NOT SO STRAIGHT-TALKING: HOW DEFAMATION LAW SHOULD TREAT IMPUTATIONS OF HOMOSEXUALITY

THEODORE BENNETT*

I INTRODUCTION

As I write this article, homosexuality is once again the subject of intense public discussion. Federal politicians and lobby groups have been debating the merits of the Safe Schools program,[1] the proposal for a plebiscite on same-sex marriage has been evaluated economically and politically,[2] and, in the lead-up to the 2016 Gay and Lesbian Mardi Gras, the NSW Parliament and Police publicly apologised for the heavy-handed crackdown on Mardi Gras marchers back in 1978.[3] Reflecting on these events, it seems that the full, free, and frank discussion of homosexuality is an accepted aspect of contemporary public discourse in Australia. However, within the restrictions imposed by defamation law there remain certain legal risks involved with speaking openly about this topic, specifically there are limitations around stating or implying that someone is homosexual or has engaged in homosexual conduct. The law in this area has recently been reconfirmed in the 2015 decision of *Gluyas v Canby*,[4] which held that although 'each case will turn upon its own facts' an imputation that someone is homosexual can have the capacity to be defamatory.[5]

This article critically analyses Australian defamation law's treatment of imputations of homosexuality and argues that such imputations should no longer be regarded as being legally capable of being defamatory. This argument is worked through in the next two parts. In Part II the relevant general principles of defamation law are explained and the key Australian cases regarding imputations of homosexuality are outlined. In Part III the legal treatment of imputations of homosexuality is critiqued for various reasons relating to the symbolic effect of the law and the problematic practical ways in which these imputations have operated in recent cases.

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* BA, LLB (Hons), PhD. Assistant Professor at the University of Western Australian Law School. My thanks to the anonymous reviewer for his or her comments and suggestions.

1 See, eg, Sarah Martin, 'Safe Schools Program: Federal Government Unveils Changes', *The Australian* (online), 18 March 2016, <http://www.theaustralian.com.au/national-affairs/education/safe-schools-program-federal-government-unveils-changes/news-story/ce2d4751b2068f6b3ecededede317954fd>; Stephanie Anderson, 'Safe Schools: Malcolm Turnbull Wants Bill Shorten, Other MPs to Choose Words Carefully in Heated Debate', *ABC News* (online), 17 March 2016, < http://www.abc.net.au/news/2016-03-17/safe-schools-debate-pm-warns-mps-to-choose-words-carefully/7253744>.

2 See, eg, Mark Kenny, 'Divisive Marriage Equality Plebiscite to Cost Australia More than $500 Million', *The Sydney Morning Herald* (online), 13 March 2016, <http://www.smh.com.au/federal-politics/political-news/divisive-marriage-equality-plebiscite-to-cost-australia-more-than-500-million-20160312-gnhgtp.html>; AAP, 'Ministers at Odds Over Same-Sex Marriage Vote', *SBS News*, 7 March 2016, <http://www.sbs.com.au/news/article/2016/03/07/ministers-odds-over-same-sex-marriage-vote>.

3 See, eg, Eoin Blackwell, 'NSW Police Apologises to 1978 Mardi Gras Marchers for "Pain and Hurt"', *The Huffington Post Australia* (online), 4 March 2016, <http://www.huffingtonpost.com.au/2016/03/03/78ers-apology-nsw_n_9379476.html>.

4 [2015] VSC 11.

5 Ibid [46].

II DEFAMATION LAW

Defamation law exists in order to protect a person's reputation from harm caused by the communications of others and to provide compensation for any such harm suffered.[6] A successful action for defamation requires that a plaintiff prove that a communication has been published to a person or persons other than them, that the communication identifies them and that the communication contains at least one imputation that is defamatory of them.[7] An 'imputation' is an attribution of 'some act or condition' to the plaintiff,[8] and is 'usually in the nature of an accusation or charge'.[9] An imputation can arise on the basis of the 'ordinary and natural' meaning[10] of the communication as understood by the ordinary reasonable reader.[11] Alternatively, an imputation can arise on the basis of 'true innuendo', a situation where 'special facts, known to those to whom the matter was published… would lead a reasonable person knowing those facts to conclude that the words have another… meaning'.[12]

The focus of this article is on the scope of defamatory meaning, namely, what kinds of imputations are legally treated as being defamatory. Despite the introduction of the so-called National Uniform Defamation Laws (NUDL)[13] this remains an issue that is 'determined in accordance with the common law'.[14] This Part will first address the general question of what kinds of imputations are legally capable of being defamatory and will then look specifically at imputations of homosexuality.

A *Scope of Defamatory Meaning*

The High Court's most recent restatement of the law regarding the scope of defamatory meaning is found in the 2009 case of *Radio 2UE Sydney v Chesterton*, in which the Court held that the 'general test for defamation' is 'whether a person is lowered in the eyes of right-thinking persons'.[15] The Court noted that 'disparagement of reputation… is the essence of an action for defamation',[16] and that the general test is one that is concerned with determining 'whether injury to reputation has occurred'.[17] The Court also recognised that the general test can and has been phrased in multiple different ways, such as 'whether a person's standing in the community, or the estimation in which people hold that person, has been lowered' and 'whether the

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6 Though, as McNamara has persuasively argued, defamation law has not provided a clear and consistent definition of what, exactly, 'reputation' is: Lawrence McNamara, *Reputation and Defamation* (Oxford University Press, 2007). For more on different theoretical concepts of 'reputation' see Robert C Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74 *California Law Review* 691.

7 See generally Patrick George, *Defamation Law in Australia* (LexisNexis, 2nd ed, 2012) 125.

8 *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1, [5] (Gibbs J).

9 *Greek Herald v Nikolopolous* (2002) 54 NSWLR 165, [8]

10 *Jones v Skelton* [1963] NSWSR 644, 650.

11 *Favell v Queensland Newspapers* (2006) ALR 186.

12 *Radio 2UE Sydney v Chesterton* [2009] HCA 16, [51] (French CJ, Gummow, Kiefel and Bell JJ).

13 Such laws include, for example, the *Defamation Act 2005* (WA), *Defamation Act 2005* (Vic), *Defamation Act 2005* (Qld), etc. See generally David Rolph, 'A Critique of the National, Uniform Defamation Laws' (2008) 16(3) *Torts Law Journal* 207.

14 George, above n 7, 161.

15 [2009] HCA 16, [32] (French CJ, Gummow, Kiefel and Bell JJ).

