

Uniform Defamation Laws in Australia: Have they struck a better balance

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*A new uniform defamation regime now operates in Australia. This paper canvasses the Uniform Defamation Laws focusing on the defence of qualified privilege and its capacity to protect mass media publications in the public interest. Whilst the uniform approach expands the circumstances when a fair report of public proceedings will be protected, the statutory qualified privilege appears to borrow from two different approaches: the UK approach articulated in *Reynolds v Times Newspapers Limited and Others* and the approach outlined in Section 22 of *Defamation Act 1974 (NSW)*. Drawing on case law and analysis of the key approaches to statutory privilege, this paper evaluates the current approach to statutory qualified privilege. The paper questions whether the UDA statutory qualified privilege will ultimately censor publications in the public interest.*

Introduction

Australia's defamation laws have undergone extensive reform, with each state and territory parliament passing uniform legislation (with some minor variations amongst the states and territories). The new arrangement, which came into effect this year, does three key things: It repeals previous legislation relating to defamation; it reinstates the common law of defamation in each state and territory and finally it specifies a set of common legislative defences. Thus the laws in each state and territory of Australia are essentially the same. The enactment of Uniform Defamation Acts (UDAs) is the culmination of several failed attempts to consolidate these laws which have historically been seen as having a potentially chilling effect on media publications in Australia (Dent & Kenyon 2004, p. 5) and one of the greatest obstacles to investigative journalism (Schultz 1998).

Now questions are being raised whether the laws have swung too far in favour of defendants, particularly the media. According to barrister Richard McHugh (in Kux, 2006, p. 2) the uniform defamation regime will be "overwhelmingly favourable" to defendants. Much of the concern arises from the application of the truth alone defence, which could "allow the media to have a field day, invading everyone's privacy and publishing rude photos without a person's consent" (Kux 2006, p. 1). Attempts have been made to allay fears of mass media invasions of privacy, with academic David Rolf (in Kux 2006) cautioning that the truth alone defence has operated effectively in a number of states before the enactment of the uniform laws. But clear distinctions were also drawn between the concepts of privacy and reputation, with Rolf cautioning that defamation law should not be used as "de facto protection" of privacy.

There appears to be a consensus of opinion that the UDAs do liberalise Australia's previously restrictive defamation laws. This paper argues however, that the new version of statutory qualified privilege adopted under the uniform scheme is potentially problematic for journalists seeking to report in the public interest. The new defence, like section 22 of the *Defamation Act New South Wales (1974)*, focuses on the relationship

between a publisher and its audience and the reasonableness of publication rather than the public interest being addressed in the publication. To support this claim, this paper explores the uniform defence of statutory qualified privilege. First it maps the key changes to the defamation law, identifying the overall aims and objectives of this body of law. It then outlines the key approaches to qualified privilege and then draws conclusions relating to the “balance” struck by the new form of statutory qualified privilege applicable in Australia.

Background to UDAs

It is well known that defamation law protects an individual’s right to reputation by providing an action against anyone involved in the publication of defamatory material other than innocent disseminators. This means authors, editors and publishers are potentially liable for the publication of material that can harm an individual’s reputation in a particular manner (set out below). Until this year, each state and territory had its own unique defamation laws. Publications that were read, seen or heard in more than one state were subject to the law of the place where the material was comprehended. Thus liability of the publishers was determined by the law of the place where the material was read seen or heard. The practical effect was that journalists, and readers alike, were exposed to different legal standards for publications in every state and territory in Australia.

The UDAs create a more stable environment for publishers and people who are the subject of publication in Australia by offering a uniform definition of what is defamatory, clarifying when a cause of action arises and outlining the defences which can be relied on by publishers to justify the publication of defamatory material. The Acts reinstate the common law approach to determining whether material is defamatory. Material that exposes the person claiming to be defamed to hatred, contempt or ridicule; or lowers the person claiming to be defamed in “the estimation of a right thinking member of society” or causes the person claiming to be defamed to be shunned or avoided without any moral discredit on his/her part will be defamatory. Any individual whose reputation has been harmed in this way can bring a civil action against a publisher. Previously, any corporation whose reputation had been similarly harmed could sue. However, the uniform defamation laws now prevent corporations (except those with fewer than ten employees) from instituting defamation proceedings. Corporations must seek redress for unjustified attacks on their reputations through other avenues such as sections 52 and 53 of the *Trade Practices Act 1974* (and equivalent state Fair Trading Laws), which outlaw the publication of misleading and deceptive conduct and false representations. Actions may also be instituted in the tort of passing off and the tort of injurious falsehood.

