



The more things change, the more they stay the same . . . or do they?

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A notorious feature of the pre-uniform NSW defamation law was its s 22 statutory qualified privilege defence. Notwithstanding its promise, judicial interpretation had left the defence with little work to do with the result that few defendants have been able to find comfort in its terms. That defence has now been picked up and extended to all Australian jurisdictions via s 30 and its counterparts in the uniform defamation legislation which commenced operation last year. The question that arises is whether the s 30 defence is doomed to suffer the same fate as its NSW predecessor?

Introduction

On 1 January 2006 the long-awaited uniform civil defamation legislation commenced operation in all the states and then a little later in the ACT and the Northern Territory on 23 February 2006 and 26 April respectively.¹ Gone are the days of grappling with eight different civil defamation laws in Australia. We now only have to contend with one, uniform, or at least nearly uniform, law.² This has been rightly hailed as ‘a historic achievement’³ and ‘a triumph for state and territory cooperation and common sense’.⁴

The uniform defamation legislation basically enacts the States and Territories Model Defamation Provisions that were released in November 2005.⁵ This model, in turn, draws ‘substantially’ from the Defamation Act

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1 Defamation Act 2005 (NSW); Defamation Act 2005 (Vic); Defamation Act 2005 (Qld); Defamation Act 2005 (SA); Defamation Act 2005 (WA); and, Defamation Act 2005 (Tas); Civil Law (Wrongs) Act 2002 (ACT) Ch 9 and Defamation Act 2006 (NT). As yet, criminal defamation does not form part of the uniform scheme. Given the differences in the naming and numbering of the Acts making up the uniform defamation legislative scheme, for convenience sake, subsequent references to provisions of the uniform defamation legislation will be to provisions of the Defamation Act 2005 (NSW) unless otherwise indicated.

2 Juries may be elected in accordance with s 21 in all jurisdictions except for South Australia, the Australian Capital Territory and the Northern Territory. See s 22 for the role to be played by juries where elected in a civil defamation trial. Also, the provision precluding actions for defamation of deceased persons (s 10) was dropped from the Defamation Act 2005 (Tas) but this was expected to ‘have no legal effect’ as such actions are also precluded at common law: See Tasmania, *Parliamentary Debates*, Legislative Assembly, 1 December 2005, pp 36–7, (Mrs Jackson, Attorney-General) <<http://www.hansard.parliament.tas.gov.au>>. Not all jurisdictions enacted their uniform defamation legislation in a ‘Defamation Act 2005’ (see above n 1) and the numbering of each Act is not completely uniform.

3 Second Reading Speech, Defamation Bill 2005 (WA), Legislative Assembly, 17 August 2005, p 4129 (J A McGinty, WA Attorney-General) <<http://www.parliament.wa.gov.au/index.htm>>.

4 Second Reading Speech, Defamation Bill 2005 (Qld), Legislative Assembly, 25 October 2005, p 3425 (L D Lavarch, Qld Minister for Justice and Attorney-General) <<http://www.parliament.qld.gov.au/>>.

5 States and Territories Model Defamation Provisions (November 2005) <http://www.agd.nsw.gov.au/report/lpd_reports.nsf/pages/rep_index>.

1974 (NSW),⁶ although there are some important differences.⁷

One notorious feature of the pre-uniform NSW defamation law that has now been extended to all jurisdictions is its s 22 statutory qualified privilege defence.⁸ This has been imported into each jurisdiction via s 30 and its counterparts.⁹

Given the poor track record of the old s 22 defence, this is perhaps a little surprising. So, too, was the apparent complacency with which this was achieved,¹⁰ although that is not to say that there were not some last minute ‘pleas’ for reconsideration.¹¹

To say that the s 22 defence was a disappointment for defendants, and media defendants in particular, is probably an understatement. It had become infamous for its ‘spectacular lack of success’,¹² leading to it being branded ‘virtually a toothless tiger’¹³ and ‘in effect, a dead letter’.¹⁴ The question that arises is whether its progeny is doomed to suffer the same fate?

It was generally recognised that the stumbling block for defendants seeking to rely on the s 22 defence was its reasonableness of conduct requirement (s 22(1)(c)) and ‘the restrictive way’ that requirement had been interpreted by the courts.¹⁵ The question becomes then whether the s 30 defence will also be plagued by this judicial interpretation in the uniform defamation era?

