that a "decline of literary publishing has been mirrored by an increase in celebrity biographies" (Davis, 2006, p. 97) and Jan Zwar claims that there is now a "shared interest in the much-documented turn towards 'reality' that has been identified as a phenomenon since the late 1990s" (Zwar, 2013, p. 8). A quick glance at the top 10 non-fiction titles at the end of August 2020 reveals "Autobiography and Biography" at the top, doubling other categories such as "History" and "Health and Wellbeing". The only other category to match "Autobiography and Biography" was "Food and Drink". Other non-fiction categories exhibiting strong growth are "Literature, Poetry and Criticism" and "World, Ideas and Culture", which include long-form journalism, investigative journalism, and social commentary (Bookscan, 2020).

The proliferation and consumption of these titles conveys an expansion of interest in people, countries, cultures and demographics, as well as particular events that claim to uncover the "truth". Demand for this content also shows an expansion of authors who write in these categories – some authors bridging their fiction writing with non-fiction works and others merging fiction with non-fiction elements. Helen Garner and Janet Malcolm, for example, write about "their search for the story rather than simply tell[ing] it. Behind the scenes and on the set, the making of the yarn, even

occasional lawsuits, shap[ing] the final outcome ... [giving] serial writing a whole new meaning” (Henderson, 2001).

Undoubtedly, this content requires commentary about (or including) people who might also have the right to privacy, even though they are in the public eye. Privacy poses legal ramifications not discussed here, but there is also the danger of publishing defamatory comments that might impact on the reputation of those individuals, which in the current reading climate, seems more likely than ever. When considering an individual’s reputation and the public interest, the following questions arise:

(a) *What constitutes texts in the public interest?*

(b) *What is the demarcation between traditional perceptions of reputation, and reputation as a modern construction?*

What interests the public?

(a) *What constitutes texts in the public interest?*

Answering (a) is challenging because what readers consume doesn’t always align with current legislation and our limited knowledge of what constitutes public interest (as outlined above). In fact, there are few legal cases that have broached this issue in book publishing specifically. We can use the above research and data as evidence of concrete trends towards specific reading, however. Examining these trends also reveals current perceptions around how reputation is constructed by the authors and the individuals they write about. In turn, this reveals how authors and publishers balance reputation with the demand for non-fiction titles by imposing their own form of self-censorship, which ensures the titles can be published in some form, albeit “chilled”.

Gagging authors and constricting publishers

Australia has some of the world’s strictest defamation laws in favour of plaintiffs, rendering it almost impossible to publish anything that might be potentially libellous. In order to steer the content towards publication without attracting a lawsuit, “implicit” or “unconscious” censorship (Butler, 1998, p. 249; Bourdieu, 1992, p. 138) is often necessary. This form of censorship is much more difficult to identify because it avoids legal consequences by “constraining in advance what will and will not become acceptable speech” (Butler, 1998, p. 128). It is this pre-emptive practice, rather than the unilateral withdrawal or pulping of a book after publication, that creates the chilling effect on the contemporary publishing landscape. While non-fiction clearly thrives, what does it take now to get a book to print? And does the process require “textual cuts” (O’Leary, 2016, p. 9) that prevent readers from hearing the full story, and authors from telling it?

It’s important to make a distinction between this implicit censorship, and the type of censorship that has led to the banning of books deemed to contain obscene, seditious or blasphemous content in Australia’s past. This form of censorship was slowly excised from the late ’60s, and current codes of conduct alert readers to obscene content before they purchase a book. (Moore, 2012, p. 278) To this day; however, Bret Easton Ellis’s *American Psycho* is sold in a sealed package, though it is available in most bookstores. Defamation law, by contrast, focuses on the grievances of the individual in response to the content – not necessarily linked to broader political, moral or religious ideals. This

complicates the public interest element, but also helps the writer to navigate specific, tricky passages of text to avoid litigation: they confine them to the personal, which can be identified and then omitted from the final printed book. Thus, “editors, translators and publishing companies ... play the role of censor, in the preparation of a text for submission” by simply eliminating content that might result in litigation (O’Leary, 2016, p. 9). In turn, the writer and publisher “may have internalized the cultural norms of the day and made suggestions ... in a less conscious way” (O’Leary, 2016, p. 9), which could inadvertently result in quite pervasive “impoverishment in society, as it undermines the core function of creative work” (O’Leary, 2016, p. 19). Kenan Malik (2008, p. 115); however, claims that if the law upholds freedom of expression, then censorship will undoubtedly fail. But Australian law does not have a legal framework sympathetic to freedom of speech in the fashion of, for example, the United States Constitution’s first amendment, so writers and publishers must temper the content most interesting to the public in order to preserve the reputation of the person being written about.