The most significant changes to defamation law, arising from the enactment of uniform legislation, relate to the defences that negate a publisher’s liability for publication of defamatory material. The defences are the mechanisms by which defamation law gives effect to countervailing public interests that justify the publication of material that harms an individual’s reputation.

Before the enactment of the uniform scheme three key defences were available to publishers; namely truth or truth and public benefit/interest, fair comment and privilege.

The position in relation to all of these defences has now changed. The UDAs specify a publisher has a complete defence to the publication of defamatory material if the material published is *substantially true*, regardless of its public interest or public benefit. The uniform scheme also clarifies the situation where a person pursues an action on multiple imputations, providing the defence of contextual truth.

The defence of fair comment has been revised as a defence of honest opinion. The UDAs identify three situations where there are defences relating to publications expressing an opinion that is honestly held by the maker, namely the opinions expressed by the defendant, opinions expressed by the defendant's employee or agent and opinions expressed by a commentator other than the defendant or an employee or agent.

One of the most significant reforms emerging from the uniform scheme relates to the privilege defences. Privilege acknowledges overriding public interests, which are fundamental to the common convenience and welfare of society, which permit the publication of untruthful defamatory material. Given the object of the defence is to promote the welfare of society, privilege can be either absolute or qualified. Absolute privilege offers a complete shield to the publication of defamatory material. It attaches to occasions of public significance, which are outlined in the uniform acts and cover legal, parliamentary, quasi-legal and quasi-parliamentary proceedings. Because of the potential harm that can arise from such extensive privilege the categories of absolute privilege are quite limited.

Qualified privilege, on the other hand, is a conditional defence that arises only in certain situations. As the majority judges in *Bashford v Information Australia Newsletters* (2004, par 22) noted, qualified privilege does not give rise to a licence to defame.

It denies the inference of malice that ordinarily follows from showing that false and injurious words have been published. If the occasion is privileged the further question which arises is whether the defendant has fairly and properly conducted himself in the exercise of it.

There are several occasions of qualified privilege including where a person has a social, moral or legal obligation to publish untruthful information that is capable of defaming an identifiable individual. This is known as common law or duty interest privilege, which has rarely been available to mass media publications unless the publication is responding to public criticism, correcting previously incorrect information; or warning of a national or local disaster. Common law privilege has been the subject of considerable interpretation in recent years, culminating in 1997 with the recognition of what has become known as the *Lange privilege* where 'reasonable' publications concerning political and government matters are seen as attracting qualified privilege (*Lange v ABC* 1997). In addition to common law privilege and the expanded *Lange* privilege, there are statutory modifications to common law privilege, which are described as statutory common law privilege.

This paper questions whether the amendments to statutory privilege as enacted through the UDAs strike a 'better' balance to give effect to the overall objectives of defamation

law. Before analysing the amendments to qualified privilege defences in the UDAs however, we must elaborate from whose perspective the question of balance should be determined.

Balancing interests in whose favour?

It is well recognized that the tort defamation balances two interests: the right of an individual in protecting their reputation and the public interest in accessing truthful or essential information. It does this by outlawing the publication of defamatory material whilst identifying certain circumstances where the publication of such material can be permitted. These aims are often couched in terms of a contest between individual rights and the public right to know or the right to freedom of expression. An analysis of reputation reveals, however, that defamation protects more than an individual's right to his/her good name. There is a public interest in protecting reputation, which has not been clearly articulated.