16 Ibid.

17 Ibid [36].

imputation is likely to cause people to think the less of a plaintiff'.[18] Some recent examples of imputations that have been found to be defamatory under Australian law include the imputation that a federal politician 'corruptly solicited payments' in order to influence their decision-making,[19] and the imputation that a lawyer acted in a manner that was 'incompetent and unprofessional'.[20]

The determination of whether or not an imputation is actually defamatory is a matter for the fact-finder at trial, and as such will typically be decided by a jury.[21] This determination is not factual in an 'empirical' sense: it does not turn on evidence about whether the imputation actually lowered the plaintiff in the eyes of any particular person/s, nor does it turn on evidence (opinion polls, surveys, or the like) about the kind of imputation that would actually lower the plaintiff in the eyes of the community.[22] Instead, this is a 'hypothetical' exercise,[23] in which jury members operate like 'experts in public opinion' who are 'asked to consider the likely responses of "ordinary reasonable people"' to the matter in order to decide whether an imputation is defamatory.[24]

Given that juries are not required to provide their reasons for deciding, one would be forgiven for thinking that there would be limited legal guidance about what constitutes a defamatory imputation. However, this is not the case because there are a number of considered judicial decisions on the scope of defamatory meaning. Pre-trial a judge may need to determine the 'threshold inquiry' of whether, as a matter of law, a plaintiff's pleaded imputation is '*capable* of being defamatory' in order to determine whether or not it should be struck out.[25] Alternatively, on appeal a judge or judges may need to decide whether an imputation that the fact-finder has found to be defamatory is legally capable of being defamatory in order to determine whether or not to set aside that finding for unreasonableness.[26] Drawing on these judicial decisions about the capacity for defamation, we can turn our attention to the legal treatment of imputations of homosexuality.

B *Imputations of Homosexuality*

Defamation cases in Australia in the late 20th century proceeded on the basis that imputations relating to homosexuality were not only legally capable of being defamatory but were inherently actually defamatory. In these cases there was generally

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18 Ibid. Other prominent formulations of the test for defamatory meaning that have been developed within the common law include whether the communication exposed the plaintiff to hatred, contempt or ridicule: *Parmiter v Coupland* (1840) 6 M&W 105; and whether the communication would cause the plaintiff to be shunned and avoided: *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581. In particular, there is a strong line of Australian authorities on exposing a person to public ridicule: *Australian Consolidated Press v Ettingshausen* [1993] NSWCA 10; *Obermann v ACP Publishing Pty Ltd* [2001] NSWSC 178; *Hanson-Young v Bauer Media Ltd* [2013] NSWC 1306.

19 *Hockey v Fairfax Media Publications* [2015] FCA 652

20 An imputation that was held to arise from repeatedly publicly referring to the lawyer as 'Dennis Denuto', a bumbling fictional lawyer from the classic Australian film *The Castle* (1997): *Smith v Lucht* [2015] QDC 289, [32].

21 *Kenny v Australian Broadcasting Commission* [2014] NSWSC 190, [21].

22 Roy Baker, 'Defamation and the Moral Community' (2008) 13(1) *Deakin Law Review* 1, 2.

23 Ibid 4.

24 Roy Baker, *Defamation Law and Social Attitudes: Ordinary* Un*Reasonable People* (Edward Elgar, Cheltenham UK, 2011) 36-37.

25 McNamara, above n 6, 31 (emphasis in original).

26 Baker, above n 24, 37.

no detailed consideration of whether an imputation of homosexuality is, or should be considered to be, something that damages a person's reputation. Instead it was simply uncritically accepted that such an imputation did cause such damage. For example, in the 1991 case of *Harrison v Galuszko* the rumour spread within the Polish community that a Polish social worker was a lesbian who had tried to seduce one of her long-term female clients was unquestioningly accepted as being defamatory.[27] It was described by Master Adams as being a 'serious slur on [the social worker] personally' and professionally, 'highly offensive' and 'particularly disgraceful and unjustified'.[28] In *Australian Broadcasting Corporation v Hanson* in 1998 the Supreme Court of Queensland Court of Appeal dismissed an appeal against the grant of a restraining order that prohibited the playing of the satirical song 'Back Door Man' on national radio. It was argued that the song imputed that the politician Pauline Hanson was variously 'a homosexual, a prostitute, involved in unnatural sexual practices, associated with the Klu Klux Klan, a man and/or a transvestite and involved in or party to sexual activities with children'.[29] In the course of his leading decision, de Jersey CJ did not attempt to disentangle these imputations in order to consider them individually but instead held simply that '[t]here was no room for debate about the defamatory nature of this material' and noted that '[t]hese were grossly offensive imputations relating to… sexual orientation and preference.'[30]

Levine J took a slightly more reflective approach to this issue in *Horner v Goulbourn City Council* whilst still reaching the same legal conclusion in 1997.[31] In this case, a letter written by an employee and attached to their performance review described what it called an 'unusual' relationship between the employer's General Manager and Human Resources Manager. This letter was alleged to carry the imputation that the two managers were involved in a homosexual relationship. In a pre-trial decision about whether such an imputation was legally capable of being defamatory, Levine J turned his mind to the general test of defamation and whether such an 'imputation could cause ordinary members of the community to think the less of the plaintiff'.[32] In deciding on this, Levine J observed that:

> Community attitudes to an assertion of a homosexual relationship may range from sympathetic tolerance and understanding to an irrational abhorrence… I do not consider that it can conclusively be said that even towards the end of this century's last decade that there can be, among ordinary members of the community, a view that to say of a person that that person is in a homosexual relationship is not disparaging or is not likely to lower that person in the estimation of such people. I do not hold that the imputations of a homosexual relationship are not capable of being defamatory.[33]

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27 *Harrison v Galuszko* (Unreported, WA Supreme Court, Acting Master Adams, 8 November 1991).

28 Ibid 7, 9. It should be noted that this case was decided under now-abandoned common law principles that drew distinctions between libel and slander, and the case held that a slanderous communication regarding female homosexuality was actionable *per se* (without requiring special proof of damage) as an imputation of unchastity in a woman.

29 *Australian Broadcasting Corporation v Hanson* (Unreported, Supreme Court of Queensland Court of Appeal, De Jersey CJ, McMurdo P and McPherson JA, 28 September 1998) 3.

30 Ibid 8.

31 (Unreported, Supreme Court of New South Wales, Levine J, 5 December 1997).

32 Ibid 5.

33 Ibid.

Despite the acknowledgement of a possible range of reactions from ordinary community members, and the obscurant use of a double negative in the above passage, the decision still clearly affirmed the general legal position that imputations of homosexuality are capable of being defamatory.

Legal authority shifted in a subtle but important way at the start of the 21st century, with a new string of cases raising the suggestion that imputations of homosexuality may only be contingently, rather than inherently, capable of being defamatory. Two of these cases arose from defamation actions brought by the stockbroker Rene Rivkin as a result of news media coverage surrounding the suspicious death of a woman. Both cases touched on imputations about the nature of the relationship between Rivkin and the woman's surviving male partner, Gordon Wood.