6 P George, *Defamation Law in Australia*, LexisNexis Butterworths, Chatswood, 2006, at [3.5].

7 Notably, truth alone will be a defence (s 25); the abandonment of the troublesome imputation system (s 8); a cap on damages for non-economic loss (of \$250,000) (s 35); and, the expansion of the role of juries (s 22).

8 Defamation Act 1974 (NSW) s 22. Henceforth, subsequent references to ‘s 22’ will be to Defamation Act 1974 (NSW) s 22.

9 See Defamation Act 2005 (Vic) s 30; Defamation Act 2005 (Qld) s 30; Defamation Act 2005 (WA) s 30; Defamation Act 2005 (Tas) s 30; Defamation Act 2005 (SA) s 28; Civil Law (Wrongs) Act 2002 (ACT) s 139A; and Defamation Act 2006 (NT) s 27. Given the different numbering in each Act, for convenience sake, subsequent reference to ‘s 30’ will be to Defamation Act 2005 (NSW) s 30.

10 Which did not escape the attention of at least one commentator: P D T Applegarth, ‘When Reasonableness is Unreasonable’ (8 July 2005) *Gazette of Law and Journalism* 1, at <http://www.lawpress.com.au/genews/ge165_Applegarth_QP_080705.html>.

11 Ibid; D Spence, ‘Spare Us the Unreasonableness of Uniformity’ (27 July 2005) *Gazette of Law and Journalism*, at <http://www.lawpress.com.au/genews/ge165_Spence_QP_270705.html>.

12 M Gillooly, *The Third Man: Reform of the Australasian Defamation Defences*, Federation Press, Annandale, 2004, p 158.

13 A A Henskens, ‘Defamation and Investigative Journalism in New South Wales: The Evolution of Statutory Qualified Privilege’ (1990) 6 *Aust Bar Rev* 267 at 268.

14 Commonwealth Attorney-General’s Department, *Revised Outline of a Possible National Defamation Law*, July 2004, pp 21–2, <<http://www.ag.gov.au>>, referring to submissions received in relation to the s 22 defence as well as the *Lange* extended form of common law qualified privilege.

15 See *ibid*, pp 21–2. See also New South Wales Attorney-General’s Task Force on Defamation Law Reform (NSW Task Force), *Defamation Law — Proposals for Reform in NSW*, 2002, p 24, <http://www.lawlink.nsw.gov.au/report/lpd_reports.nsf/pages/def_law_proposal>; S Walker, ‘*Lange v ABC*: the High Court rethinks the “Constitutionalisation” of defamation law’ (1998) 6 *TLJ* 9 at 21, 25; Gillooly, above n 12, p 142; M Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant*, Ashgate, Aldershot, 2000, pp 142–3; A T Kenyon, ‘*Lange* and *Reynolds* Qualified Privilege: Australian and English Defamation Law and Practice’ (2004) *MULR* 406 at 417–18. See especially *Morgan v John Fairfax & Sons Ltd (No 2)* (1991) 23 *NSWLR* 374 at 387–8 (Hunt AJA with whom Samuels JA agreed).

The purpose of this article is to examine these questions. In doing so it is important to appreciate from the outset that the s 22 defence on which the s 30 defence is based is not the first generation version around which the burdensome judicial interpretation developed but the second generation version which came into existence when the section was amended (with effect from 17 February 2003) to insert a list of matters a court may take into account when determining reasonableness of conduct.¹⁶

So to tackle these questions it is proposed first to consider whether and if so to what extent the previous judicial interpretation survived to burden the second generation s 22 defence? This issue is still relevant, of course, in its own right, apart from any light it may shed on an understanding of the way in which the s 30 defence may operate, given the transition arrangements put in place for pre- 1 January 2006 publications in New South Wales.¹⁷ The enquiry will then consider the different context in which the s 30 defence lives compared with its predecessor. It may be that its residence in the uniform defamation legislation may bring different considerations to bear on the way it operates.

But first, as a preliminary to these issues, we need to examine the nature of the first generation s 22 defence and its troublesome reasonableness of conduct requirement.