Reputation, until recently was an under-researched aspect of defamation law. The nebulous concept is commonly defined as “the opinion that people in general have about someone or something, or how much respect or admiration someone or something receives, based on past behaviour or character” (Cambridge Dictionaries Online 2005). Therefore, reputation is how others' perceive us based on an evaluation of our individual characteristics and our actions (see Mahon 2002, pp. 417-418). Thus reputation encompasses a range of interests including the property value of a person's reputation as well as “the respect (and self respect)” a person needs to be a fully functioning member of society (Baker (a) 2003, p. 7). Defamation law therefore protects a person's right to be him or her self and to reach self-realisation within society. Thus there are public interest dimensions to protecting an individual's reputation because it promotes self-realisation at individual (individual interests) and social levels (public interest).

Importantly, however, recent studies suggest (See Baker 2003 a, b; Bell 2006) that defamation law has ignored the importance of public attitudes with respect to both building reputations and the destruction of them. Baker's research into public attitudes towards harmful publications revealed what he termed “a third person effect” where “people tend to think of themselves as being more tolerant than the average person” (University of NSW 2004, p. 1). Baker states:

Only 18 percent of people said that they would think less of a man for being gay. But 71 percent said they thought the ordinary reasonable person would think less of him. 30 percent said they would think less of someone for having criminal record, while 77 percent thought the ordinary reasonable person would judge such a person badly (University of New South Wales 2004, p. 1)

These findings led Baker to conclude that “misperceptions of community values consistently favour the plaintiff at the expense of the media”. In a subsequent study, Bell argued (2006) that these misperceptions of popular understandings of reputation were not corrected in media reporting of defamation, resulting in a widening gap developing between populist and legal understandings of the concept. This gap has not been

addressed by the UDAs, and nor is it corrected in the media. This suggests that the *public* interest in protecting reputation – the very justification for having defamation law – is not adequately protected in the way the law is interpreted. This raises questions about the desirability of maintaining this body of law which is protecting a legally constructed fiction relating to reputation. It also highlights the fact that when evaluating the effectiveness of the UDA reforms to strike “a better balance”, the question must be assessed at two levels: first the tort’s capacity to protect the individual interests of a person to protect their reputation. Secondly, the question of balance must address the public interest in protecting reputation, which studies reveal has been misconstrued within the courts. These studies suggest that the public interest in protecting reputation will be better served by adopting a subjective, rather than objective, test when determining the question of defamatory meaning. This approach would minimize the risk of the third person effect identified by Baker (2003; University of Sydney 2004).

The question remains whether the defence of statutory qualified privilege redresses some of the censoring effect of the current approach to defining defamation by permitting media publications in the public interest.

Qualified privilege at common law

Qualified privilege recognises that sometimes it might be necessary to publish untruthful defamatory statements in order to properly discharge one’s legal social or moral obligation or to “protect one’s own legitimate interests” (Gillooly 2004, p. 109). Where the publisher has a social, moral or legal obligation to publish information and the recipients have a reciprocal interest to receive such information, the common law of defamation recognises that untruthful statements that have a tendency to harm an individual’s reputation can be published with immunity provided such publications are not malicious. The rationale for recognising the defence of qualified privilege was expressed by the court in *Horrocks v Lowe* (1975):

The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has ... to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue. With some exceptions ... the privilege is not absolute but qualified. It is lost if the occasion which gives rise to it is misused. For in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit - the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he uses the occasion for some other reason he loses the protection of the privilege

In these circumstances the public interest is served by allowing communication to be free and frank. Therefore, untruthful statements can be published in certain circumstances. First, the publication should not go beyond those people that have an interest in receiving the information. It also means that the publisher must be motivated by reasons of satisfying his/her social, moral or legal duty and therefore cannot publish maliciously. This means the common law defence of qualified privilege will be made out if a defendant can prove that he/she:

- had a duty to publish and the people who received the material had a reciprocal interest to receive the information;
- the information related to a matter of private or overriding public interest;
- the publication was restricted to what is necessary to satisfy that private or public interest; and
- the circulation of the publication was limited to the audience with a reciprocal interest to receive the information.

The reciprocal duty and interest will not arise from the mere fact that the publisher has information which would interest the public. This relationship is not automatically inferred because a publisher is a journalist and/or media organisation. To determine whether a duty/interest relationship exists, the courts look at the quality of information. The kind of interest which will justify the publication is an interest arising from some particular quality in the subject....” (it) comes back to ‘*the common convenience and welfare of society*’ or the general interest in society” (Comalco 1985: 31 emphasis this author).