The 2001 decision in *Rivkin v Amalgamated Television Services*[34] concerned a Channel 7 television broadcast that was alleged to have imputed *inter alia* that Rivkin and Wood had had homosexual intercourse and also that the police had reason to believe that they had had homosexual intercourse. Bell J was asked to rule pre-trial on whether these imputations were capable of being defamatory, and the argument was put to the court that due to 'change[s] in the social and moral standards of the community' it was no longer the case that 'right thinking members of… society generally would hold that the mere fact of homosexual intercourse lowered a man in their estimate'.[35] In support of this argument, the court's attention was drawn to decades of Australian legal reforms around homosexuality, including the incremental decriminalisation of consensual homosexual adult sexual activities, the introduction of anti-discrimination protections and legal recognition of homosexuality in relation to de facto relationships, migration visas, and workplace relations.[36] Whilst Bell J acknowledged that there may still be some 'reasonable members of the community' who (perhaps because of their religious belief) would think less of a person who was homosexual, she noted that the legal test for defamatory meaning required looking more broadly at the 'standard common to society generally'.[37] On this basis Bell J accepted the submission that 'it is no longer open to contend that the shared social and moral standards with which the ordinary reasonable member of the community is imbued include that of holding homosexual men (or men who engage in homosexual sex) in lesser regard on account of that fact alone'.[38] Nevertheless, she importantly noted that the imputation of homosexuality still had the capacity to be defamatory in that it could give rise to correlative defamatory imputations 'such as hypocrisy, the abuse of a position of power or trust, infidelity, or the like in the context of the publication or by way of true innuendo'.[39] Soon after, this decision was cited positively by Levine J in *Obermann v ACP Publishing Pty Ltd*[40] in an apparent departure from his earlier decision in *Horner v Goulbourn City Council*.[41]

The subsequent 2003 case of *John Fairfax Publications Pty Ltd v Rivkin*[42] was based on a series of three newspaper reports that were alleged to contain imputations about homosexual sex between Rivkin and Wood that were very similar to those

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34 [2001] NSWSC 432.
35 *Rivkin v Amalgamated Television Services* [2001] NSWSC 432, [18].
36 Ibid [19]-[20].
37 Ibid [26].
38 Ibid [30].
39 Ibid [30].
40 [2001] NSWSC 1022, [21].
41 (Unreported, Supreme Court of New South Wales, Levine J, 5 December 1997).
42 (2003) 201 ALR 77.

covered in the earlier related case. After a trial in which a jury found that these imputations did not arise from the articles, Rivkin was granted a retrial on appeal. However, the decision regarding the retrial itself became the subject of a further appeal to the High Court. Although the High Court was not directly tasked with determining whether or not an imputation of homosexuality was defamatory Kirby J's judgment did consider this issue. In passing, Kirby J observed that:

> In most circumstances, it ought not to be the case in Australia that to publish a statement that one adult was involved in consenting, private homosexual activity with another adult involves a defamatory imputation. But whether it does or does not harm a person's reputation to publish such an imputation is related to time, personality and circumstance… The day may come when, to accuse an adult of consenting homosexual activity is… generally a matter of indifference. However, it would ignore the reality of contemporary Australian society to say that that day has arrived for all purposes and all people. At least for people who treat their sexuality as private or secret, or people who have presented themselves as having a different sexual orientation, such an imputation could, depending on the circumstances, still sometimes be defamatory.[43]

As this passage makes clear, unlike Bell J in *Rivkin v Amalgamated Television Services*,[44] Kirby J did not go so far as to conclude that a bare assertion of homosexuality would never be capable of being defamatory. However, like Bell J, Kirby J does also draw attention to the importance of the context of the case in order to determine whether or not such an imputation would be defamatory.

A few months prior to the handing down of this High Court decision this issue was also considered in the case of *Kelly v John Fairfax Publications*.[45] This case concerned the publication of a picture and accompanying text in a newspaper. The picture was of a half-dressed man who was tied to a piano in Hyde Park, Sydney, and the accompanying text incorrectly identified the man as Robert Kelly (a senior lawyer) and described the picture as Kelly practicing a 'bondage display' for the upcoming Gay and Lesbian Mardi Gras. When Kelly sued for defamation one of the imputations that was alleged to arise from the communication was that Kelly was homosexual. In a pre-trial hearing Levine J was asked to decide once again whether or not this imputation was capable of being defamatory as a matter of law. This time Levine J noted that he was not 'entirely in agreement' with Bell J's decision in *Rivkin v Amalgamated Television Services*[46] and declined to follow it.[47] Levine J expressed doubt about Bell J's line of reasoning that a series of consecutive legal developments pointed to a general community standard that was accepting of homosexuality, instead raising the 'interesting… proposition that if it be the case that it is a general community position that no-one would think less of a person said to be homosexual, then there would be no need for all this remedial legislation'.[48] However, the primary point of departure from Bell J appears to be the result of the intervening precedent of *Greek Herald v Nikolopolous*,[49] a 2002 case that Levine J regarded as 'playing an important part in the

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43 *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77 at [140] (citations omitted).
44 [2001] NSWSC 432.
45 [2003] NSWSC 586.
46 [2001] NSWSC 432.
47 *Kelly v John Fairfax Publications* [2003] NSWSC 586, [40].
48 Ibid [39].
49 (2002) 54 NSWLR 165

question of capacity to defame'.[50] In *Greek Herald v Nikolopolous*, the NSW Court of Appeal held that whether an imputation was capable of being defamatory was not something that could be decided theoretically in an abstract sense, but should instead be decided with reference to the context of the particular case, including the entire content of the communication which is alleged to carry that imputation.[51] Adopting this focus on context as a key 'factor' in the consideration of imputations of homosexuality,[52] Levine J ultimately held that such an imputation was capable of being defamatory in the context of the particular communication in the case:

> This article or the material sued upon is extraordinary ─ by that, I mean it is out of the ordinary in terms of the material that predominates this list. In the context of such a piece, I am not persuaded, on a capacity basis, to withdraw the imputation from the jury's consideration on the ground that it could not be defamatory of the plaintiff. [53]

Although this decision was framed by Levine J as not (necessarily) following Bell J's earlier decision, it ends up with a somewhat similar result. Neither *Kelly v John Fairfax Publications* nor *Rivkin v Amalgamated Television Services* holds that a bare imputation that someone is homosexual or has engaged in homosexual conduct is in and of itself always defamatory. Rather, both cases acknowledge that an imputation of homosexuality may only be defamatory when linked to the presence of an additional factor such as the context of the case or a related true innuendo.

Despite the flurry of cases in the early 2000s, this issue lay mostly dormant until its recent reconsideration in *Gluyas v Canby* in 2015.[54] *Gluyas v Canby* involved a series of blog posts made by Canby that contained inflammatory statements about Gluyas, imputing variously that he was a paedophile, a homosexual, a liar and that he had attacked someone. In an uncontested judge-only trial, Forrest J found that 'each imputation [was] defamatory of Mr Gluyas'.[55] Elaborating on the reasons for this decision in relation to the imputation of homosexuality, Forrest J turned his mind to the various cases of *John Fairfax Publications Pty Ltd v Rivkin*, *Rivkin v Amalgamated Television Services* and *Kelly v John Fairfax Publications*, recognising that according to these authorities 'the question of whether the reference to Mr Gluyas as a homosexual is defamatory requires an examination of the publication in context' and that 'each case will turn upon its own facts'.[56] The particular facts of the case that Forrest J found relevant were that Gluyas was married and that he had asserted that he had never been in a homosexual relationship. On this basis Forrest J held that 'an

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50 *Kelly v John Fairfax Publications* [2003] NSWSC 586, [41].