The first generation s 22 defence and its troublesome reasonableness of conduct requirement

An unhappy story of unfulfilled promise

The first generation s 22 defence made its debut in New South Wales with the enactment of the Defamation Act 1974 (NSW) on the recommendation of the NSW Law Reform Commission.¹⁸ The way had been paved by the statutory protection defences in s 17 of the Defamation Act 1958 (NSW)¹⁹ and it seemed that the NSW Law Reform Commission contemplated that s 22 would do the work of some of these old code defences;²⁰ but, alas, this has not worked out in practice.²¹

The s 22 defence aimed to extend the protection of qualified privilege to defendants who could not satisfy the tough reciprocal duty/interest requirement of common law qualified privilege.²² This held out great

16 See Defamation Act 1974 (NSW) s 22(2A), inserted by Defamation Amendment Act 2002 (NSW) Sch 1 [11].

17 Defamation Act 2005 (NSW) Sch 4 cl 2 and *Habib v Nationwide News* (2006) 65 NSWLR 264.

18 NSW Law Reform Commission, *Report of the Law Reform Commission on Defamation*, Report No 11, 1971, App D [101]–[109].

19 But there were problems with these defences, see *ibid*, App D [89]–[95]; NSW Law Reform Commission, *Defamation*, Discussion Paper No 32, 1993, at [9.24]–[9.25].

20 See especially Defamation Act 1958 (NSW) ss 17(d), (e): NSW Law Reform Commission, *Defamation*, Discussion Paper No 32, 1993, above n 19, at [9.10] (referring to NSW Law Reform Commission, 1971, above n 18, App D [103]), at [9.34].

21 NSW Law Reform Commission, *Defamation*, Report No 75, 1995, at [10.9].

22 *Morosi v Mirror Newspapers Ltd* [1972] 2 NSWLR 749 (NSW CA) at 797 (*Morosi*). The

'promise' for media defendants²³ as '[o]nly in exceptional cases has the common law recognised an interest or duty to publish defamatory matter to the general public'.²⁴ As recently explained by Gillard AJA in *Herald & Weekly Times v Popovic*, the problem for the media is 'at least twofold':

namely, it has never been the duty of any part of the media to publish for profit untrue facts about a person to the public . . .; and secondly, because the media publishes to so many persons, it is nearly impossible to conclude that every publishee, or the great majority of them, had an interest in receiving the particular information . . .²⁵

So s 22 ditched the troublesome reciprocal duty/interest requirement but the quid pro quo for doing this was to require that 'the conduct of the publisher in publishing [the matter in question] is reasonable in the circumstances'.²⁶

But this reasonableness of conduct requirement in turn proved to be a huge obstacle for defendants with the result that the availability of the s 22 defence was severely curtailed. Indeed, 'only a handful of' defendants have managed to successfully raise the defence,²⁷ with it succeeding 'rarely, if ever' at the behest of media defendants.²⁸ Little wonder then that commentators were heard to lament that what promised to be a boon for defendants failed to materialise.²⁹

But what was fuelling the reasonableness of conduct obstacle?³⁰ The source has generally been traced to its 'restrictive' interpretation by the courts, culminating with the approach taken in *Morgan v John Fairfax & Sons Ltd (No 2)*.³¹

NSW Law Reform Commission branded this reciprocal duty/interest requirement as 'artificial' and 'insufficiently wide': NSW Law Reform Commission, 1971, above n 18, App D [103].

23 Walker, above n 15, p 21; Gillooly, above n 12, p 142 referring to *Morosi* [1977] 2 NSWLR 749 at 797. Although, as reminded by the NSW Law Reform Commission, s 22 was not specifically designed to protect the media: NSW Law Reform Commission, 1993, above n 19, at [9.8].

24 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 570 (citations omitted) (*Lange*).

25 (2003) 9 VR 1 at [73] (citations omitted) (*Popovic*).

26 Defamation Act 1974 (NSW) s 22(1)(c). See NSW Law Reform Commission, 1971, above n 18, App D [104]; *Morosi* [1972] 2 NSWLR 749 at 797; Walker, above n 15, at 21. Section 22(1) also required demonstration that '(a) the recipient has an interest or apparent interest in having information on some subject, [and] (b) the matter is published to the recipient in the course of giving to the recipient information on that subject'; but these elements have been considered to be relatively undemanding, with the courts taking a broader view of what constitutes an 'interest' for the purposes of s 22(1)(a) compared with the common law qualified privilege defence: *Austin v Mirror Newspapers Ltd* (1985) 3 NSWLR 354 (PC) at 358-9 ('any matter of genuine interest to the readership of the newspaper').

