The New Public Interest Defence to Defamation

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One of the most significant reforms to Australia's uniform defamation laws due to take effect on 1 July 2021[1] will be the introduction of a new public interest defence. In this article, we consider how the new defence will operate and whether it is likely to live up to the aim of providing protection for the media and others in relation to the publication of matter in the public interest which would otherwise give rise to liability in defamation.

Background

A new public interest defence will be enacted in a new section 29A to be inserted into the uniform defamation provisions. The new defence is aimed at remedying the shortcomings of the current statutory qualified privilege defence.

The current statutory qualified privilege defence was introduced as part of the uniform defamation provisions in 2005, based on the defence in section 22 of the *Defamation Act 1974* (NSW). In 2005, the NSW Attorney-General at the time said that statutory qualified privilege was a particularly important defence, providing protection in a range of situations.

Despite the initial optimism, the statutory qualified privilege defence proved to be an abject failure, having been "frequently pleaded but rarely successful".[2] The defence has almost never been successfully argued by a mass media defendant since it was introduced, in the absence of a successful alternative substantive defence or where the imputations contended for by the plaintiff were found not to be conveyed.[3]

It has been said that statutory qualified privilege's requirement of reasonableness "lives in the shadow of truth",[4] given that in practical terms, satisfying the requirement of reasonableness often requires the truth of imputations to also be made out. Consequently, it has been widely acknowledged, including by various state governments, that the current section 30 defence does not adequately protect public interest journalism,[5] or guard against the potential "chilling effect" defamation laws have on debates of matters of legitimate public interest.[6]

Section 29A

The new public interest defence in section 29A provides a complete defence to the publication of "defamatory matter" if the defendant proves that the matter concerns an issue of public interest, and the defendant reasonably believed that the publication of the matter was in the public interest (s 29A(1)). In determining whether the defence is established, the tribunal of fact (whether a jury or the judge) must take into account all of the circumstances of the case (s 29A(2)).

Section 29A(3) then sets out a list of factors that the Court *may* take into account in determining whether the defence is made out. Those factors are similar to the factors that are currently contained in section 30(3) of the uniform laws, which were adapted from the United Kingdom case of *Reynolds v Times Newspapers Ltd*,[7] concerning a comparable defence of qualified privilege under the common law of the UK.

Section 29A modelled on the UK public interest defence

The new defence is modelled on section 4 of the *Defamation Act 2013* (UK). Key differences between the UK defence and section 29A include the omission of a statutory "reportage" defence, the reference in the new provision to "defamatory matter" rather than the "statement complained of" referred to in the UK version, and that s 29A contains the list of adapted *Reynolds*-style factors which have not been included in the UK version of the defence.

There has been surprisingly little case law addressing the UK public interest defence in the eight years since its enactment. In the leading decision in *Serafin v Malkiewicz*,[8] the UK Supreme Court held that although the common law defence stated by the House of Lords in *Reynolds* was abolished by section 4(6) of the *Defamation Act 2013* (UK), the *Reynolds* defence and the section 4 defence are not materially different. In particular, the Court held that the *Reynolds* factors should not be seen as a checklist but as a non-exhaustive list of factors to which reference ought to be made, in particular in order to check whether a preliminary conclusion should be confirmed.

In arriving at that view, Lord Wilson in *Serafin* affirmed the statements of Lady Justice Sharp in the UK High Court decision of *Economou v De Freitas*,[9] that although the new defence directs attention to the publisher's belief (which Wilson LJ notes should have referred to the publisher's *reasonable* belief), the

1 The amendments to the uniform defamation provisions are due to take effect on 1 July 2021 in NSW, South Australia, Victoria and Queensland, with the other Australia states and territories expected to follow.
2 David Rolph, 'A critique of the national, uniform defamation laws' (2008) 16(3) *Torts Law Journal* 207, 230.
3 See, for example, *Herron v HarperCollins Publishers Australia Pty Ltd (No 3)* [2020] FCA 1687.
4 Kim Gould, 'Statutory qualified privilege succeeds, but too early for the media to go "dancing in the streets"' (2011) 16(3) *Media And Arts Law Review* 241, 260.
5 Hansard, NSW Legislative Assembly, 29 July 2020, Second Reading Speech to the Defamation Amendment Bill 2020 (NSW).
6 Hansard, Queensland Parliament, 20 April 2020, Second Reading Speech to the Defamation (Model Provisions) and Other Legislation Amendment Bill 2021 (Qld).
7 (2001) 2 AC 127.
8 *Serafin v Malkiewicz and others* [2020] UKSC 23, [2020] WLR 2455, [2020] 4 All ER 711.
9 *Economou v De Freitas* [2018] EWCA Civ 2591, [2019] EMLR 7.

rationale for each of the defences is not materially different and the principles which underpinned the *Reynolds* defence (namely, that a fair balance should be held between freedom of expression on matters of public interest and the reputation of individuals[10]) are also relevant to the interpretation of the statutory defence.[11]

Application of the new defence

Opening the floodgates to irresponsible journalism?