Thus we see the defence of common law privilege arises from a relationship between publisher and audience implied from the type of information being disseminated. Examples where a reciprocal interest has been upheld include a reference written by an employer to another employer considering engaging a former employee, or the provision of a credit report by one creditor to another about their debtor, reports of suspected criminal activity to police or similar authority (see Butler & Rodrick 2004, p. 72; Gillooly 2004, p. 114). These occasions of qualified privilege do not usually extend to mass publications unless it can be shown that some general interest is being accommodated. The common law recognises that a person should be able to defend him or herself in the same forum. Therefore publications replying to some public criticism are seen to be occasions of qualified privilege provided the medium for the retort is a similar forum to that used to convey the criticism. If the criticism has been made in the mass media then the response can be made in the mass media. The qualified privilege granted to such exchanges is narrow, covering only the original criticism and a reply (see *Kennett v Farmer* 1988). Other situations where the mass media have been able to rely on qualified privilege to publish defamatory material include where previously incorrect information is being corrected and where there is a warning of a national or local disaster where the source of information is official or quasi-official; or the material relates to a political of

government matter. This would include warning relating to health risks such as suspected food and water contaminations as well as reporting suspected terrorist attacks.

It is the courts - assisted by juries - that determine whether the reciprocity of interests exists. But given the “third person effect” phenomenon we need to ask whether publishers are being unfairly censored. If the public do not think less of an individual from adverse publicity, why should publishers be put to the expense of proving a publication meets a particular interest?

It should also be remembered that this approach to qualified privilege arose at a time when there were clear divisions between public (mass) and private communications. Improved communication technologies mean that most individuals are now in a position to be public communicators. There are no longer the organisational constraints on individuals becoming mass media producers. In fact, Australian media policy promotes such participation. These changes in the mass media environment, combined with the widening gap between popular understandings and legal understanding of meanings, raises a question as to whether the common convenience of society is being met by this defence.

Another approach to privilege and mass publications

In the United Kingdom, publishers enjoy expanded protection from the qualified privilege defence – based on questions of public interest. This approach was taken when the House of Lords recognised a “new found elasticity” in common law privilege (Butler and Rodrick 2004, p. 83; *Reynolds v Times Newspaper Limited* 2001). Kenyon (2004, 1) argues that *Reynolds* “can be seen as conceptually, a different species of qualified privilege from the general duty-interest defence or at least as a substantial expansion of the circumstances in which the defence can be satisfied”. He explains that *Reynolds* privilege seeks to protect defamatory material of *public importance* where defendants have published responsibly, irrespective of the material’s truth or falsity. The criterion for attracting the privilege is the public importance of the issue rather than the relationship between the parties and the quality of information.

If the publication establishes that a defamatory publication relates to a matter of public interest, the publisher must then prove that he/she acted responsibly. In order to assess whether a publisher fairly met his/her obligations arising from the occasion of qualified privilege, the House of Lords identified a range of factors to be taken into account including the seriousness of the allegation, the nature of the information and the extent to which the subject matter is of public concern; the source of the information; the steps taken to verify the information; the status of the information; the urgency of the matter; whether comment was sought from the aggrieved party but failure to approach does not necessarily negate the privilege; whether the publication included the gist of the aggrieved party’s side of the story; the tone of the article; the circumstances of the publication including the timing.

Australian approach

As mentioned already, Australia has taken a different approach to expanding common law privilege which again relies on the relationship between the publisher and his/her audience. First we have an expanded version of common law privilege that applies to mass publications on political and government matters that are published reasonably (*Lange v ABC*). Secondly, we have a statutory defence of qualified privilege.

In order to rely on the *Lange* privilege a publisher of mass communications must establish:

- The material published relates to political and government matters, which implies the duty/interest relationship.
- Where the publication extends to mass audiences, the publication must be reasonable in all the circumstances, and
- The defence will be defeated if the publisher is motivated by malice.

In recognising the extended privilege relating to political and government matters the High Court acknowledged the harmful effect of mass publications of defamatory material meant that the mass media must satisfy an additional requirement in order to attract qualified privilege.

