"REASONABLENESS" & A CODE OF CONDUCT?

The Hon Justice M B J Lee

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A INTRODUCTION

What I want to talk about tonight is the mutual and abiding interest of the law and journalism in providing for the responsible expression of fact and opinion, including when this involves the publication of defamatory imputations.

Of course, in the law, the perceived utility of the responsible publication of facts and opinions is the purpose behind the qualified privilege defence and the public interest defence under the *Defamation Act 2005* (NSW) (**the Act** or the **2005 Act**).

These defences strive to achieve a balance between protecting the public against irresponsible journalism on one hand and avoiding placing unnecessary limitations upon a journalists' ability to investigate and report where they have acted reasonably on the other.

What I would like to discuss is a proposal, advanced from time to time, of a Code of Conduct that incorporates values or norms of conduct – which would reflect the accumulated experience of members of the journalist community.

This is at a time when journalism, as we have known it, confronts radical change.

In a recent article by Nic Newman, reference was made to the depressing findings of the 2024 Digital News Report (published by the Reuters Institute). It painted a picture of the news media increasingly challenged by low levels of trust, attacks by politicians, and an uncertain business environment. Even leaving aside the challenge of artificial intelligence, the author posited that the building crisis in journalism had been compounded by the power and changing strategies of social media giants and search engines (some of whom have deprioritised news and political content). These organisations do not have any obligation to the presentation of news or responsible opinion but now represent the medium through which many now get much of their information.

It is also important to recognise that these legacy organisations, and professional journalists more generally, are operating in the age of digitisation. We are a world away from my experience in an early 1980s John Fairfax & Sons working as a copyboy for *The Sun* and mastering an art that it is of limited ongoing utility: operating a Telex machine.

There is now a 24/7 news cycle, and the associated pressure for journalists to "churn out" publications immediately. Reflecting this notion and as recognised in a report titled "The Impact of Digital Platforms on News and Journalistic Content" which was commissioned by the ACCC, "within the news industry, there remains a deep-set fear that the price of survival in a landscape dominated by non-journalistic platforms, citizen-journalists and journalists seeking the

approval of citizens is a lowering of standards and a de-professionalisation of the industry".

Like everyone can be a publisher, we live in a world where everyone, it seems, can be a journalist. This creates challenges not only for the enforcement of journalistic standards but for defamation law, which was not developed with a complete comprehension of the impact that the internet would have on an average person's ability to publish material which is accessible to the public at large almost instantaneously.

These manifold challenges are well beyond the scope of this talk – what I want to talk about is the prospect of better defining standards of traditional journalism and how this may be relevant to the way in which two different "reasonableness" based defences to the publication of defamatory matters operate.

First, the statutory qualified privilege defence forms part of the uniform defamation laws which were introduced in 2005. The establishment of a statutory defence of qualified privilege is described in The Laws of Australia as being "perhaps the most significant development with respect to defences to the publication of defamatory matter, brought about by the introduction of the uniform defamation laws".

Second, is the public interest defence. Although the right to publish defamatory statements concerning matters of "common convenience and welfare of a modern plural democracy" has long been recognised, borne out primarily through

common law and statutory formulations of the defence of qualified privilege: *Toogood v Spyring* (1834) 1 Cr M & R 181; (1834) 149 ER 1044 (at 1049–50 per Parke B). Section 29A was inserted into the 2005 Act on 1 July 2021. The aim of this defence was described in the Explanatory Note to the *Defamation Amendment Bill 2020* (NSW) as being to ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance.

B THE CONCEPT OF REASONABLENESS IN THE 2005 ACT

Both these defences revolve around the notion of reasonableness.

Under s 30 of the 2005 Act, a person will be entitled to the defence of qualified privilege for the publication of defamatory matter to a person if the defendant can prove that:

(a) the recipient has an interest or apparent interest in having information on some subject (an apparent interest being present only if, at the time of publication, the defendant believes on reasonable grounds that the recipient has that interest);

(b) the matter is published to the recipient in the course of giving him or her information on that subject; and

(c) the conduct of the defendant in publishing the material in question is *reasonable* in the circumstances.

Under the old 1974 Act, s 22(2A) included a list of eight factors, drawn from *Reynolds v Times Newspaper Ltd* [1999] 4 All ER 609 concerning a comparable defence of qualified privilege under the general law of the United Kingdom, which the Court could, but was not required to consider in determining whether the conduct of a publisher was reasonable in the circumstances. I cannot pass from this point without noting that the reform agenda which saw the insertion of s 22(2A) into the 1974 Act also resulted in the insertion of a statement of objects into that Act, including the object (in s 3(b)) "to ensure that the law of defamation does not place unreasonable limits on the publication and discussion of matters of public interest and importance".