27 Kenyon, above n 15, at 418 and see the cases cited at n 95.

28 *Nagle v Chulov* [2001] NSWSC 9 at [53] (Levine J), as noted by Gillooly, above n 12, at 142 n 170.

29 See, eg, Walker, above n 15, at 21; Chesterman, above n 15, pp 142-3; Gillooly, above n 12, p 142.

30 Although more accurately referred to as a 'reasonableness of conduct' requirement, for ease of expression this will be subsequently referred to simply as a 'reasonableness' requirement.

31 (1991) 23 NSWLR 374 at 385-6, 387-8 (Hunt AJA with whom Samuels JA agreed)

The *Morgan* stumbling block

After reviewing the cases on s 22 reasonableness in *Morgan*, Hunt AJA formulated four propositions that are worth setting out in full:

- (1) The conduct must have been reasonable in the circumstances to publish each imputation found to have been in fact conveyed by the matter complained of. The more serious the imputation conveyed, the greater the obligation upon the defendant to ensure that his conduct in relation to it was reasonable. Of course, if any other defence (such as truth or comment) has already been established in relation to any particular imputation found to have been so conveyed, it is unnecessary to consider the reasonableness of the defendant's conduct in relation to the publication of that particular imputation.
- (2) If the defendant intended to convey any imputation in fact conveyed, he must (subject to the exceptional case discussed in *Barbaro's* case, and perhaps also that discussed in *Collins v Ryan*) have believed in the truth of that imputation.
- (3) If the defendant did not intend to convey any particular imputation in fact conveyed, he must establish:
 - (a) that (subject to the same exceptions) he believed in the truth of each imputation which he did intend to convey; and
 - (b) that his conduct was nevertheless reasonable in the circumstances in relation to each imputation which he did not intend to convey but which was in fact conveyed.

If, for example, it were reasonably foreseeable that the matter complained of might convey the imputation which the jury finds was in fact conveyed, it will be relevant to the decision concerning s 22(1)(c) as to whether the defendant gave any consideration to the possibility that the matter complained of would be understood as conveying such an imputation, as will be his belief in the truth of that particular imputation and what steps he took to prevent the matter complained of being so understood . . .

- (4) The defendant must also establish:
 - (a) that, before publishing the matter complained of, he exercised reasonable care to ensure that he got his conclusions right, (where appropriate) by making proper inquiries and checking on the accuracy of his sources;
 - (b) that his conclusions (whether statements of fact or expressions of opinion) followed logically, fairly and reasonably from the information which he had obtained;
 - (c) that the manner and extent of the publication did not exceed what was reasonably required in the circumstances; and
 - (d) that each imputation intended to be conveyed was relevant to the subject about which he is giving information to his readers.

The extent to which the inquiries referred to in para (4)(a) should have been made will depend upon the circumstances of the case, in particular the nature and the source of the information which the defendant has obtained, and whether the position, standing, character and opportunities of knowledge of

(Morgan). See Commonwealth Attorney-General's Department, *Revised Outline*, above n 14, pp 21–2; and see other references cited above n 15.

the informant (as perceived by the defendant himself) are such as to make his belief in the truth of that information a reasonable one . . .³²

Hunt AJA also added that these ‘propositions do not purport to be exhaustive’.³³

For Walker, the source of the restricting effect of this interpretation is the view that ‘the defendant must in most cases establish his honest belief in the truth of what he has written’³⁴ and this was later endorsed by the NSW Attorney-General’s Task Force on Defamation Law Reform (NSW Task Force).³⁵ The *Morgan* view was not put as high as an absolute requirement, with courts having recognised that there may be exceptions (as indeed did Hunt AJA himself in *Morgan*).³⁶ Nevertheless, approaching it as ‘a critical element’,³⁷ ‘in most cases’,³⁸ has put the s 22 reasonableness requirement out of the reach of most defendants.