“Whether the making of a publication was reasonable must depend upon all the circumstances of the case. But, as a general rule, a defendant’s conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant has *reasonable grounds for believing the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material, and did not believe the imputation to be untrue*. Furthermore the defendant’s conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff the opportunity to respond” (*Lange* 1997, 13 italics my own).

Reasonableness is also an essential element of the defence of statutory qualified privilege, which is set out in the Uniform Defamation legislation. The wording of the statutory qualified privilege defence as set out in the uniform Act borrows heavily from Section 22 Defamation Act NSW 1974 and *Reynolds*. The Uniform Defamation Laws specify that a publisher will have a defence to the publication of defamatory material if he/she can prove:

- The recipient has an interest or apparent interest in having information on some subject.

- The matter is published to the recipient in the course of giving to the recipient information on that subject and
- The conduct of the defendant in publishing that matter is reasonable in the circumstances.

In determining whether the conduct of the defendant in publishing defamatory material was reasonable, the UDAs specify that the court may take into account a range of considerations including:

- the extent to which the matter published is of public interest
- the extent to which the matter published related to the performance of the public functions or activities of the person referred to in the defamatory publication
- the seriousness of any defamatory imputations carried by the matter published
- the extent to which the matter published distinguishes between suspicions allegations and proven facts
- the urgency of the publication
- the nature of the business environment in which the publisher operates, which means taking account of the working realities in which publications are produced
- the sources of information and the integrity of sources
- whether the publication included the substance of the aggrieved person's story
- whether reasonable attempts were made to obtain and publish a response
- other steps taken to verify information
- any other circumstances the court considers relevant.

The comparative table set out below, (see Breit, forthcoming) compares and contrasts the key elements of the defences. As you will see there are some subtle differences in approach.

	Common Law	Expanded Common law (Lange)	Statutory privilege UDA	Reynolds (UK)
Occurrence	Social, moral or legal duty to publish & reciprocal interest to receive	Duty to publish & interest to receive arising from mass publication of political and government matters	Apparent interest to publish	Public interest
Condition	Limited publication or general public interest on limited issues	Mass publication & reasonable publication	Interest to publish & reasonable publication	Responsible publication
Factors taken into account	Practical reality of the circumstances that invoke the privilege	Reasonable grounds for believing the imputation was true Steps taken to verify the accuracy of the material Did not believe the imputation to be untrue Response sought from the person defamed wherever practicable.	Seriousness of imputations;	Seriousness of the allegation;
			Relevance to public interest & public functions or activities;	Nature of the information and the extent to which the subject matter is of public concern
			integrity of sources;	source of the information;
			Distinction between suspicions allegations and proven facts;	steps taken to verify the information;
			urgency;	urgency of the matter
			business reality;	status of the information;
			attempts to publish a response;	whether comment was sought from the aggrieved party but failure to approach does not necessarily negate the privilege
			whether the story included aggrieved party's side of story; any other	whether the publication included the gist of the aggrieved party's side of the story;
			other steps taken to verify information;	the tone of the article;

			circumstances the court considers relevant.	circumstances of the publication including the timing.
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As the above table illustrates, there are many similarities between the UDA statutory privilege and the Reynolds approach. Both approaches take account of the seriousness of the allegations, the integrity and nature of the sources of information, the urgency of the matter, the attempts to publish a response and attempts to include the aggrieved person's version of events. However, there are differences in approach: the UDA privilege looks at whether the allegations relate to a matter of public interest or public functions and activities whereas the Reynolds defence is concerned with the extent to which the subject matter is of public concern. This subtle difference in the wording could lead to different outcomes.

An example might help illustrate why this is a problem. A building contractor is in dispute with clients over the quality of work. The complaints relate to serious flaws in the quality and suitability of the homes the builder was contracted to build. The contractor is a small business that operates within a specified region. One national and one local television station report on the dispute and the building contractor claims he/she has been defamed. All publishers are sued by the builder who seriously disputes the claims publicised. The publishers can prove truth of some of the imputations arising from the publication, but they cannot prove the truth of a number of non-contextual imputations. Therefore, the publishers seek to rely on qualified privilege. Applying the Australian criteria, the publisher would have to show reciprocity of interest and reasonable publication. Given that the story does not relate to political or government information there is no automatic inference of the requisite interest. Therefore, both the local and national publishers must prove a reciprocal interest exists. It is feasible the local publisher could establish that relationship, but the national publisher could not.

