Defamation in the Public Interest: A New Defence to Defamation in NSW

Dominic Keenan

Introduction

On 6 August 2020, the NSW Parliament passed the *Defamation Amendment Act 2020* (NSW) which introduces a public interest defence to defamation in section 29A. The reform is part of a national effort to uniformly update Australia's defamation laws, with other jurisdictions likely to follow suit.[1] The defence is intended to provide publishers with greater protection when reporting on matters of public interest, filling the gap left by qualified privilege.

The new provision has been modelled on section 4 of the *Defamation Act 2013* (UK), which has been successful in providing media organisations with a functional public interest defence. A number of differences in the text and context of the provision import considerable uncertainty into the precise operation of the defence in NSW. Due to these differences, Australian courts are likely to take an approach that places greater weight on protection of reputation than has been seen in the UK. Consequently, the NSW provision may be more difficult to rely upon successfully than its UK counterpart. Despite this, the public interest defence will provide publishers with a more flexible defence than qualified privilege.

The public interest defence

The defence as enacted in NSW consists of two elements. First, the publisher must prove that the defamatory matter concerns an issue of 'public interest'.[2] Once this is established, the publisher must then prove that they 'reasonably believed' that publication of the defamatory matter was in the public interest.[3] These two elements call for both an objective and subjective analysis of the circumstances in which the defamatory matter was published.

The provision closely mirrors the UK defence which consists of the same two elements, similarly worded. Under each provision, the court must take into account all relevant circumstances in determining whether the publisher 'reasonably believed' that the publication was in the public interest.

Issues of public interest

The concept of 'public interest' has been broadly construed in the UK. Courts have construed the term to mean matters relating to the 'public life of the community' which necessarily includes the administration of government, major institutions and in some circumstances, companies.[4] While private matters are excluded, other issues of public concern like the commission of serious crimes, for example, may fall within scope.[5] The UK's broad and inclusive approach to public interest promotes the availability of the defence by widening its applicability.

From an interpretative standpoint, it is likely that Australian courts will seek consistency with other pre-existing provisions in Australian defamation regimes. In NSW, the defence of honest opinion includes a public interest requirement.[6] A relatively expansive approach has been taken to public interest in that defence, which covers matters that legitimately interest segments of the public or activities that 'inherently… invite public criticism or discussion'.[7] A similarly expansive approach to public interest has also been taken to the common law defence of fair comment.[8] On this basis, Australian courts are likely to take a broad approach to public interest that extends beyond government and political matters to issues of legitimate interest to the public at large. This suggests that the public interest defence will also be widely applicable to a range of publications and topics, as seen in the UK.

Reasonable belief

The key textual difference between the NSW and UK provisions concerns the assessment of whether the publisher's belief was reasonable. The UK provision includes a single mandatory consideration. A court in the UK must make 'such allowance for editorial judgment as it considers appropriate'.[9]

In contrast, section 29A(3) sets out a list of nine non-mandatory considerations, which broadly reflect

1 The Council of Attorneys-General supports the enactment of the *Model Defamation Amendment Provisions 2020* by each State and Territory. At the time of writing, South Australia has already enacted the model amendments.

2 *Defamation Amendment Act 2020* (NSW) s 29A.

3 Ibid.

4 *Serafin v Malkiewicz & Ors* [2019] EWCA Civ 852, [33] (Lord Justice Haddon-Cave) citing *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 176-177 (Lord Nicholls).

5 See eg, *Economou v de Freitas* [2018] EWCA Civ 2591.

6 *Defamation Act 2005* (NSW) s 31.

7 *Tabbaa v Nine Network Pty Ltd* [2018]NSWSC 468, [34]-[35] (Fagan J).

8 See eg, *Bellino v Australian Broadcasting Corp* (1996) 185 CLR 183; *Wake v John Fairfax & Sons Ltd* [1973] 1 NSWLR 43.