Many countries are now looking to adapt their laws, mostly to address “the development of digital networked communication” (Kenyon, 2016, p. 8) in which increased access to information challenges original perceptions of reputation and the dissemination of works. In Australia, the Defamation Working Party, on behalf of the NSW Government, recently called for feedback on Australia’s Model Defamation Provisions, in order to ascertain “whether the existing laws are meeting their objectives ... in response to the rise of online publications and technological changes.” (NSW Government, Communities and Justice, 2021) In particular, the Defamation Working Party looked to Australia’s public interest defences in an attempt to recalibrate protection of reputation and freedom of expression under Australian defamation law. However, adaptation is impeded where an inflexible legal framework persists and where an entrenched perception of “reputation” perpetuates, as will be discussed in the next section of this paper.

Reputation, the Law and Literature

(b) What is the demarcation between traditional perceptions of reputation, and reputation as a modern construction?

In terms of answering question (b), globalisation and unfettered digital access to information has certainly added to the distinction being blurred. For example, what is reputation constructed by the individual, and what is reputation constructed by the public’s view of the individual, in which the media plays a role? (Rolph, 2016, p. 180) The right to reputation has a history of protection in Australian defamation law. (Rolph, 2016, p. 180) Chris Dent (2018, p. 492) says that “reputation” has been at the heart of defamation since the 19th century, and the role of “dignity” in reputation started in the 20th, but reputation is a fairly modern concept which is still largely undefined. According to Dent’s research, early defamation law in England paid closer attention to *scandalum magnatum* (the slander of great men) and focused on maintaining social order by preserving the positions and roles of people in power in the society. (Dent, 2018, p. 499) Most cases brought to the ecclesiastical and manorial courts during the period between the 13th and 17th centuries were the result of economic grievances such as deliberately undermining another’s business. A shift to utilitarianism commenced, with an individual’s “experience [of] internal life ... with the capacity to protect their own interests” (Dent, 2018, p. 518), which then became more pronounced until the 19th century when “honour” as an extension of a person’s family name became intertwined with reputation. The law, therefore,

protected a person's reputation as "a standardised version of the individual's perception of their place in society" (Dent, 2018, p. 518).

The concept of reputation as honor and reputation as dignity have never been fully defined in defamation law as a result of this incremental shift. In the Canadian case of *Hill v Church of Scientology Toronto* ("*Hill*"), Cory J claimed that "the good reputation of the individual represents and reflects the innate dignity of the individual" (1995). And in *Reynolds v Times Newspaper* ("*Reynolds*"), Lord Nicholls of Birkenhead stated "reputation is an integral and important part of the dignity of the individual" (1999; 2001; 1999). Scholarly analysis; however, reveals a more nuanced perspective in which both concepts provide for an external and an internal application (Steel, 2012, p. 113) – the internal being how the individual sees themselves and the external being the validation of that perception in the public realm – and in theory these concepts are based on "the fundamental equality of all plaintiffs" (Rolph, 2016, p. 64). But if honour and dignity stem from an outdated feudal system of law, how can we account for a contemporary society where global communication and the presence of the mass media have the ability to impinge on reputation either negatively or positively? (Rolph, 2016, p. 55) For example, our idea of what is moral, which might encompass the shared values of a particular society or community, has shifted over time, and the role of reputation might not be as clear as in the past. (Rolph, 2016, p. 47) In *Cairns v John Fairfax and Sons Ltd* ("*Cairns*"), (1983) for example, defence argued that the imputation that politician Jim Cairns and his secretary Junie Morosi were having an affair was not defamatory and may in fact "transcend middle-class morality" (Baker, 2011, p. 114 citing counsel in "*Cairns*" at 78). It was also suggested that the imputation might even "raise their standing in public eyes because Morosi was 'intelligent and glamorous' and Cairns was important" (Baker, 2011, p. 114).