By reason of the 2021 amendments to the uniform defamation laws, in determining whether the conduct of the defendant in publishing the material in question was reasonable in the circumstances, the Court may consider a list of factors which are substantially in conjunction with the factors as originally outlined in *Reynolds*. The factors which the Court may take into account to the extent they consider them applicable in the circumstances are listed under s 30(3) of the 2005 Act, and are as follows:

(a) the seriousness of any defamatory imputation carried by the matter published,

(b) the extent to which the matter published distinguishes between suspicions, allegations and proven facts,

(c) the nature of the business environment in which the defendant operates,

(d) whether it was appropriate in the circumstances for the matter to be published expeditiously,

(e) any other steps taken to verify the information in the matter published.

It is worth emphasising that the Court is not required to consider each factor; nor is the specification of factors intended to limit the matters that the Court may take into account.

As for the public interest defence, s 29A provides that it is a defence to the publication of defamatory matter if the defendant proves that:

(a) the matter concerns an issue of public interest; and

(b) the defendant *reasonably* believed that the publication of the matter was in the public interest.

The Court must take into account the seriousness all of the circumstances of the case and, without limiting this general requirement, the Court may take into account the seriousness of any defamatory imputation, the extent to which publication distinguishes between suspicions, allegations and proven facts and the following factors:

(a) the extent to which the matter published relates to the performance of the public functions or activities of the person;

(b) whether it was in the public interest in the circumstances for the matter to be published expeditiously;

(c) the sources of the information in the matter published, including the integrity of the sources;

(d) if the source of the information in the matter published is a person whose identity is being kept confidential, whether there is good reason for the person's identity to be kept confidential;

(e) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person; and

(f) the importance of freedom of expression in the discussion of issues of public interest.

C EVALUATING REASONABLENESS

But where do we start in evaluating reasonableness?

And where does the journalist start in defending their conduct, recognising that where the reasonableness of a publication is put into question, the journalist publishing the content will bear the onus of proving it was reasonable to do so in

the circumstances: *Wright v Australian Broadcasting Commission* [1977] 1 NSWLR 697 (at 700 per Moffitt P).

Touching on the fluidity of the "reasonableness" concept, Gleeson CJ and Gummow J noted in *Rogers v Nationwide News Pty Ltd* [2003] HCA 53; (2003) 216 CLR 327 (at [30]) that reasonableness is "not a concept that can be subjected to inflexible categorisation".

In a similar vein, I noted in the *Lehrmann* trial judgment (at [932]), that the governing notion of reasonableness is open-textured and value-laden; and when Courts are required to apply such a standard, as Professor Julius Stone observed: "judgment cannot turn on logical formulations and deductions, but must include a decision as to what justice requires in the context of the instant case … [Such standards] are predicated on fact-value complexes, not on mere facts": see Legal System and Lawyers' Reasonings (Stanford University Press, 1964) (at 263–264).

At best, the list of factors provides a guide or pointer to the sorts of things which might be relevant in assessing reasonableness. Indeed, as I noted in another case, when certain propositions are seen as vital to establishing reasonableness, the achievement of the standard is put beyond reach for many respondents: *Russell v Australian Broadcasting Corporation (No 3)* (2023) 303 FCR 372; [2023] FCA 1223 (at [289]).

What this all means is that there is no determinative factor in assessing whether a publication was reasonable, and assessing reasonableness should be approached

by the Court as a multifactorial inquiry: *Bailey v WIN Television NSW Pty Ltd* [2020] NSWCA 352; (2020) 104 NSWLR 541 (at 559 per Simpson AJA). Critical to this multifactorial inquiry is the need to keep in sight the overriding importance of context and a consideration of all relevant circumstances, and the need to resist or discourage any reliance on a "checklist approach" which diverts attention away from the need to make a broad and bespoke evaluative assessment grounded in all the circumstances of the case and the nature of what was conveyed: *Palmer v McGowan (No 5)* [2022] FCA 893; (2022) 404 ALR 621 (at 664 per Lee J). Generally, the weight of a particular factor depends upon the particular case at hand: *Chau v Fairfax Media Publications Pty Ltd* [2019] FCA 185 (at [107] per Wigney J); *Palmer v McGowan (No 5)* [2022] FCA 893; (2022) 404 ALR 621 (at 661 per Lee J).