9 *Defamation Act 2013* (UK) s 4(4).

the factors identified in the 2001 case *Reynolds v Times Newspapers Ltd*[10] (known as the *Reynolds* factors):

- the seriousness of the defamatory imputation;
- the extent to which the publication distinguishes between allegations and proven facts;
- whether it was in the public interest to publish the matter expeditiously;
- the sources of information and their integrity;
- whether there is a good reason to keep the name of an anonymous source confidential;
- whether the defendant was given a right of reply;
- any steps taken to verify the information; and
- the importance of freedom of expression.

These textual differences raise a question as to how much guidance UK authorities truly provide in the Australian context. There is significant uncertainty concerning the weight Australian courts will give to the listed factors and the way in which they will be applied, especially to non-traditional publishers. While the factors are non-mandatory, they are likely to create some minimum threshold of reasonableness that varies according to the publisher. Precisely how these factors are considered by the courts, and the impact on the availability of the defence, remains to be seen.

This is not to say that UK authority provides no guidance as to how Australian courts might approach reasonable belief. While section 4(6) of the UK provision expressly abolishes the *Reynolds* defence, the factors set out in it remain important in assessing whether the publisher has reasonable belief.[11] Despite the relevance of these factors, UK courts have stepped away from the strict checklist approach previously used and have adopted considerable flexibility in assessing reasonable belief.

In NSW, the non-mandatory language and crossover between the enumerated factors and *Reynolds* factors is sure to give publishers some comfort. Given these similarities, it is likely that Australian courts will take a flexible approach similar to that seen in the UK, even if the defence does operate somewhat differently.

Balancing freedom of expression and protection of reputation

Fundamentally, the public interest defence seeks to find a balance between freedom of expression and protection of reputation. In the UK, freedom of expression is a right under Article 10 of the *European Convention of Human Rights*. Article 10 informs the interpretative landscape in which the UK provision has been construed. UK courts have expressly recognised that 'the approach to [the public interest defence] must be consistent with the protections for freedom of expression provided by Article 10'.[12] While it is difficult to quantify the impact of Article 10 on the interpretative lens of judges, it is commonly referred to throughout cases in which the defence is relied on.[13] The presence of an enshrined freedom of expression in the UK is sure to shift the balance in favour of freedom of expression.

In contrast, Australia has no express right to freedom of expression. An implied right to political communication has been inferred from the structure of the Constitution,[14] but this is a substantially more limited right that applies only to political and governmental matters. Freedom of expression is one of the non-mandatory factors that courts may take into account. However, they are explicitly not required to do so.[15] This calls into question the weight with which Australian courts are likely to consider freedom of expression when assessing reasonable belief.

The lack of an enshrined explicit right to freedom of expression is sure to impact the way that Australian courts balance these competing interests. It is prudent to expect that Australian courts will reach a balance that favours protection of reputation to a greater degree than in the UK. In practice, this may mean that the availability of the defence is more greatly restricted in the Australian context, particularly where the publication does not concern government or political matters.

Conclusion

The introduction of a new public interest defence is a significant development in Australian defamation law. Departures from the text of the UK provision have created uncertainty as to precisely how courts will assess the reasonable belief and apply the enumerated factors. Similarly, with no right to freedom of expression, NSW courts are likely to place more weight on protection of reputation than seen in the UK. Whether these factors limit the availability of the defence remains to be seen. Despite this, the defence will be a welcome change for publishers and is likely to provide considerably more protection than was previously available at common law or under statute.

10 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

11 *Economou v de Freitas* [2018] EWCA Civ 2591, [75]-[86] (Lady Justice Sharp); see also *Shikil-Ur-Rahman v ARY Network Ltd* [2016] EWHC 3110 (QB), [50] (Sir David Eady).

12 *Burgen MP v News Group Newspapers & Anor* [2019] EWHC 195 (QB) [82] (Justice Dingemans).

13 See eg, *Serafin v Malkiewicz & Ors* [2019] EWCA Civ 852; *Yeo v Times Newspapers Ltd* [2015] EWHC 209 (QB); *Doyle v Smith* [2018] EWHC 2935 (QB); *Economou v De Freitas* [2018] EWCA Civ 2591; *Turley v Unite the Union* [2019] EWHC 3547 (QB).

14 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

15 *Defamation Amendment Act 2020* (NSW) s 29A(4)(a).