In the case of celebrities, their relationship with the mass media is often collaborative. David Rolph relays that "the mechanism of the mass media ... connects a plaintiff and his or her audience, thereby facilitating the formation of reputations" (Rolph, 2006, p. 57 citing Post, 1986, p. 691) and Daniel Boorstin proposes that reputation as celebrity is contingent on the media's involvement with it – that the media "create[s] and sustain[s] 'the human-pseudo event'" (Boorstin, 1973, p. 57). In other words, the "real" person at the axis of interest is, perhaps, actually constructed by the people reading their story, or in the case of social media, sharing their comment/post. Boorstin's "human-pseudo event" highlights the media's involvement in the external application of an individual's reputation as a form of property. From a trade book publishing perspective, "'celebrity publishing' is simply an extension of this fundamental dynamic ... where the 'author's' platform becomes not just one factor to be taken into account but the overriding factor, indeed the principal reason for publishing the book" (Thompson, 2017, p. 204). While this particular quote might be more akin to the celebrity publishing in which the author becomes notable via their creative writing, this paper makes a distinction between the fiction author as celebrity and the type of biographical work focused on, and about, a person in the public arena. Joe Moran, for example, explores the celebrity of fiction authors, in particular, but also "the large number of recent novels written by (or, more usually, ghost-written for) celebrities such as Ivana Trump, William Shatner, Martina Navratilova and Joan Collins ... suggest[ing] the increasing importance of the recognizable media-friendly personality as a kind of brand name with which to sell the literary product" (Moran, 2000, p. 37). And it is exactly this genre – autobiography and biography – which sits at the top of Australian readers' preferred non-fiction categories.

The “celebrity” subject highlights a contradiction in the perception of reputation as an individual right. If reputation as celebrity is contingent upon the media and the public creating reputation, should the media and the public, then, enjoy an intrinsic interest in its construct? Moran adds to this distinction by asserting that “the collapse ... between public and private could be said to be consistent with two particular characteristics of advanced capitalism: the ever-expanding search for new markets, and the exploitation of the self as a sellable commodity” (Moran, 2000, p. 122). In discussing how reputation as celebrity may apply in a legal sense, Rolph also claims “the audience’s assessment of the information it receives from the media about the plaintiff thereby constitutes the plaintiff’s celebrity” (Rolph, 2016, p. 180). This statement indicates that celebrity as reputation is not only earned via the individual’s output in talent or achievement, but can also be constructed without any input at all from the individual (Rolph, 2016, p. 181). Reputation as celebrity is a commodity in which the public is invested and it is for this reason that Bob Tarantino argues that persons with a public profile should be treated differently in defamation law (Tarantino, 2010, p. 595). He reasons that a public person is an active participant in the construction of their outward identity – a construction shared with the media (Tarantino, 2010, p. 620). Yet even with this knowledge of a “new” form of reputation, its protection continues to exist.

Not just a celebrity?

Australian defamation law is undoubtedly vague regarding reputation as honour or dignity, but even more so on the concept of reputation as celebrity (Rolph, 2016, p. 180). Publications about the private lives of individuals in government and politics, as well as business people and those holding responsible positions in society, has contributed in some cases to the rise of their celebrity status (Tarantino, 2010, p. 616). No doubt the media’s dissemination of these publications to a wide audience has also extended these individuals’ exposure. Tarantino suggests that if a person chooses to place themselves at the center of public matters, relying on the public to maintain their public profile, writers (such as biographers and journalists) communicating about their actions should be protected from litigation, provided the reporting is thorough and reasonable (Tarantino, 2010, p. 595).

For some celebrities, raising a complaint about a supposed false allegation can also be a way for that person to manage their “brand”: Even if the celebrity doesn’t win a defamation case, the mere act of fighting for their reputation can be enough to earn the public’s favor (Bukspan, 2015) and a public person may also actively seek recognition or conflict, and in doing so, assert their values and beliefs more vigorously than a private person would be capable of doing (Tarantino, 2010, p. 616). Public persons are also often in a better financial position to sue (Steel, 2012, p. 117). It is rare that an average Joe will be able to afford the high costs of a potential court hearing if the matter cannot be settled.