It has been argued that there is a real danger that the new public interest defence will result in journalists or "pseudo-journalists" irresponsibly and unreasonably publishing untrue stories about individuals that would not be published under traditional journalistic standards.[12]

But this contention ignores the requirement that it must be reasonable *in all the circumstances* for the defendant to have formed the relevant belief. For example, the extent to which a media defendant complied with the applicable professional standards and ethical obligations will very likely be taken into account in considering the reasonableness of their belief. The Court will in fact have to take any and all relevant matters into account in determining whether the defendant's belief was reasonable, including any of the factors in s 29A(3) that may be relevant in the circumstances.

By contrast, it has also been suggested that the inclusion of the series of factors in section 29A(3) will result in the new defence being treated virtually the same way as the current section 30(3) considerations, as requiring a "counsel of perfection" (notwithstanding Justice White's comments to the contrary in *Hockey v Fairfax Media Publications*[13]), or as a series of "trip-wires" or hurdles, each of which must be overcome by the defendant in order to make out the defence.[14]

Given the uncertainty as to how the defence will be applied by the tribunal of fact (given that the new provision expressly provides that it is for the jury (where applicable) to determine whether the defence is established[15]), it seems unlikely that there will be any significant loosening of journalistic standards, at least in the short term. With respect to non-mass media publications, the standard of discourse evident on social media is unlikely to drastically deteriorate because of the availability of a public interest defence, given that it would be very difficult to argue that the bulk of the more objectionable material published on social media was published in circumstances in which the publisher reasonably believed that its publication was in the public interest.

The requirement that the publisher's belief must be reasonable will require the tribunal of fact to engage in an assessment that includes both subjective and objective elements. For the defence to succeed, not only must the jury find that the defendant did in fact hold the relevant belief, but that holding that belief was reasonable, from the perspective of a reasonable observer.

Publication of defamatory matter

The new provision provides a defence to the publication of "defamatory matter". This differs from the UK version which refers to the "statement complained of". This departure from the wording of the UK defence may have been for the sake of consistency with the other statutory defences (other than justification and contextual truth, which relate to the imputations carried by the matter and complained of by the plaintiff). Nevertheless, the reference to "defamatory matter" will likely mean that both limbs of the defence will be considered through the lens, or prism, of the imputations ultimately found to be conveyed by the matter complained of.

The tribunal of fact will be required to determine both the extent to which the matter complained of (insofar as it conveys defamatory imputations) concerns a matter of public interest, and the extent to which the defendant's belief that it was in the public interest to publish the matter was reasonable (insofar as it conveyed those imputations). Similarly, in the context of the honest opinion defence, in *Channel Seven Adelaide Ltd v Manock,* the High Court held that the meaning pleaded by the plaintiff is relevant to the defence, not least because it is the meaning found by the Court that is to be scrutinised for its fairness.[16]

However, the form of the imputation should not be treated as being synonymous with the matter complained of, nor should it be permitted to "hijack" the task of determining whether the defence applies.[17] As is the case with the honest opinion defence, the inquiry that the tribunal of fact will be required to undertake in determining whether the new s 29A defence applies is contextual in nature, and not focused solely on the imputations conveyed by the matter complained of.[18]

10 *Economou* at [110].
11 *Serafin* at [68], citing *Economou* at [86].
12 *Briefing Paper from Defamation Lawyers Regarding the Proposed Changes to the Uniform Defamation Law 2005,* Sue Chrysanthou & others, 1 April 2021.
13 [2015] FCA 652; 237 FCR 33
14 *Supplementary submissions to the Council of Attorneys General in relation to the Draft Model Defamation Amendment Provisions and Recommendations,* Banki Haddock Fiora, 24 January 2020; *Submission to the Council of Attorneys-General Defamation Working Party Regarding the Model Defamation Amendment Provisions 2020 (Consultation Draft),* Australia's Right to Know Coalition, 24 January 2020.
15 Section 29A(5).
16 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245 per Gummow, Hayne and Heydon JJ [83]
17 *Harbour Radio Pty Ltd v Ahmed* [2015] NSWCA 290; 90 NSWLR 695; *Feldman v Polaris Media Pty Ltd as trustee of the Polaris Media Trust Trading as the Australian Jewish News (No 2)* [2018] NSWSC 1035.
18 *O'Brien v Australian Broadcasting Corporation* [2016] NSWSC 1289 at [45] [46].

What is in the public interest?

One of the guiding factors set out in the new defence is the importance of freedom of expression in the discussion of issues of public interest (s 29A(3)(i)). The principles arising from the earlier cases in relation to what constitutes a matter of public interest are likely to be relevant to the consideration of the new public interest defence.