51 (2002) 54 NSWLR 165, [20]-[23]. This particular case concerned an alleged imputation that the plaintiff had lied, and the defendant raised the argument that 'merely to be accused of lying was not defamatory, without specification of what the lie was about, why it was told, or its effect', given that many innocuous lies are told (such as about Father Christmas): at [6]. However, the court held that the defamatory capacity of such imputations should not be analysed in a vacuum like this: 'The defendants wish to have the imputation removed from the context of the article as a whole so that the jury can be invited to debate the moral issue whether lying is always wrong, and whether (if it is not) it is defamatory of a person to say that he or she lied. Such matters may befit a philosophy seminar. But they are so divorced from the reality of the true dispute between the litigants as to be a wasteful perversion of justice' [23].

52 *Kelly v John Fairfax Publications* [2003] NSWSC 586, [41].

53 Ibid [43].

54 [2015] VSC 11.

55 *Gluyas v Canby* [2015] VSC 11, [42].

56 Ibid [45]-[46].

ordinary, reasonable reader with knowledge of Mr Gluyas would regard such an assertion as being defamatory'.[57]

Given the cases outlined above, it is clear that under Australian common law the imputation that someone is homosexual is capable of being defamatory in certain circumstances. Historically the common law has uncritically accepted that a bare assertion of homosexuality is actually defamatory, but recent cases have engaged more critically with this issue and there is now 'conflicting authority' on whether and in what circumstances an imputation of homosexuality has the capacity to be defamatory.[58] There is the suggestion in recent cases that whether or not an imputation of homosexuality is capable of being defamatory depends on either understanding the imputation more broadly within the context of the case or relating the imputation to further true innuendo. As Baker identifies, '[t]oday, any reference to homosexuality in pleaded imputations is likely to be combined with aggravating factors',[59] rather than as simply a bare imputation of homosexuality.

III DIFFICULTIES WITH DEFAMATORY MEANING

Alongside the doctrinal questions around whether an imputation of homosexuality is legally capable of being defamatory, there is an important series of related questions of principle about social attitudes, notions of community, and the very role of defamation law. Do people in contemporary Australian society actually think less of someone who is homosexual? Hypothetically, how would a 'right-thinking' person regard someone who is homosexual? Is defamation law concerned with how people actually think or what people should be thinking?[60] What regard should defamation law have for differences of public opinion around issues like homosexuality and any changes in such opinion over time? And should defamation law only recognise broad community-wide views or should it recognise the views of sub-sections within the community?

These kinds of questions have attracted sustained consideration within contemporary American jurisprudence.[61] These questions have also been pursued in

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57 Ibid [45].

58 David Rolph, *Reputation, Celebrity and Defamation Law* (Ashgate, 2008) 127.

59 Baker, above n 24, 99.

60 Ibid 10.

61 Randy M Fogle, 'Is Calling Someone "Gay" Defamatory?: The Meaning of Reputation, Community Mores, Gay Rights, and Free Speech' (1993) 3 *Law and Sexuality Review: Lesbian and Gay Legal Issues* 165; Elizabeth M Koehler, 'The Variable Nature of Defamation: Social Mores and Accusations of Homosexuality' (1999) 76(2) *Journalism and Mass Communciation Quarterly* 217; Rachel M Wrightson, '*Gray* Cloud Obscures the Rainbow: Why Homosexuality as Defamation Contradicts New Jersey Public Policy to Combat Homophobia and Promote Equal Protection' (2001-2002) 10 *Journal of Law and Policy* 635; Eric K M Yatar, 'Defamation, Privacy, and the Changing Social Status of Homosexuality: Re-Thinking Supreme Court Gay Rights Jurisprudence' (2003) 12 *Law & Sexuality: Review of Lesbian, Gay, Bisexual and Transgender Legal Issues* 119; Robert D Richards, 'Gay Labeling and Defamation Law: Have Attitudes Towards Homosexuality Changed Enough to Modify Reputational Torts?' (2009-2010) 29 *Commlaw Conspectus* 349; Haven Ward, '"I'm Not Gay, M'Kay?: Should Falsely Calling Someone a Homosexual be Defamatory?' (2010) 44 *Georgia Law Review* 739; Abigail A Rury, 'He's So Gay… Not That There's Anything Wrong With That: Using a Community Standard to Homogenize the Measure of Reputational Damage in Homosexual Defamation Cases' (2010-2011) 17 *Cardozo Journal of Law & Gender* 655; Matthew D Bunker, Drew E Shenkman and Charles D Tobin, 'Not That There's Anything Wrong With That: Imputations of Homosexuality and the Normative Structure of Defamation Law' (2011) 21 *Fordham*

relation to Australian law, but in a more intermittent manner and with a slight tendency towards using imputations of homosexuality as an illustrative tool for investigating the general workings of defamation law rather than addressing them as an issue in their own right.[62] Another tendency within Australian commentary has been to focus on whether or not imputations of homosexuality are broadly treated as being defamatory, leaving largely undeveloped the specifics of the role of context and related true innuendo that more recent case law trends have identified as playing a key role in producing defamatory meaning. By contrast, this article squarely addresses the issue of homosexuality within defamation law as an end in itself and will also touch on these newer legal developments.

This Part will argue that imputations of homosexuality should no longer be treated as being defamatory in any situation. Treating imputations of homosexuality as legally capable of being defamatory is problematic because of both the inequalities that result from the symbolic nature of defamation law as well as the practical problems with the operation of these imputations in recent cases.

A *The Symbolic Nature of Law*

Whilst every ruling or judgment necessarily has a practical legal effect on the particular case before the court, it is also true that the effects of rulings and judgments are not limited either to those particular cases or to the domain of law. Law can operate in broadly symbolic ways: functioning alternatively as a form of condemnation or validation of certain activities and identities, and embodying or delimiting key socio-political values such as equality and autonomy. This normative character of law has been identified by McNamara as being inextricably woven into the jurisprudential underpinnings of defamation.[63] McNamara has argued that the 'processes of moral judgment' that are built into defamation law are made 'visible… because the principal test [to determine whether an imputation is defamatory] makes "right-thinking" or "decent" persons in the community the point of reference'.[64] In order to determine whether an imputation is defamatory under this general test a court needs to decide whether that imputation would lower the person in the eyes of 'right-thinking' persons, which in turn necessitates that the court:

Intellectual Property, Media and Entertainment Law Journal 581; Laurie M Philipps, 'Libelous Language Post *Lawrence*: Accusations of Homosexuality as Defamation' (2012) 46(1) *Free Speech Yearbook* 55; Holly Miller, 'Homosexuality as Defamation: A Proposal for the Use of the "Right-Thinking Minds" Approach in the Development of Modern Jurisprudence' (2013) 18 *Communication Law & Policy* 349.

62 See, eg, McNamara, above n 6; Baker, above n 22; Julie Eisenberg, 'Sex, Satire and "Middle-Class Morality": Reflections on Some Recent Defamation Cases' (1999) 92 *Media International Australia, Incorporating Culture & Policy* 19; Gary K Y Chan, 'Defamatory Meaning, Community Perspectives and Standards' (2014) 19 *Media & Arts Law Review* 47. Cf Gary Lo, 'Queer Lies in the Law's Eye: Is It Still Defamatory to Call Someone Gay?' (2004) 13(2) *Polemic* 1; Lawrence McNamara, 'Bigotry, Community and the (In)Visibility of Moral Exclusion: Homosexuality and the Capacity to Defame' (2001) 6(4) *Media & Arts Law Review* 271.