Applying the Reynolds criteria, it is likely the matter would be construed as a matter of public interest because building a house represents a significant investment and such contracts involve large amounts of money. Therefore, the fact that it is a matter of public interest justifies publication at both local and national levels. The publishers must then prove she/he acted responsibly.

Applying the Australian approach, one of the publishers could not meet the first step in establishing a defence of qualified privilege because the publication went beyond the audience with an apparent interest to receive the defamatory material. Thus the subsequent question of "reasonableness" of publication is not asked. The Reynolds approach ensures that both publishers can move to the next level of reasonableness of publication.

Having proved the reasonableness of publication, the defence is destroyed if the publication is motivated by malice. The courts have found a range of conduct *indicative* of a malicious intention including knowledge of the falsity of defamatory material or

absence in the belief in its truth; recklessness as to whether the matter complained of was true or false; failure to inquire as to the truth of defamatory material; the manner and extent of publication including the language used; the publication of other defamatory material published by the defendant concerning the plaintiff; the conduct of litigation by the defendant including the conduct of the trial (Tobin & Sexton par 18.005-18.040). The considerations, outlined in relation to reasonableness of publication, would traditionally be proof of malice. Thus the question arises as to whether the publishers should be burdened with proving the reasonableness of their publication. Given the publications to which qualified privilege relates are of such fundamental importance, the defence should be balanced in favour of allowing publicity. Therefore, the issue of reasonableness of publication should be taken into account in determining whether the publication was malicious. It should not form part of the threshold for invoking the defence.

Before the enactment of the UDAs, Kenyon (2004) conducted research into the qualified privilege. He conducted a series of interviews with defamation lawyers about developments in Australia and the UK in relation to qualified privilege, where lawyers concluded that the more flexible approach to qualified privilege adopted by the UK courts in Reynolds offered a better media defence than the Lange privilege. The *Uniform Defamation Acts* have adopted the Reynolds criteria to describe reasonableness, suggesting that Australian publishers might enjoy a more robust privilege in future. But Brisbane barrister Peter Applegarth (2006 personal interview) is not confident the uniform provisions will live up to such expectations. He fears the limitations of section 22 Defamation Act NSW “will come back to haunt us”.

Reasonableness

Before the enactment of the UDAs, the courts accepted that the question of what is reasonable in the circumstances depended on the context in which defamatory material was published. The more serious an allegation, the greater the obligation on media publishers’ to show such publication was reasonable. In order to prove the publication was reasonable, a publisher had to show that:

- (a) reasonable care was exercised to ensure the conclusions drawn from facts believed to be true were correct. In most circumstances this will involve making proper inquiries and checking on the accuracy of sources;
- (b) the conclusions drawn (whether statements of fact or expressions of opinion) followed logically, fairly and reasonably from the information obtained by the publisher;
- (c) the manner and extent of the publication did not exceed what was reasonably required in the circumstances; and
- (d) each imputation intended to be conveyed was relevant to the subject about which he is giving information to his readers (*Amalgamated television Services v Marsden* 2002, par. 984)

In assessing reasonableness, the focus is squarely on the conduct of the publisher, which in relation to mass media publications relates to the conduct of journalists. The courts

conceded that journalists can get the facts wrong despite exercising reasonable care. “But a member of the public is at least entitled to expect that a journalist will take *reasonable care to get his facts right* before he launches an attack upon him in a daily newspaper” (*Austin v Mirror Newspapers Ltd* (1985) 3 NSWLR 354 at 360).

