How to Chill Free Speech: Defamation Down Under

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The free speech argument in Australia has always been skewed. Lacking the confidence, courage and maturity to have a bill of rights that might protect it, Australia's body politic has stammered its way to the frailest of protections. The Australian High Court has done its small bit to read an implied right into one of the world's dreariest constitutions, though the judges have been at pains to point out that it can never be personally exercised. The wordy "implied right to protect freedom of communication on political subjects" can only ever act as a restraint on excessive legislative or executive actions.

The International Covenant on Civil and Political Rights, to which Australia is a signatory, enumerates a right to hold opinions without interference and the right to freedom of expression (Article 19). As uplifting as this is, the article also permits restrictions upon that right for reasons of protecting the rights or reputations of others, national security, public order, public health or morals. With such exceptions, authorities have vast latitude to clip, curtail and restrain. But even then, Australia expressly implemented the machinery that would enable anyone in the country to enforce it.

The great stifling brake on free expression in the country comes in the form of draconian defamation laws that can be used by the powerful, the petty and the privileged. The political classes, for one, regularly resort to that mechanism to silence critics, claiming that their tattered reputations would somehow be impugned by a comedy sketch, an angry social media post, or a hurtful remark.

One particularly nasty example of this has come from current **Defence Minister Peter Dutton**, described by the late Bob Ellis as a "simian sadist", a pious detainer of refugees. Since then, we can also add war enthusiast, given his regular remarks about a willingness to send Australians over to die on that piece of land formerly known as Formosa.

Despite being in a government proclaiming the importance of free speech, Dutton has, like other politicians, availed himself of the tools that undermine it. That tool – namely, the defamation action – was used recently, with partial and regrettable success, against refugee advocate Shane Bazzi. It is worth reflecting that the action took place over a six-word tweet

posted on February 25 this year. The tweet was flavour-fuelled with accusation: "Peter Dutton is a rape apologist."

It had been typed – as things often are – in the heat of anger: some hours after Dutton had told a press conference that he had not been furnished with the "she said, he said" details of a rape allegation made by Britney Higgins, a former Coalition staffer who has spurred a movement to redress Parliament's sexual violence problem.

That comment, while seemingly rash, had rich context in terms of opinion, taking issue with Dutton's characterisation of refugee women detained on Nauru as being the sort who were "trying it on" to ensure entry to the Australian mainland. Those were Dutton's own words, noted in a 2019 Guardian Australia article mentioned in the tweet.

This legal action was merely one measure of the Morrison government's general enthusiasm for trying to regulate the Internet and, more specifically, the effusive, often mad hat chatter on social media. Prime Minister Scott Morrison, no less, has called it "a coward's place" filled with anonymous abusers and vilifiers, and has been on a crusade to make publishers of defamatory comments, and the platforms hosting them, liable.

Dutton had also promised in March with menace that he would start to "pick out some" individuals who were "trending on Twitter or have the anonymity of different Twitter accounts" posting "all these statements and tweets that are frankly defamatory."

His government is also drafting laws which will require social media companies to gather the details of all users and permit courts to force companies to divulge their identities to aid defamation cases. These regulations stink of advantating the powerful and political whose tendency to be offended is easy to provoke. They also point to an obvious purpose: reining in criticism, however sound, of the government.

In instigating proceedings against Bazzi, Dutton claimed in the trial that he was "deeply offended" by the contents of the tweet. He claimed to be a paragon of veracity and accuracy severely misunderstood. "As a minister for immigration or home affairs … people make comments that are false or untrue, offensive, profane, but that's part of the rough and tumble."

Bazzi, however, had crossed the line; his comments were made by a person verified by Twitter. "It was somebody that held himself out as an authority or a journalist." His remarks "went beyond" the acceptably rough and tumbling nature of politics. "And it went against who I am, my beliefs … I thought it was hurtful."

In court, Dutton outlined a series of measures he had taken as a minister to deal with allegations of abuse. He created the Australian Centre to Counter Child Exploitation. He dispatched Australian Federal Police officers to Nauru to investigate sexual assault allegations. It never once occurred to him that these initiatives took place on a problem of his own government's making. If you set up concentration camps on Pacific islands to allow asylum seekers and refugees to sunder, subsidizing client states to so, denigration and depravity follow.

Bazzi, through his lawyer, Richard Potter SC, claimed that the defences of honest opinion or fair comment applied. According to Potter, the honest opinion defence was "a fundamental protection in our society", "a bulwark of freedom of speech". In Australia, such assertions

would be going too far, given how difficult they are to apply.

The law firm representing Bazzi, O'Brien Criminal and Civil Solicitors, also made the understandable claim in April that the whole proceedings should worry us all. "For a politician to use defamation law to stifle expression of a public opinion is a cause for real concern."

In the public domain, individuals who had known a thing or two about the spiritual and physical torment of rape expressed their puzzlement over Dutton's response. Higgins, who is seeking redress for her own suffering in this matter, found the minister's legal response to Bazzi "baffling". "I've been offended plenty." Despite that, it still afforded "people … the right to engage in public debate and assert their opinion." The whole case was a "shocking indictment on free speech."

From the outset, the Federal Court seemed, as much of Australia's legal system is, inclined to the complainant. The Anglo-Australian culture puts much stock in the artificial contrivance of reputation, which is often a social illusion that says little about the conduct of the defamed individual. Reputations are often false veneers fiercely protected.

And so it came as no surprise that Justice Richard White was critical of the legal firm defending Barazzi. The justice asked those representing the firm whether they were appearing as solicitors with obligations to be objective and independent, or as "supporters and barrackers" of their client. He preferred the parties to seek a settlement. "It does seem to me that this should be a matter of capable resolution. There are risks on both sides."

In finding for Dutton in November, Justice White ruled that the tweet had been defamatory, and that Bazzi could not resort to the defence of honest opinion. With classic, skewering casuistry, the judge found that "Bazzi may have used the word 'apologist' without an understanding of the meaning he was, in fact conveying." If this had been the case, "it would follow that he did not hold the opinion actually conveyed by the words." Let it be known: if you do no not understand the meaning of certain words, you can have no opinions about them.

Despite his eagerness to seek damages for all grounds, Dutton was only successful on one of the four pleaded imputations. Claims for aggravated damages and an injunction targeting Bazzi's comments, were rejected. The Defence Minister's appetite for pursuing Bazzi for his full legal bill also troubled Justice White, who had repeatedly urged the parties to reach a settlement. Why had Dutton not sued in a lower court, he asked? The reason, claimed Dutton's barrister Hamish Clift this month, was because his client was a prominent figure requiring a prominent stage to protect his prominent reputation. "It would not be appropriate for the court," retorted White, "to exercise their discretion more favourably to Dutton simply because of the important public and national office of which he holds."

In stating that all were equal before the law irrespective of their position, White made a sound point that those schooled in aspirational justice would appreciate but hardly believe. When it comes to Australia's defamation laws, such a statement is a matter of form and formality, not substance and reality.

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