It is generally accepted that defining "public interest" is a notoriously difficult task, although it has been accepted by the Courts that *"there is a world of difference between what is in the public interest and what is of interest to the public"*.[19]

What constitutes public interest can be broadly or narrowly construed,[20] and an infinite variety of matters may be of public interest.[21] Nevertheless, Courts often prefer a concrete articulation of what constitutes a matter of public interest.[22]

An important formulation of what constitutes a "subject of public interest" was enunciated by the High Court in the 1996 decision of *Bellino v Australian Broadcasting Corporation*,[23] where the majority stated (in the context of a fair comment defence):

> A subject of public interest meant the actions or omissions of a person or institution engaged in activities that either inherently, expressly or inferentially invited public criticism or discussion.

More recent cases have continued to apply the formulation from *Bellino* as to what constitutes a subject of public interest, not only in the context of a fair comment or honest opinion defence, but more broadly.[24] For example in *Green v Schneller*, Justice Simpson accepted that proceedings in Courts probably of themselves and without more fall into the category of matters of public interest, notwithstanding that the focus must be on whether the imputations established relate to that matter of public interest.[25]

Does the defence go far enough?

The Defamation Working Group declined to codify the category of common-law qualified privilege known in the UK as "reportage", which has now been enshrined in section 4(3) of the UK Defamation Act. The reportage defence arises where it is not the content of a reported allegation that is of public interest, but the fact that the allegation has been made.[26] Where the defendant has taken proper steps to verify the making of the allegation, they are protected by the defence of reportage. It is perhaps regrettable that in undertaking once-in-a-generation reform to strike a better balance between providing fair remedies for a person whose reputation is harmed by a publication and ensuring defamation law does not place unreasonable limits on freedom of expression about matters of public interest,[27] the opportunity to introduce reportage into Australian law was not taken.

In the consultation phase of the reform process, several stakeholders called for a standalone requirement to be included in the public interest defence for the Court to have regard to the importance of the principle of freedom of expression, in considering whether the defence applies. It was noted by stakeholders that the objects of the uniform defamation provisions emphasise the importance of freedom of expression, and in particular the discussion of matters of public interest, but that the principle is not mentioned anywhere else in the uniform laws and the Court is not at any point required to take the principle into account.

There was also a strong view expressed by stakeholders during the consultation process that the new defence should not include the *Reynolds*-style factors, because their inclusion would likely encourage a "check-list" approach, which had undermined the effectiveness of the statutory qualified privilege defence. In *Serafin,* Lord McNally quoted the then-Minister responsible for the *Defamation Act 2013* (UK), saying that the omission from section 4 of the *Reynolds* factors was a deliberate decision to allow "flexibility", whereby those factors may well be relevant to determining the extent to which the belief held by the defendant was reasonable.

Conclusion

The new public interest defence is certainly an important reform, which seeks to strike a better balance between freedom of expression on matters of public interest and the protection of a person's reputation. There is disagreement, however as to how successfully that balance has been struck, given the strongly held views among stakeholders, on the one hand that the new defence may open the floodgates to irresponsible journalism, and on the other that it will be plagued with the same difficulties as the current statutory qualified privilege defence and provide limited protection for the publication of defamatory matter in the public interest. In any event, it will be some time before it becomes clear precisely how the new defence will be interpreted by the Courts.

19 *Lion Laboratories Ltd v Evans* [1985] QB 526, at 553, cited in *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183.
20 *Allworth v John Fairfax Group Pty Ltd* (1993) 113 FLR 254 at 262 per Higgins J, citing *London Artists Ltd v Littler* [1969] 2 QB 375 at 391 per Lord Denning MR.
21 *John Fairfax Publications Pty Ltd v Hitchcock* (2007) 70 NSWLR 484; [2007] NSWCA 364 at 487 per Ipp JA.
22 see *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183 at 220.
23 *Bellino* at 215.
24 For example, *Green v Schneller* [2000] NSWSC 548; *Hitchcock v John Fairfax Publications Pty Ltd* [2007] NSWSC 7; *Eustice v Channel Seven Adelaide Pty Ltd & Ors* [2020] SASC 4; *Noone v Brown* [2019] QDC 133; *Habib v Radio 2UE Sydney Pty Ltd & Anor (No 4)* [2012] NSWDC 12; *Haddon v Forsyth* [2011] NSWSC 123; *Stead v Fairfax Media Publications Pty Ltd* [2021] FCA 15 at [141].
25 *Green* at [27].
26 *Flood v Times Newspapers Ltd* [2012] UKSC 11.
27 Hansard, NSW Legislative Assembly, 29 July 2020, Second Reading Speech to the Defamation Amendment Bill 2020 (NSW).