63 McNamara, above n 6. On the normative dimensions of defamation law see, also: Anonymous, 'Tort Law — Defamation — New York Appellate Division Holds That The Imputation Of Homosexuality Is No Longer Defamation Per Se. — *Yonaty v. Mincolla,* 945 N.Y.S.2d 774 (App. Div. 2012)' (2013) 126 *Harvard Law Review* 852; Bunker, Shenkman and Tobin, above n 61.

64 McNamara, above n 6, 34.

> [F]orm[s] a view about who the ordinary, decent, right-thinking folk are that will be the benchmark for its judgment. That is, it must form a view about what makes the people of the jurisdiction more than merely a legal or political community; it must form a view about what values bind the people in the jurisdiction together as a *moral community*.[65]

The High Court clarified in *Radio 2UE Sydney v Chesterton* that the general test for defamatory meaning does not 'import particular standards, those of a moral or ethical nature, to the assessment of the imputations'.[66] Instead, the test is about setting 'a benchmark by which some views would be excluded from consideration as unacceptable',[67] and 'simply conveys a loss of standing in some respect'.[68] However, it is this 'inclusion/exclusion dynamic' which is itself a normative process,[69] in that it envisions certain kinds of communities — communities in which certain attitudes are or are not accepted, and accordingly communities in which certain people are or are not full and proper members whose dignity is respected.[70] In this way the operation of defamation law extends beyond the courtroom walls as it sends broader normative signals about what kind of community Australia is, what kind of people it is made up of, and what kinds of attitudes it holds.

The application of the general test of defamation to imputations of homosexuality has so far sent clear negative signals about homosexuality. The multiple findings by Australian courts that an imputation of homosexuality is defamatory (as discussed above) are each an authoritative determination that a person who thinks less of someone because they are homosexual is a 'right-thinking' member of the Australian community. Commentators have argued that the law here functions to 'symbolically endorse discriminatory attitudes or conduct',[71] because by 'basing legal decisions on discriminatory beliefs and behaviors' law simultaneously 'validates those beliefs and behaviors' (or at least creates the perception that it does).[72] The common law position, both historically and in its slightly altered contemporary form, 'send[s] a message to the community that homophobia is both acceptable and "right-thinking"',[73] and envisions an Australian community in which homosexual people are 'excluded' and their dignity and equality is not fully respected.[74] If we were to accept the seemingly uncontentious general principle that laws within a modern liberal democracy like Australia should endorse values such as acceptance and non-discrimination rather than bigotry and intolerance, then these kinds of symbolic effects provide a principled basis for refusing to legally recognise imputations of homosexuality as being defamatory.

However, some commentators have disagreed with this line of thinking around the symbolic effect of defamation and have done so for a number of reasons. It may be the case that the impact of any symbolic effect that the law can have here is vastly

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65 Ibid (emphasis in original).
66 [2009] HCA 16, [37] (French CJ, Gummow, Kiefel and Bell JJ).
67 Ibid [40]
68 Ibid [37]
69 McNamara, above n 6, 35
70 Ibid 275-276. I adopt the term 'envision' here from Lidsky, who argues that this term is appropriate because the judicial determination of community attitudes in defamation law 'is rarely based on objective evidence but is instead based on (often) unconscious decisions and beliefs about communities and their values': Lyrissa Barnett Lidsky, 'Defamation, Reputation, and the Myth of Community' (1996) 71 *Washington Law Review* 1, 36.
71 Bunker, Shenkman, and Tobin, above n 61, 602.
72 Ibid 608.
73 Yatar, above n 61, 155 (citations omitted). Though Yatar ultimately rejects this line of thinking.
74 McNamara, above n 6, 275-276.

over-played. Whether or not the intricacies of the doctrinal debates within this area of law are of any interest to the public is unclear. Lo poses the pertinent question: 'Do people pay attention to defamation law?'[75] Even if people did pay attention to defamation law and the issues regarding imputations of homosexuality did attract public interest, whether legal change in this area could somehow catalyse changes in public attitudes is doubtful.[76] Withholding legal recognition of the unfortunate fact 'that sizable pockets of society still hold gays and lesbians to… obloquy, ridicule, and contempt', by excluding these groups from the 'right-thinking' general test standard, 'does not eradicate that prejudice from reality'.[77] Indeed, the limitations of the use of law as a tool to bring about change in the hearts and mind of the population are amply demonstrated by the unacceptably high levels of discrimination still faced by homosexual people,[78] despite the longstanding existence of anti-discrimination laws around sexual orientation which typically have the elimination of prejudice as part of their explicit or implicit goals.[79]

Whilst the legal recognition of homophobic attitudes within defamation law as 'right-thinking' could be read as a form of judicial legitimisation of these attitudes, if law conversely fails to recognise these attitudes it still opens itself up to criticism. Turning a blind eye to these attitudes could be seen as a failure of law to engage with the 'actual reality' of prejudice,[80] and as an abdication of the functional role of law to provide compensation for the real harm suffered by plaintiffs. Whilst an 'idealist' court may '"screen" the social and moral attitudes of the ordinary, hypothetical people' and aim to 'buil[d] more "appropriate" moral and social attitudes into these hypothetical judges', Magnusson notes that a 'realist' court should recognise actual social and moral attitudes 'warts and all'.[81] It is only through the recognition and reflection of society's own prejudice that law can 'provide a remedy for harm suffered *in fact*, because of the reactions — bigoted or otherwise — of those considered by the court to represent ordinary, hypothetical members of society'.[82] If the purpose of defamation law is to protect reputation and provide compensation for damage to reputation then arguably these functions should not be sacrificed in order to symbolically police social attitudes.[83] However, as Yatar recognises, these ends may not be mutually exclusive; treating imputations of homosexuality as legally capable of being defamatory allows courts to openly punish the kind of person who would 'pejoratively use… homophobic

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75 Lo, above n 62, 4.

76 Chan is confident that court decisions on defamatory meaning can 'have an effect on the community's moral attitudes' as they 'sen[d] out a signal as to how the community should view the imputation when the judgments of defamation cases are reported and disseminated through the mass media': Chan, above n 62, 11. However, mass media reporting on defamation cases in Australia has been characterised as selective, sensationalised and lacking sufficient detail: Philip Bell, 'Defamation and Reputation in the Australian Press' (2006) 28(1) *Australian Journalism Review* 125. On this basis, it is doubtful whether the signals that may be sent by court decisions actually reach the community, either in their original form or at all.

77 Richards, above n 61, 369.

78 See, eg, Australian Human Rights Commission, *Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination* (2011); Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights* (2015).

79 See, eg, *Equal Opportunity Act 1984* (WA) s3; *Anti-Discrimination Act 1991* (Qld) preamble.

80 Yatar, above n 61, 156.

81 Roger S Magnusson, 'Freedom of Speech in Australian Defamation Law: Ridicule, Satire and Other Challenges' (2001) 9 *Torts Law Journal* 269, 278-279.