Even after charges and damages, public persons may also have enough of a platform to rebuild their reputation. English novelist Jeffrey Archer, for example, was able to redeem himself from his jail cell after being charged with perjury (*Jeffrey Archer v The Star*, 1987). David Anderson explains this phenomenon succinctly:

In today’s pluralistic society, much is tolerated and little is universally condemned. A congressman can be the subject of a sex scandal one year and win an election the next ... if

one's reputation is harmed, the victim is not condemned automatically to live out his life in disgrace. The mobility and anonymity of modern society make rehabilitation much easier. (Anderson in Steel, 2012, p. 34)

Yet, if the concept of reputation as celebrity is “broad enough to include not just celebrities, but also public officials and individuals who possess either policy-level public power or private power that is exercised in the public sphere” (Tarantino, 2010, p.630), it clearly becomes difficult for the courts to identify what is in the public interest. The analysis becomes a precarious dance between the public and private aspects of the plaintiff:

The defamatory publications in question do not merely relate to these plaintiffs in their private capacity. They also reflect upon them in their public lives ... Indeed, as Beaumont J observed in the Costello case, Ellis's anecdote reflected on both politicians' professional and personal reputations. (Rolph, 2016, p. 127)

As has already been discussed, however, the line between public and private is still difficult to determine and this in turn affects whether a publication can be defined as being in the public interest. Tarantino's recommendation for differential treatment is therefore ideal but perhaps impossible to implement. In addition, with strict liability on their side and the money and power to proceed with the action, plaintiffs retain the power to perpetuate reputation over freedom of expression, rather than the writer and the publisher making that determination based on the facts they possess at the time of publication, and their own input into what constitutes public interest.

Australia's public interest defences

Australian defamation law's public interest defences, in particular, propose to mitigate the chilling effect (Kenyon, 2004, p. 7). While there are some defamation cases that involve trade book publishing, most common law public interest defence developments can be observed in cases involving journalism, which will be discussed here in order to offer some foundational evidence of their potential impact on trade book publishing. The outcomes will also be used to analyse how Australian defamation law gags writers and publishers and results in specific “judgement call[s]” (Malik, 2008, p. 114), to avoid publication entirely or steer writing away from the danger zone.

Normally, respondents have deferred to the defences of truth or comment, which have proven notoriously difficult due to the specificity of plaintiffs' imputations and the incidence of unintended meanings (Kenyon et al., 2006, p. 79). Defendants always bear the burden of truth if there is an accusation of a defamatory statement (George, 2006, p. 23), providing three conditions are met: that the statement is defamatory, the statement is published, and the plaintiff is identified (*Defamation Act 2005*). Australian law also presumes that a claimant has been defamed without their having to prove damage to reputation, providing their good reputation exists in the first place (George, 2006, p. 22). Often the evidence required to prove the truth of the statement becomes an onerous task for the writer and publisher and, consequently, publication is sometimes avoided, even when the material is of great public importance or interest (Barendt et al., 1997, p. 113).

The defence of qualified privilege has been used in an attempt to provide for freedom of expression in content with a public interest element. In the landmark case *Lange v Australian Broadcasting Corp* (“*Lange*”), (1997), an implied freedom of political expression (as set down in *Theophanous v Herald Weekly Times* (1994) was built upon and combined with “an expanded common law qualified privilege defence into a new form of privilege” (Kenyon et al., 2006, p. 83), which provided “reasonableness” guidelines for journalistic commentary in matters concerning the law and politics (Kenyon, 2004, p. 9). Journalistic guidelines that had been discussed in *Theophanous* (para. 104) were refined in *Lange*, in the hope that evidence of good journalistic practice might assist in determining if, in the absence of a defence of truth, a publication could still be protected from litigation. However, the need to verify the facts and proof of an attempt to seek a response from the person being reported on has created a narrow berth. Journalists have little time to check facts, due to the immediacy of their profession, and the ability to tick all the requirements of reasonableness is quite impossible. In further absence of support, it has only been by appellate courts revisiting the choices made in relation to common law qualified privilege in the middle decades of the 19th century via court proceedings or references, for example, which has allowed for the development of public interest defences to be recognised. The strict reciprocity of duty and interest remains an impediment, however. Combine this with a patchwork of state laws and common law development (or lack thereof), and qualified privilege has failed to be successfully applied in Australian cases for over twenty years. [2] Dr Matt Collins QC has described the current Australian legal framework as a “Frankenstein’s Monster” and adds: “If you were starting from scratch, the defamation laws you would draft would bear no relationship at all to those we are saddled with” (Ackland, 2018).