While the nature of the reasonableness inquiry, being one that is flexible, multifactorial and open-textured means it may be more difficult for publishers to understand with precision what conduct will be considered reasonable, or unreasonable, one can immediately see the role that codes or guidelines might have in mitigating uncertainty for responsible journalists if those guidelines or codes were perceived as reflecting proper practice and had the widespread support of traditional or legacy media.

But before coming to that matter in more detail, it is worth just pausing to understand what journalists glean from guidelines and case law to better understand what is required of them.

C.1 *Reasonableness in case law*

As explained above, while reasonableness is necessarily a fact-specific inquiry, some considerations emerge frequently and are important to the reasonableness assessment in most cases.

Notwithstanding that this summary was provided prior to the 2021 amendments to the uniform defamation laws coming into operation, Wigney J in *Chau v Fairfax Media Publications Pty Ltd* [2019] FCA 185 (at [109]–[115]) drew together the relevant principles as to reasonableness conveniently as follows:

> *First*, in most cases, the more serious the imputation that is conveyed, the greater the obligation upon the respondent to ensure that its conduct in relation to the publication was reasonable: *Morgan v John Fairfax & Sons Ltd (No 2)* (1991) 23 NSWLR 374 at 387C (per Hunt A-JA, with whom Samuels JA agreed); see s 30(3)(c) of the Defamation Act.
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> *Second*, a respondent who intended to convey an imputation that was in fact conveyed must generally establish that they believed in the truth of that imputation and that the imputation conveyed was relevant to the subject: Morgan at 387F and 388C.

Third, the fact that the respondent may not have intended to convey the imputation that was in fact conveyed does not necessarily mean that their conduct in publishing was unreasonable: Austin at 362; *Roberts v Bass* (2002) 212 CLR 1 at [81]-[82]. In such a case, the respondent must generally establish that they believed in the truth of the imputation that they intended to convey, and that their conduct was nevertheless reasonable in relation to the imputation which they did not intend to convey, but which was in fact conveyed. In that regard, it may be relevant to consider whether it was reasonably foreseeable that the publication might convey the unintended imputation and, if so, whether the respondent considered that possibility and took appropriate steps to prevent that imputation being conveyed: Morgan at 387G-388A; *Obeid v John Fairfax Publications Pty Ltd* (2006) 68 NSWLR 150 at [70]-[75]; *Evatt v Nationwide News Pty Ltd* [1999] NSWCA 99 at [40]-[43].

Fourth, the respondent must generally establish that reasonable steps were taken before publishing to ensure that the facts and conclusions stated in the publication were accurate. That would generally involve making proper or reasonable inquiries, checking the accuracy and reliability of sources of information and ensuring that the conclusions followed logically, fairly and reasonably from the information that had been obtained; Morgan at 388B; see generally ss 30(3)(g) and (i) of the Defamation Act. In that context, the

respondent must ordinarily disclose both the nature and source of the information which was possessed: *Sims v Wran* [1984] 1 NSWLR 317 at 327F.

Fifth, in relation to sources, the respondent's belief or perception of the position, standing, character and opportunities of knowledge of the source must be such as to make the respondent's belief in the truth and accuracy of the information reasonable in the circumstances: Morgan at 388D; s 30(3)(g) of the Defamation Act.

Sixth, a respondent must show that the manner and extent of the publication did not exceed what was reasonably required in the circumstances: Morgan at 388C.

Seventh, the respondent must also establish that the respondent gave the person defamed an opportunity to make a reasonable response to the defamatory imputation: *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 252; referred to by the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 574.

C.2 *Codes including the MEAA Code*

It is already no doubt evident that the assessment of reasonableness has, implicit within it, the identification of *values* against which conduct is measured. Some assistance is derived from the non-exclusive statutory factors and their

application in case law, but these factors have been developed by lawyers rather than the profession of journalism and have been static. Although on one level this makes sense (as values reflect verities) times change – as does the conduct and practices which reflect those values. It might be thought a widely accepted and dynamic Code of Conduct, which reflects the changing demands and modalities of journalistic work, could have some use in informing the conduct of responsible and reasonable journalism.

In one sense none of this is new. Many here will be familiar with the Media, Entertainment and Arts Alliance (**MEAA**) Journalist Code of Ethics (**Code**).