82 Ibid 278.

83 Lo, above n 62, 3-4. Contra Lidsky, above n 70, 47, in which it is argued that '[d]ue to the unique nature of reputational harm, defamation's primary role may be symbolic rather than instrumental'.

epithets to… injure the reputation of the plaintiff'.[84] Regardless, whatever symbolic role the law may take on in this area, it might still be argued that it is subsumed by the functional role of the law in settling disputes, righting wrongs, and compensating for actual damage.

It is at this juncture between the symbolic and the functional aspects of defamation law that the most persuasive argument around this issue lies. Consider the kind of plaintiff who would be compensated under Australian law after successfully suing someone for defamation for being labelled homosexual. Given that the substantive truth of an imputation is a defence against liability for a claim of defamation, successful plaintiffs are presumably heterosexual.[85] Consider also what exactly they would be compensated for. That is, the loss of social status that is said to come with being publicly recognised as homosexual rather than heterosexual. Understood on these terms, it becomes clear why it would be thoroughly perverse for the law to provide compensation to a heterosexual person for the 'harm' of being thought of, and treated like, a homosexual person. Many homosexual people lead open and public lives and to regard such 'coming out' as a form of legally compensable 'harm' is profoundly disrespectful.[86] Even if the law were to recognise that pockets of homophobia and bigotry exist in the community, the protection offered by defamation law extends only to insulating heterosexual people from the negative effects of these attitudes and does nothing for the homosexual population who are far more routinely subjected to this. Unlike the mislabelled heterosexual plaintiff, homosexual people are not offered any compensation for the damage that they may have suffered at the hands of homophobic parts of society, and any 'harm' that their reputation could be said to have suffered cannot be restored by judicial pronouncement and is not compensated by damages.[87] Furthermore, the general idea that a social status change from heterosexual to homosexual is compensable 'reinforces a hierarchical social structure in which the heteronormative paradigm reigns supreme',[88] as this is treated as a harmful downwards shift rather than a neutral lateral movement. In this way defamation law constitutes homosexual people as 'second-class' citizens[89] or 'partial members' of society:[90] the legal equivalents of 'damaged' heterosexuals.

With this hierarchical model of sexuality in mind, it becomes less important whether or not a court should adopt a 'realist' or 'idealist' perspective when it comes to the recognition of homophobia within (pockets of) Australian society, and whether or not legally recognising an imputation of homosexuality should be read as legitimising or simply acknowledging the reality of bigoted attitudes. When the analytical focus shifts from the capacity of an imputation to damage a person's reputation towards providing compensation for that damage, law can no longer maintain the veneer that its general principles are facially neutral and simply reflect society's own pre-existing

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84 Yatar, above n 61, 156.

85 Or are at least adept at denying that they are homosexual in a court of law, such as in the successful actions for defamation brought by Liberace: Joan W Howarth, 'Adventures in Heteronormativity: The Straight Line from Liberace to *Lawrence*' (2004) 5 *Nevada Law Journal* 260.

86 And may also operate as a general deterrent to coming out in the future: Wrightson, above n 61, 677-678.

87 Indeed, as Baker notes, if anything 'gay people' pay a 'price' for defamation law protecting heterosexual plaintiffs from society's homophobia, namely the ongoing 'confusion of homosexuality with immorality' within the symbolic messages law sends by way of its treatment of imputations of homosexuality as having the capacity to defame: above n 24, 12.

88 Ward, above n 61, 760

89 Wrightson, above n 61, 678.

90 Baker, above n 24, 54.

homophobia. By compensating heterosexual people for the 'harm' of being mistaken for being homosexual, defamation law itself is complicit in constructing and propagating — not simply reflecting — a heterosexist sexual hierarchy.

In order to redress the negative symbolism and problematic sexual hierarchisation inherent in the way defamation currently works, this article contends that Australian law should no longer treat an imputation of homosexuality as capable of being defamatory. But what then for the heterosexual plaintiff who would no longer be able to claim compensation for any loss suffered as a result of being wrongly labelled homosexual? As important as the symbolic power of law is, Howarth warns us that where there is a 'degree of "real harm" at stake… it seems self-indulgent for courts to place sermonising on morality and rationality ahead of such harm.'[91] The tort of injurious falsehood (also known as malicious falsehood) could provide an alternative way to address this harm whilst still ensuring law operates in a symbolically egalitarian manner. A successful claim for injurious falsehood requires that the plaintiff 'establish that the [defendant] maliciously published a false statement about the [plaintiff], its property or business, and that actual damage resulted from such publication'.[92] Unlike defamation, this tort does not rely on a normatively-loaded test involving 'right-thinking' persons and thus would not depend on the character of social attitudes about homosexuality. Furthermore, the requirement that each plaintiff demonstrate that actual harm (typically understood as economic loss) has been suffered as a result of the falsehood means that this tort would not operate on the basis of any generalisation that all instances of public identification as homosexuality constitute a form of 'harm'. Because of its dissimilarities with defamation, this tort may allow the law to protect and compensate for actual harm done here to a heterosexual plaintiff whilst avoiding negative symbolic messaging about homosexuality. There is some confusion about the scope of this tort and whether it only protects against statements made about the plaintiff's proprietary or business interests or whether it also includes statements that reflect on the plaintiff more widely.[93] However, it has recently been accepted by Le Miere J in the Western Australian Supreme Court that there is a 'reasonable possibility that… a course of action will lie' for a claim for injurious falsehood in the wider sense.[94] If this were the case, then the mislabelled heterosexual plaintiff may not be left entirely without legal recourse if defamation law were to develop in the way suggested by this article.

In any event, it is not merely the inegalitarian symbolism of current defamation law that justifies no longer treating an imputation of homosexuality as capable of being defamatory. It could be argued in response to the discussion in this section that within contemporary Australian jurisprudence whatever symbolic effect that defamation law may have around homosexuality is diluted by the fact that a bare imputation of homosexuality is no longer recognised as sufficient to be defamatory. As such, any perception of judicial legitimisation of homophobia is undercut because the law does not recognise homosexuality itself as being defamatory absent some additional context or related true innuendo. However, as the next section of this article will show, the

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91 David Howarth, 'Libel: Its Purpose and Reform' (2011) 74(6) *Modern Law Review* 845, 851-852 n 40.

92 *Palmer Bruyn & Parker v Parsons* (2001) 185 ALR 280, [1] (Gleeson CJ). Slightly different formulations of the requirements are also provided: at [52] (Gummow J) and at [114] (Kirby J). On the tort of injurious falsehood see generally *Ratcliffe v Evans* (1892) 2 QB 524; *Radio 2UE Sydney v Chesterton* (2009) 254 ALR 606; Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (Thomson Reuters, 2011, 10th ed) 795-800.

93 See, eg, *Ballina Shire Council v Ringland* (1994) 33 NSLWR 680, 692-693 (Gleeson CJ); *Williams v Smith* [2012] WASC 371, [22]-[27].

94 *Williams v Smith* [2012] WASC 371, [29].

common law does not draw a neat line separating out imputations of homosexuality from their related context and true innuendo but instead continues to centralise homosexuality as a focus within the problematic operation of these imputations in practice.