An attempt to find some uniformity and balance in this “Frankenstein’s Monster” prompted the unification of state defamation laws via the *Defamation Act 2005*. The Act provides a statutory version of the *Lange* defence via section 30 (section 30 was imported from section 22 of the *Defamation Act 1974* (NSW)). Codification of this defence might, at first glance, appear to offer some development on its common law equivalent. On closer inspection, however, the freedom of political expression established in *Theophanous*, and the imposition of reasonableness, have simply been indoctrinated into the uniform laws. For example, s. 30(3) offers a list of what is considered reasonable conduct on behalf of the defendant. But there is little scope for editorial input in determining what constitutes public interest. And editorial input is precisely where decisions about what readers want is canvassed. In addition, section 30 imposes the same restrictions that have made *Lange* so difficult to apply. [3] Recently in the UK, law reform has sought to address this problem directly, particularly in light of expanded journalism genres and other non-fiction. The UK reforms have also addressed a variety of other forms of writing in the digital realm, such as tweets and blogs. The following section aims to inspect these reforms and assess whether they might also help Australian writers and publishers to exercise freedom of expression without having to implicitly censor works.

New laws and guidelines – Australia and the UK

Australian law is based on UK law and therefore uses UK case law to determine its own path forward. But there is a resounding difference between how Australian and UK defamation law has progressed, particularly around how editorial input is considered. Consideration for editorial input in UK law allows writers and publishers more power to determine content with a public interest. This progressive

approach shows a greater understanding of the function and nature of contemporary mass communication and trends in commercial trade publishing, by including many more forms of writing. Revisiting our initial question in this paper – what constitutes texts in the public interest? – allows us to see how editorial input can ensure the scope for public interest is broad and reflective of a contemporary landscape. Given the similarities of the jurisdictions, Australia could learn something from recent UK developments.

Editorial input – an Australian and UK comparison

In contrast to Australia's inadequate section 30, section 4 of the *Defamation Act 2013* (UK) provides for editorial input and responsibility (McMahon & Price, 2013, p. 61), thus negating the need for a strict checklist in the form of reasonableness guidelines. Section 4 is an offshoot of the defence found in *Reynolds v Times Newspaper* ("*Reynolds*") (1999), which advanced the common law (similarly to Australia's *Lange* defence) but attempted to also define matters of public interest. This is undoubtedly a step forward for non-fiction content overall, even though the case was primarily focused, Like *Lange*, on Journalistic content. *Reynolds* also explored whether journalism should be offered a defence for defamatory material even when the content is false or could not be proven true. This was achieved by outlining guidelines to not only gauge good journalistic practice, but also to gauge whether a published article was in the public interest. The defence offers a much broader criterion (ss. 4(1)(a) and (b)) of communication forums, including new media in the form of tweets and blogs (Young, 2016, p. 3). It is possible to observe how the UK's section 4 might benefit UK writers and publishers via the outcome in *Flood v Times Newspapers* ("*Flood*") – a case that was integral to the development of section 4.

Flood was heard in the Supreme Court just after the revised 2013 UK defamation laws were drafted and about to be presented to the House of Commons. *Flood* highlighted an important principle that was set out in *Jameel v Wall Street Journal* ("*Jameel*") (2006) – the principle of editorial decision making in what constitutes public interest (McMahon & Price, 2013, p. 107) and became the case upon which section 4 of the *Defamation Act 2013* (UK) was based (McMahon & Price, 2013, p. 107). As stated by Lord Brown of Eaton-under-Heywood:

Could whoever published the defamation, given whatever they knew (or did not know) and whatever they had done (and had not done) to guard so far as possible against the publication of untrue defamatory material, properly have considered the publication in question to be in the public interest? (*Flood* at para. 113)

In confirming this intention at the third reading of the draft Bill, Lord McNally, then Minister for State of Justice, said "I can assure the Committee of our view that the term 'editorial' is not limited to editors or newspapers" (McMahon & Price, 2013, p. 70). *Flood*; therefore, consolidated the importance of editorial decision making discussed in *Jameel*, determining the inclusion of published material other than journalism and prompting more flexibility via section 4 of the Act.