The MEAA (the industrial association successor of, among other things, the Australian Journalists Association), binds its members to the Code. The Code has a very long history and, as Callinan J observed in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63; (2001) 208 CLR 199 (at 305–306 [268]) "[f]rom time to time, the [Code] finds its way into evidence in defamation cases".

Under MEAA's rules (registered with the Fair Work Commission), the Code only applies to MEAA journalists. Nonetheless, the Code provides some basis for considering what might be considered "unreasonable" conduct. Relevantly and in a summarised form, the Code prescribes the following twelve standards:

1. Report and interpret honestly, striving for accuracy, fairness and disclosure of all essential facts.

2. Do not place unnecessary emphasis on personal characteristics.

3. Aim to attribute information to its source.

4. Do not allow personal interest, or any belief, commitment, payment, gift or benefit to undermine your accuracy, fairness or independence.

5. Disclose conflicts of interest that affect, or could be seen to affect, the accuracy, fairness or independence of your journalism.

6. Do not allow advertising or other commercial considerations to undermine accuracy, fairness or independence.

7. Do your utmost to ensure disclosure of any direct or indirect payment made for interviews, pictures, information or stories.

8. Use fair, responsible and honest means to obtain material.

9. Present pictures and sound which are true and accurate.

10. Do not plagiarise.

11. Respect private grief and personal privacy.

12. Do your utmost to achieve fair correction of errors.

Industry-led codes such as the MEAA Code of Conduct are not uncommon, and can act as a form of voluntary self-regulation, which although not enforceable under legislation, would apply to industry participants who agree to be bound by them.

While the MEAA Code of Conduct is undoubtedly useful to its members, it is not uncommon for respondents in defamation cases to make the submission that while these standards are industry norms guiding the conduct of journalists, they are generally considered aspirational, are interpreted differently depending on the facts and circumstances of particular cases, and ultimately, do not bind those who are not members of the MEAA.

The further point can be made that it is but one of many such codes. Although the MEAA Code of Conduct is often viewed as the overarching code of ethics governing the media industry (and leaving aside privately owned publication specific codes), there appear to be approximately 13 other codes of practice or conduct governing journalist conduct being the:

1. Commercial Television Industry Codes of Practice 2015 (March 2018);
2. Commercial Radio Codes of Practice March 2017 (March 2018);
3. ABC Code of Practice 2011 (March 2016);
4. SBS Codes of Practice 2014 (October 2018);
5. Community Radio Broadcasting Codes of Practice 2008;
6. Community Television Codes of Practice 2011;
7. Subscription Broadcast Television Codes of Practice 2013 (March 2018);

8. Subscription Narrowcast Television Code of Practice 2013 (March 2018);

9. Open Narrowcast Television Codes of Practice 2009;

10. Subscription Narrowcast Radio Codes of Practice 2013;

11. Open Narrowcasting [Radio] Codes of Practice;

12. Australian Press Council Statement of General Principles/Statement of Privacy Principles (2014); and

13. Independent Media Council Code of Conduct (2012).

It might be argued that the existence of a multitude of codes of practice or standards which apply to Australia's media industry have resulted in a fragmented and arguably overcomplicated system of guidance for the conduct of journalists working in the legacy media. Perhaps it is time for an attempt to be made to synthesise all these codes into one, comprehensive industry guide (which descends into more detail than mere aspirational statements).

D CONCLUSIONS

Although there is some innate uncertainty associated with predicting an assessment of reasonableness in the context of the qualified privilege and public interest defence, an extent of uncertainty is, I am afraid, unavoidable because the factors determined appropriate to be considered will be different in each case, and attributed unequal weight.

But my point is that *unnecessary* uncertainty may be reduced through the development of a comprehensive code for journalists, which imbeds within it the interpretation of reasonableness in case law, and the general standards expected of journalists by their peers.

The changing nature of the publication of news and the proliferation of publishers complicates the process of making any code comprehensive, but that does not render the task futile. The law will still need to deal with defamation cases against legacy media publishers and those organisations have an interest in developing greater certainty if it can be achieved and, despite their differences and political and cultural perspectives, these organisations no doubt seek to promote the traditional norms of the profession.

How a code would be developed, how it would be adopted (and the significance of adoption in later assessing the conduct of a journalist) are all matters for others, but discussion as to its utility might be a worthwhile endeavour. Apart from any use the law may make of it, a comprehensive statement or values and norms representing peer opinion and practice, updated to reflect the realities of the practice of journalism, would presumably serve an educative purpose.

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