B *Problems in Practice*

If a bare imputation of homosexuality is no longer recognised within Australian law as being defamatory then our attention should turn to how and in what ways the addition of contextual factors or related true innuendo somehow adds defamatory meaning. What emerges from an analysis of the ways in which these contextual factors and true innuendoes operate in practice is the conclusion that homosexuality is problematically centralised even though it is superfluous to defamatory meaning. A close look at two of the key cases establishes this point.

Firstly, in the case of *Rivkin v Amalgamated Television Services*[95] (discussed above) Bell J found that the following pleaded imputations were not capable of being defamatory on the basis that they simply contained a bare imputation of homosexuality:

> (c) That the plaintiff had engaged in homosexual intercourse with Gordon Wood;
> (d) That the police had reason to suspect that the plaintiff had engaged in homosexual intercourse with Gordon Wood.[96]

As a result, the plaintiff was granted leave to substitute an amended set of pleadings that introduced some additional factors to the imputations. Bell J accepted that the following substituted imputations were capable of being defamatory:

> (c) That the plaintiff engaged in homosexual intercourse with Gordon Wood, a man who was an employee of his, much younger than him, who viewed him as a father figure, upon whom he lavished gifts and who was engaged to be married;
> (d) That the police had reason to suspect that the plaintiff engaged in homosexual intercourse with Gordon Wood, a man who was much younger than him, an employee of his, who viewed him as a father figure, upon whom he lavished gifts and who was engaged to be married;
> (e) The plaintiff procured a male employee to have sexual intercourse with him by lavishing presents on him; an abuse of his wealth and power.[97]

On the face of these new pleadings it is difficult to see exactly how the presence of homosexuality materially contributes to the defamatory meaning of the imputations. If the defamatory meaning relates to the adulterous nature of having sex with a person who is already engaged to someone else,[98] then whether that adultery is heterosexual or homosexual seems beside the point. Similarly, if the defamatory meaning relates to an

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95 [2001] NSWSC 432.
96 Ibid [3].
97 Ibid [32]-[36].
98 An imputation of adultery may itself be capable of being defamatory under Australian law, see: F A Trindade, 'When is Matter Considered "Defamatory" by the Courts?' (1999) *Singapore Journal of Legal Studies* 1, 19-21; Baker, above n 24, 110-114, Rolph, above n 58, ch 5; *Cairns and Morosi v John Fairfax & Sons* [1983] 2 NSWLR 708.

employer's abuse of wealth and power to leverage sexual favours from an employee, then whether the employee is the same sex or a different sex again seems beside the point. Whilst Baker has identified that '[t]oday, any reference to homosexuality in pleaded imputations is likely to be combined with aggravating factors',[99] it seems that the opposite process is happening here: homosexuality is being used as an 'aggravating factor' that somehow bolsters imputations that are already defamatory. However, if the bare imputation of homosexuality is not itself defamatory, then it is manifestly unclear how tacking homosexuality onto another imputation adds anything. The issue of homosexuality seems superfluous to determining defamatory meaning here even though it is still centralised within the pleadings.

Secondly, in the case of *Gluyas v Canby*[100] (discussed above) Forrest J found that the imputation that Gluyas was homosexual was defamatory given the context of the case, drawing particular attention to the facts that Gluyas was married and that he maintained that he had never been in a homosexual relationship. Exactly how or why these extrinsic facts make the imputation of homosexuality defamatory is not set out in any detail. It is, however, possible to speculate about how an imputation of homosexuality could somehow give rise to a series of related defamatory suggestions or true innuendo. For example, that Gluyas is a liar, as he must be feigning his heterosexuality to those who know him. Perhaps the suggestion is that he is an adulterer, because if he is acting on his homosexuality then he must necessarily also be unfaithful to his wife. Or perhaps the suggestion is that he is a hypocrite, maintaining an outwardly 'heterosexual' façade and marriage whilst he is 'really' homosexual.[101] But regardless of the exact defamatory meaning that Forrest J had in mind, again it appears that although homosexuality is centralised within the legal consideration it is superfluous to determining defamatory meaning. One can be a liar, adulterer or hypocrite without being homosexual, and being homosexual does not necessarily make one a liar, adulterer or hypocrite. If the underlying defamatory meaning is simply that Gluyas is a liar, adulterer or hypocrite then homosexuality loses its importance within the legal equation because it is just the particular means through which these defamatory imputations are expressed in this case.

This point becomes clearer by engaging in a simple thought-experiment. Imagine a case that was identical in every respect to *Gluyas v Canby*[102] except that instead of being married to a woman and a publicly avowed heterosexual the imaginary plaintiff is instead in a de facto relationship with another man and is a publicly avowed homosexual. The only other relevant factual difference is that instead of imputing that he is homosexual, the abusive blog posts written about the imaginary plaintiff instead impute that he is heterosexual. In the context of such a case the imputation that the imaginary plaintiff is heterosexual raises the exact same series of suggestions, namely that he is a liar to those who know him, a possible adulterer who has cheated on his partner, and a hypocrite generally. The hypothetical judge in this thought-experiment case is tasked with determining whether the imputation of heterosexuality has the capacity to be defamatory here. If the judge were to conclude that it does not have the capacity to be defamatory, then this implicitly suggests that there is something inherently defamatory about an imputation of homosexuality *qua* homosexuality that is

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99 Baker, above n 24, 99.

100 [2015] VSC 11.

101 McNamara also muses that 'where a heterosexual person is said to be homosexual… it is serious because it suggests a breach of trust at an intimately personal level' in that the 'person has hidden from their partner something central to their personal identity and the very nature of their relationship': above n 6, 206.

102 [2015] VSC 11.

not present in an imputation of heterosexuality. However, if the judge were to conclude that it does have the capacity to be defamatory, then it becomes apparent that these imputations relating to sexuality are simply a neutral method by which the core defamatory meanings of lying, adultery and hypocrisy are expressed. On this account, an imputation of homosexuality would have the same capacity for being defamatory as an imputation of heterosexuality.

In addition to the practical concerns already raised about the superfluity of imputations of homosexuality in recent cases, there is another even more practical sense in which the ongoing jurisprudential scuffle about such imputations is divorced from case outcomes. Amidst the development of the common law around this issue through various hearings, rulings and appeals it is easy to lose sight of the fact that although judges decide the technical legal issue of whether or not an imputation has the capacity to be defamatory, it is typically ultimately up to a jury in these cases to decide whether an imputation is actually defamatory.[103] In at least two defamation trials Australian juries have found that although the communications complained of contained the imputation that the plaintiff was homosexual this imputation was not actually defamatory. The first of these trials was heard in 1999 and was connected to a series of cases involving the publication of 'The Gambling Man', a book that was alleged to impute, *inter alia,* that Arthur Harris was homosexual.[104] The second of these trials was the end-point of the proceedings addressed in *Kelly v John Fairfax Publications* and was heard in 2003.[105] Eisenberg characterises these decisions as part of a social shift towards a more relaxed approach to sexuality from the late twentieth century onwards, with this shift resulting in juries that 'are prepared to adopt a less po-faced approach to "middle-class morals"' around issues such as nonmonogamy and homosexuality.[106] Rolph more circumspectly describes these two cases as 'hardly a trend' but still enough to 'offer at least a small insight into prevailing community attitudes'.[107]