If the same level of consideration for material other than journalistic content could be founded in Australia, we might have a situation whereby publishers are supported in their expert opinion of what constitutes a matter of public interest in relation to industry trends and contemporary perspectives –

not on laws that apply to an outdated publishing and mass media landscape. This also raises an important point regarding a writer's expertise as axiomatic. The checklist in *Reynolds* is based on the premise that a writer should be treated in the same way as any other professional, such as a doctor who would normally be immune from malpractice if they can show that they took all the correct steps to avoid damage (Jones, 2007). The ethical practices traditional journalism imposes (such as seeking a response from the claimant) are not unreasonable, and undoubtedly are already exercised by professional publishers and writers. Also, lead times for book publication are much longer than for news and current affairs journalism, so there is ample opportunity to check facts, and to seek a response from the person being written about. The growing trend towards autobiography and biography in particular, and the inherent legal implications for these genres, has already forced publishers to adopt rigid parameters often resulting in self-censorship, and it could be argued that these parameters, while stifling, display a regard for investigative guidelines (if only to avoid litigation). In particular, Eric Barendt's UK qualitative study of 16 publishers has outlined how publishers have amended and suppressed stories in order to avoid libel action against them (Barendt et al., 1997, p. 60).

There also still exists the demarcation between traditional perceptions of reputation, and reputation as a modern construct (posed at the beginning of the paper), and accurately observing where a line should be drawn. UK developments seem to have rolled this question in with what constitutes public interest, via editorial input. Australian courts have not addressed it at all. A further interrogation of how this murky evaluation materialises in the contemporary publishing landscape is enlightening.

Australia: The nanny state for non-fiction

The absence of tight deadlines does not mitigate accuracy in deciding what should be fair game for public consumption in trade book publishing. Australian presses are well aware of the consequences of publishing libel, often minimising instances of defamatory content from the outset before a book contract is signed. In most boilerplate contracts, publishers have the option of refusing to enter into the agreement if the author will not warrant that the work does not contain any content that might prompt litigation. So from the outset, censorship hovers. With non-fiction currently providing almost 40% of the top 10 titles in Australia, there is more reason to ensure that the writing is factual and non-defamatory. The warrants and indemnities section of publishing contracts are therefore extremely important to many publishers who, compared to individual authors, are in more danger of being sued because of their relative financial strength and their position as secondary infringers. But do writers have a duty to inform the public too? And shouldn't publishing houses assist writers to achieve this? For many, the simple answer is to tone down the material. Before the inclusion of section 4 of the UK *Defamation Act*, Eric Barendt's UK qualitative study mentioned describes the problems and effect of such intervention:

In order to have a defence against every possible defamation ... would require certainty that in every case there were witnesses willing and able to appear in court on the paper's behalf, or that conclusive and legally admissible documentary evidence be in the editor's hands. If such certainty were required for everything controversial, there would be no newspapers worth reading. (Barendt et al., 1997, p. 77)

The study found that at least 70% of manuscripts read for libel content were altered to avoid legal action, and six respondents had chosen to not publish manuscripts that contained potentially defamatory material (Barendt et al., 1997, p. 131). The result echoes Butler and Bourdieu's observations of implicit and unconscious censorship, which Barendt also describes as a "pervasive self-censorship for which no person or office is directly responsible, but which is as powerful as direct prohibitions in stifling publication" (Barendt et al., 1997, p. 140). Although this study was conducted before *Reynolds*, over 20 years ago, the "pervasive self-censorship" is indicative of what is still happening in Australia, with authors being asked to tone down the content or risk not being published at all, or embark on a costly and full-scale legalling. Clive Hamilton's *Silent Invasion* is one striking example.