[T]he journalistic standard (expected) ... does not exceed what is reasonable in the circumstances; it is not required to rise to some pinnacle of unreal perfection. When enquiries have been undertaken which, viewed objectively and taking into account the circumstances, encompass what is reasonably practical in the circumstances, they should suffice if they "*are such as to make [the publisher's] belief in the truth of that information a reasonable one*". The circumstances include "*the nature and source of the information obtained, relative to the matter of publication and position, standing, character and opportunities for knowledge of the informant*" as perceived by the (publisher). (*Amalgamated Television Services Pty Ltd v Marsden* (2002), par 989)

In NSW, section 22 also required proof of reasonable publication in order to invoke the defence. In interpreting section 22, the court acknowledged a need for flexibility but it was agreed that reasonable publication required reasonable care in gathering of information, the assimilation of that information and its dissemination. Therefore, a publisher must be able to establish that he/she/they made proper inquiries and checked the accuracy of sources; that conclusions drawn from this information were logical, fair and reasonable; the manner and extent of publication did not extend beyond those with an interest in receiving the information and each defamatory imputation was relevant to the subject of public interest that justified publication (see *Morgan v John Fairfax & Sons No 2*, 1991, pp 387-388; *John Fairfax Publications Pty Ltd v O’Shane*, 2005).

Whilst cautioning that reasonable conduct should not require some pinnacle of unreal perfection, the legal standard of reasonable conduct differs from the professional standards espoused by the industry. Several codes of ethics and codes of professional conduct set out what is seen as responsible publication (See MEAA (AJA) Code of Ethics, APC Statement of Principles, CRA Codes of Practice, FreeTVA Codes of Practices). In each of these codes, a matter of public interest justifies breaches of the professional standards. Using the terminology of the qualified privilege defence, the journalism codes of ethics and codes of professional conduct specify that a matter of public interest will justify irresponsible or unreasonable publication. The statutory qualified privilege, on the other hand, requires publications in the public interest to be reasonable. This could be one reason why few media organisations have been able to rely successfully on section 22 defence because they have failed to meet the standards of reasonableness expected of the courts.

A matter that has not been canvassed by the courts is whether public expectations of journalism are being correctly interpreted by the courts (and juries) to reflect contemporary attitudes. This is the subject matter of another paper. But more importantly, it raises the question as to whether the overall objective of the tort of defamation is

moving from protecting reputation to introducing a legally enforceable code of journalistic conduct.

Conclusions

This paper has offered a generalised analysis of the uniform defamation regime that now applies across Australia. It raises questions about the appropriateness of those laws to reflect current attitudes to reputation and reputational harm, public interest and public expectations of journalism. It argues that the reforms have simply accepted misplaced assumptions about the effect of publicity on people's reputation, focussing too heavily on the individual interests of a person's conception of self vis a vis the general public, without taking full account of the public interests in protecting reputations. It is accepted that part of a person's reputation involves their self-esteem, which has many intersections with privacy protection. But the other, and probably more important component of reputation, involves how the public feel about that individual. And the work of Bell (2006), Baker (2003) and others suggest that the law of defamation (even under the new regime) is out of step with popular opinion. Thus the tort is moving towards de facto privacy protection. But it is not doing this effectively; therefore real questions arise about its appropriateness. The adoption of a subjective, rather than objective, standard to determine defamatory meaning may go some way to redressing this problem.

This paper also questions the focus of Australia's qualified privilege defence. Is the common convenience and welfare of society being promoted when citizens, whose reputations have not been harmed in the eyes of others, can force publishers to justify their publication? The second question arising from Australia's approach to qualified privilege involves the grounds prescribed for publishers – particularly media publishers – to justify publication. Instead of a general public interest requirement, Australian publishers must prove their publication is promoting a particular interest. This interest – or relationship between publisher and audience – is implied through the nature and quality of information; not the overriding public interest of the issue in question. An example has been provided to illustrate how these different thresholds can give rise to different outcomes. This paper also highlights a divide between professional standards of reasonableness and those required to invoke the qualified privilege defence. Given the aims of qualified privilege and the changing media environment, it was suggested that the reasonableness of publication should be taken into account when determining the question of malice. It should not form part of the publishers' burden to invoke the defence.

Finally the paper questions whether the court's interpretation of the public expectations of the mass media reflects the reality of community attitudes. Given the "third person effect" identified by Baker; is it possible the standards of reasonableness required by the law of defamation go beyond the public's expectations of a reasonable publication. It was noted however, that this issue requires further investigation.

This paper raises more questions than it answers. Hopefully, answers will emerge as the new regime is interpreted in the courts.

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