Picking up on this connection between community attitudes and jury outcomes, if juries are even broadly representative of community attitudes around homosexuality then we can expect that modern juries will continue to find that imputations of homosexuality are not actually defamatory. Between 2003 and the present day there has been nothing short of a dramatic shift in public sentiment towards understanding and accepting homosexuality. The data gathered in the Second Australian Study of Health and Relationships found that there was a 'greater acceptance of homosexual behaviour' in 2012-2013 than in 2002,[108] and the authors observed that 'attitudes towards homosexual behaviour were generally positive'.[109] Gallup polling over the last decade indicates that an ever-increasing majority of Australians think that gay or lesbian relations between consenting adults should be legal, and that since 2012 a majority of Australians believe that marriages between same-sex couples should be

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[103] Though the uncontested case of *Gluyas v Canby* [2015] VSC 11 is an exception to this as it was decided without a jury and by the judge alone.

[104] This earlier trial is referenced in the later related case of *Harris v 718932 Pty Ltd* [2000] NSWSC 784, [5-6].

[105] [2003] NSWSC 586. For details on the trial decision see Y C Kux, 'Robert Kelly v John Fairfax Publications Pty Ltd' (November 8 2003) *Gazette of Law & Journalism*.

[106] Eisenberg, above n 62, 27.

[107] Rolph, above n 58, 136.

[108] Richard O de Visser et al, 'Attitudes Toward Sex and Relationships: The Second Australian Study of Health and Relationships' (2014) 11 *Sexual Health* 397, 404.

[109] Ibid 400.

legally recognised as valid.[110] Given the general trajectory of social attitudes on this issue a jury today would be more likely than ever to reject the proposition that an imputation of homosexuality would lower someone in the eyes of 'right-thinking persons'. As a result, not only is there a current 'disparity between what judges think is capable of being defamatory and what society generally… think[s] is in fact defamatory',[111] but this disparity is broadening. In the 2003 trial regarding the matter considered in *Kelly v John Fairfax Publications*, counsel for the defendant posed the following rhetorical question to the jury: 'Would you like to be the Supreme Court jury in 2003 that says it's defamatory to say someone's gay?'.[112] The decision of that jury reflected a negative answer to this question in 2003, and it is much less likely that a jury would provide a positive answer to a similar question posed in 2016 or beyond.

The general trajectory of public attitudes around homosexuality also has significant implications for the application of the general test for defamation. The higher the proportion of the population that regards homosexual and heterosexual people as equal, the smaller the proportion of the population that would think less of a person because they were homosexual. There may come a tipping point where homophobia is so far outweighed and so far beyond general community attitudes that such a perspective should no longer be recognised as 'right-thinking' and should be excluded from consideration within defamation law. Some American commentators have argued that this tipping point has already been reached in their local jurisdictions, pointing to recent indicators of acceptance such as public opinion polling, the introduction of anti-discrimination legislation and the legalisation of same-sex marriages in various states.[113] A similar argument could be made in relation to Australia given the data around public opinion set out above and given Commonwealth legislative changes towards equalising the legal treatment of homosexual couples[114] and protecting homosexual people from discrimination.[115] If this argument were accepted, imputations of homosexuality would not need to go to a jury to determine whether they were actually defamatory because they would no longer even have the legal capacity to be defamatory.

IV CONCLUSION

The introduction to this article began with the observation that although the full, free and frank discussion of homosexuality currently appears to be an accepted aspect

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110 Gallup, *Gay and Lesbian Rights* (2016) <http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx>. Indeed, the most recent Fairfax/Ipsos polling shows that 68% of Australian voters support legalising same-sex marriages: Phillip Coorey, 'Fairfax/Ipsos Poll: Gay Marriage Support at Record', *Financial Review* (online) <http://www.afr.com/news/politics/fairfaxipsos-poll-gay-marriage-support-at-record-20150614-ghnjhi>.

111 Rolph, above n 58, 127.

112 Kux, above n 105.

113 See, eg, Bunker, Shenkman, and Tobin, above n 61; Miller, above n 61; Wrightson, above n 61. Though in regard to this final point the recent Supreme Court decision in *Obergefell v Hodges* 576 U. S. ____ (2015) has now overtaken these incremental and individual state-based developments as it requires all states to license and recognise marriages between two people of the same sex.

114 *Same-Sex Relationships (Equal Treatment in Commonwealth Laws- General Law Reform) Act 2008* (Cth); *Same-Sex Relationships (Equal Treatment in Commonwealth Laws-Superannuation) Act 2008* (Cth).

115 *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth).

of public discourse in Australia, defamation law still maintains certain legal restrictions on speaking openly about homosexuality. Circling back to this initial observation, the critical analysis undertaken in the body of this article suggests that these legal restrictions are unjustified. The restrictions themselves arise from the common law position that a communication that carries an imputation that a person is homosexual is capable of being defamatory. Whilst the common law has traditionally recognised that a bare imputation of homosexuality is inherently defamatory, some recent Australian cases suggest a shift towards recognising that this should be assessed on a case-by-case basis and that such an imputation will only be capable of being defamatory if accompanied by certain contextual factors or related true innuendo. In contrast to the common law position, this article has argued that imputations of homosexuality should never be regarded as capable of being defamatory and it has reached this conclusion on the basis of both symbolic and practical reasons.

Symbolically, messages of inequality and disrespect are contained in any legal position that recognises that an imputation of homosexuality is capable of being defamatory. This position signals judicial endorsement of homophobia as 'right-thinking' and envisions such bigotry as a legally recognisable part of the Australian community. By recognising that imputations of homosexuality constitute a legal harm and compensating a successful (heterosexual) plaintiff, defamation law constructs a heterosexist hierarchy of sexualities that discriminates against homosexual people by treating them as second-class citizens and the legal equivalent of a 'damaged' heterosexual. The tort of injurious falsehood may be better positioned than defamation law to respond to the reality of actual harm suffered by mislabelled heterosexual plaintiffs in a way that avoids causing symbolic harm to homosexual people generally.

Practically, homosexuality itself has been largely superfluous to determining defamatory capacity within recent cases involving communications about homosexuality. In such cases homosexuality appears simply to be tacked on to already defamatory imputations, or merely to provide a neutral method of establishing other related imputations that are themselves defamatory. In addition, the practical consequences of any legal decisions about the defamatory capacity of imputations of homosexuality are limited by recent trial outcomes in which juries have found that such imputations are not actually defamatory. Given the general shift in public attitudes towards the acceptance of homosexuality this gap between technical legal capability and practical actuality is not likely to be bridged and is likely only to widen further.

For these reasons, Australian law should no longer treat imputations of homosexuality as capable of being defamatory. The historical common law position is impractical, at odds with important contemporary principles such as equality and non-discrimination, and increasingly divergent from public sentiment. The more recent common law trends that subtly alter this flawed historical common law position do not provide an adequate solution to these fundamental problems with this area of law.