Allen and Unwin had published eight of Hamilton's previous titles, yet the publisher backed out of *Silent Invasion*. Allen and Unwin Chief Executive Robert Gorman explained that various threats had been issued, "the most serious of these threats was the very high chance of a vexatious defamation action against Allen and Unwin" (Brull, 2018). Subsequent publisher Melbourne University Press also withdrew amidst speculation that due to the perceived anti-Chinese sentiment of the book, its publication could have a devastating effect on international enrolments at Melbourne University. *Silent Invasion* was eventually published by Hardie Grant in March 2018. But in order for the book to avoid "legal bullying" (Brull, 2018), the manuscript was initially submitted as part of a parliamentary inquiry into intelligence and security. It was consequently offered the potential protection of parliamentary privilege (Brull, 2018), as well as being legalised with a fine-toothed comb. But this will not be possible for many non-fiction titles that could also be of interest and importance to the public. This was a high-profile example and is not indicative of other publications that might have been rejected outright for their problematic content. A fresh Australian study similar to Barendt's would no doubt reveal defamation law's influence over non-fiction content, but even without such specific research there is evidence that writers are being gagged by way of the many books that have not made it to publication, or that have been amended after publication when problems of defamation arise. Consider the following pulped Australian titles: Bob Ellis's *Goodbye, Jerusalem* and *Goodbye, Babylon*; as well as the titles that were pulled from publishing lists before their to-print dates, or amended to exclude potentially defamatory material: Peter Alexander's *Les Murray: A Life in Progress*, Dorothy Hewett's poem "Uninvited Guest" and Amanda Lohrey's *The Reading Group* (Moore, 2012). Hodder Headline also had their fair share of problems with Anne Coombs and Susan Varga's *Broometime*, which residents of Broome claimed contained defamatory imputations. Hodder reprinted the book with the offending material removed. Judith Moran's *My Story* was also withdrawn by publisher Random House after journalist John Silvester claimed the book contained defamatory comments about him and his late father (Caterson, 2005). Journalist and author Kate McClymont has also said, "Whenever I do a story, in the back of my mind is a lawsuit" (Brook, 2018). After her book *He Who Must Be Obeid* was pulped in 2014 and republished with edits. Printed books can also be obstructed at distribution and booksellers threatened with legal action for selling supposed defamatory titles. In 2019, Ronan Farrow's *Catch and Kill* was challenged. *The New York Times* reported that "lawyers for Dylan Howard, an executive with American Media, Inc., sent letters to Australian booksellers ... warning of 'false and defamatory allegations' potentially contained within the book" (Rychter, 2019). In the letter the lawyers stated: "We note that if the book is distributed by you in Australia and our client is correct as to the defamatory imputations contained within the book, we are instructed to initiate immediate defamation proceedings against the publisher, and our client will have

no alternative but to join you as a party to those proceedings as a distributor” (Rychter, 2019). It seems that the word is out across the globe about Australia’s strict defamation laws.

It is also yet to be seen whether section 4 of the *Defamation Act 2013* (UK) will provide significant relief from the chilling effect in the UK, and what it might mean for Australian law reform by extension. It was only a few years ago that *Going Clear* struggled to find a UK company to publish a domestic edition. Criticism from the Church of Scientology’s international spokesperson claimed that a legal reading of the book found the material to be defamatory and unpublishable, alluding to unethical journalism (Sweeney, 2013). The UK press reasoned that:

No UK company dared touch the book for fear of being sued for libel by the Church of Scientology. They would have been required to prove every point and, even if they had won, it would have cost them a fortune (which would have broken many companies). (Sweeney, 2013)

Going Clear eventually found a UK publisher, but one who conceded that they had introduced “some editing to accommodate legal concerns that are particular to the UK” (Thompson, 2016). There is still no published Australian edition. While it seems incongruous with freedom of speech principles that writers and publishers must circumvent potential litigation via interventionist editing, perhaps it isn’t so detrimental to readers at all. If the bulk of the content is conveyed, is it necessary to retain the potentially defamatory content? Is it necessary to change the law? No doubt bringing clarity to reputation, matters of public interest, and a clear identification of what defamation litigation is protecting would be advantageous, but would it impact the content significantly? I would argue that more research is needed in this area.

In compiling the academic discourse about the courts’ attempts to accommodate technological changes and new modes of communication within the defamation law framework, there is a clear acknowledgement of a need to provide for freedom of communication. But it is also entirely reasonable to require editors and writers to do their due diligence and check the facts. Some writers and publishers do not see libel as obstructive to communicating their stories. A lawyer’s intervention at the early stages of a publication might even create a stronger and more factual piece. As one journalist in Barendt’s study stated: “it [libel] just means you have to be sure that what you want to say is true” (Barendt et al., 1997, p. 61). The same journalist stated that the existence of strict libel law is a framework that encourages “a good discipline” (Barendt et al., 1997, p. 61). The recent publication of Tom Wright and Bradley Hope’s *Billion Dollar Whale* (an exposé on Malaysian financier Jho Low) is a good example. After booksellers were threatened with legal action, publisher Scribe was able to reassure them that “our legal advisors believe that *Billion Dollar Whale* neither infringes the legal rights of Low or others charged with involvement in the financial scandal, nor is it vulnerable to actual legal challenge in our territories” (Scribe Publications, 2019). However, this still potentially shows evidence of a chilling effect in the freedom of expression of these stories without the gag of libel (Dent & Kenyon, 2004, p. 89). How much was excised from the book after legalling, and what was the importance of this content to the public? Alternatively, perhaps the precise and skilled construction of the writer’s prose allows them to convey what they want, as if it were said outright. As Lord Devlin famously proclaimed in *Lewis v Daily Telegraph Ltd*, “A man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also a fire: but it can be done” (1964).

Unintentional defamation is also common, and a writer or publisher cannot be certain that a plaintiff will sue, or indeed how much damage has been caused, until both parties are at court (Barendt et al., 1997, p. 114). In order to minimise the potential risk; therefore, the policy for book publishers is to simply refuse to publish certain manuscripts, or water down content that cannot be supported by concrete evidence (Barendt et al., 1997, p. 140). A gag, no doubt, but perhaps a gag not so tightly bound?

Conclusion

In an attempt to balance freedom of speech and the right to reputation in a new global and digital literary landscape, Australia and the UK have sought to address their respective legal frameworks, targeting the scope of publications where communication can be seen as a duty to the public. Without doubt, the UK has been more progressive in extending the boundaries of what is accepted as a matter of public interest, and a level of respect for editorial decision making in determining this. A renewed perception of reputation amid the rise in popularity of celebrity-driven titles, and a surge in sales of narrative non-fiction in general, have exposed Australia's defamation laws as very restrictive by comparison. These restrictions can be seen in the subsequent problems associated with the publishing and dissemination of non-fiction titles in particular. Not only have some books been pulled from publication, implicit censorship is common practice. Gagging the author, while protecting reputation, can have consequences to readers and the public at large. In the words of an Australian writer: "The problem with defamation ... is self-censorship. People consistently don't write things, don't write elements, don't write the guts of it" (Marjoribanks & Kenyon, 2003, p. 38).

While the NSW government has suggested amendments to the qualified privilege defence to lower its existing threshold and guidelines for reasonableness, their recommendations are pending and the chilling effect is still evident. This paper has argued that books pertaining to the public interest should be open to be challenged by the public as well as the individual being written about, but that professional judgment in determining what constitutes a text in the public interest is paramount.

Though further investigation and research into the practice of implicit censorship in trade book publishing will likely reveal the extent to which writers are gagged by Australian defamation law, existing scholarship and data provides evidence that it is rife. A legal overhaul, such as the adaption in the UK, could provide for a clear and reasonable framework that outlines a construction of reputation more reflective of the contemporary landscape in which digitalisation and globalisation have allowed readers and the general public wider access to information and content. This overhaul would also help writers and publishers determine more accurately whether their works are in the public interest, in line with current non-fiction reading trends.

Notes

[1] Data supplied with kind permission from Bianca Whiteley, territory manager of Nielsen Book Australia.

[2] See *Watt v Herald & Weekly Times Ltd* [1998] 3 VR 740 (VSC), *International Financing & Investment Pty Ltd v Kent* (unreported, WASC, Anderson J, 9 April 1998), *Deren v State of NSW* (1998) Aust Torts Rep 81–463 (NSWSC), *Heytesbury Holdings Pty Ltd v City of Subiaco* (1998) 19 WAR 440 (WASC) and *Conservation Council of SA Inc v Chapman* [2003] SASC 398, (2003) 87 SASR 62.

[3] Such as “whether the matter published contained the substance of the person’s side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person.” Section 30 of the *Australian Defamation Act 2005*.

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