The difficulty is that subjective belief tests are notoriously difficult to satisfy. Not only this, as we shall see, the *Morgan* test is particularly demanding. And satisfying it may also require a defendant to reveal its sources,³⁹ an option that the media does not usually find very palatable.⁴⁰ In addition, the *Morgan* interpretation makes demands in relation to imputations which, though found to have been conveyed, were not intended by the defendant.⁴¹

Apart from a demanding subjective element, the *Morgan* interpretation also carries with it an objective component. This is not set as high as requiring the defendant to establish that her honest belief in the truth of the imputation was reasonable but goes a long way towards this by requiring her to establish various matters which would go to this end.⁴² The media defendant in *John Fairfax Publications Pty Ltd v O’Shane*⁴³ recently felt the sting of this element when even though the journalist was found to have an honest belief in the truth

32 (1991) 23 NSWLR 374 at 387–8 (Hunt AJA with whom Samuels JA agreed) (citations omitted).

33 *Ibid.*, at 388, drawing on the guidance of the Privy Council in *Austin v Mirror Newspapers Ltd* (1985) 3 NSWLR 354 at 360.

34 Walker, above n 15, at 21 (quoting from *Morgan* (1991) 23 NSWLR 374 at 385–6, and see *Morgan* propositions (2), (3)), 25.

35 NSW Task Force, above n 15, p 24.

36 *Morgan* (1991) 23 NSWLR 374 at 387 referring to *Barbaro v Amalgamated Television Services* (1990) 20 NSWLR 493 (*Barbaro*) and *Collins v Ryan* (1991) 6 BR 229.

37 *Barbaro* (1990) 20 NSWLR 493 at 500 (Samuels JA).

38 *Morgan* (1991) 23 NSWLR 374 at 386 (Hunt AJA).

39 NSW Law Reform Commission, above n 21, at [10.12].

40 Especially in view of cl 3 of the Media Alliance Code of Ethics <<http://www.alliance.org.au/>>.

41 See *Morgan* proposition (3), above n 31 and accompanying text. The rationale for this was explained by the NSW Court of Appeal in *Evatt v Nationwide News Pty Ltd* [1999] NSWCA 99 at [27] (Giles JA with whom Shellar and Powell JJ agreed).

42 See *Morgan* proposition (4), above n 31 and accompanying text.

43 (2005) Aust Torts Reps 81-789 (*O’Shane*).

of the imputations,⁴⁴ the s 22 defence failed as it was unable to show that ‘that . . . [the journalist’s] conclusions . . . followed logically, fairly and reasonably from the information . . . obtained’.⁴⁵

All in all then, the *Morgan* interpretation set a very high bar for s 22 reasonableness. So high in fact that it effectively rendered the s 22 defence ‘practically useless’.⁴⁶ But how does it compare with the reasonableness requirement in the defence that has come to be known as *Lange* extended common law qualified privilege?

Is s 22 reasonableness the same as *Lange* reasonableness?

The High Court in *Lange* set out its reasonableness requirement in these terms:

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 had reasonable grounds for believing that 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 an opportunity to respond.⁴⁷

The court justified this on the basis that ‘the damage that can be done when there are thousands of recipients of a communication is obviously so much greater than when there are only a few recipients’.⁴⁸ But, as with its s 22 cousin, *Lange* reasonableness has effectively rendered the extended common law defence ‘barely useable’.⁴⁹

After reading *Lange*, the temptation is to equate the two reasonableness requirements, especially given that s 22 was seen as the reason why NSW defamation law complied with the implied guarantee of political communication.⁵⁰ And this has tended to be the approach taken by the

44 *O’Shane v John Fairfax Publications Ltd* (2004) Aust Torts Reps 81-733 at [205] (Smart AJ).

45 *O’Shane* (2005) Aust Torts Reps 81-789 at [86]–[90] (Giles JA), at [243], [246] (Young CJ in EQ) upholding the trial judge’s finding in *O’Shane v John Fairfax Publications Ltd* (2004) Aust Torts Reps 81-733 at [201]–[207] (Smart AJ) referring to *Morgan* proposition (4)(b), above n 31 and accompanying text. The Commonwealth Attorney-General also appeared to consider this a burdensome factor in his proposal for a uniform defamation code: Commonwealth Attorney-General’s Department, *Revised Outline*, above n 14, p 22.

46 Applegarth, above n 10, pp 1–3; endorsed by Spence, above n 11, p 1. See also Kenyon, above n 15, at 418.

47 *Lange* (1997) 189 CLR 520 at 574 (citations omitted).

48 *Ibid*, at 572. But the court at 573 stressed that ‘reasonableness of conduct is imported as an element only when the extended category of qualified privilege is invoked to protect a publication that would otherwise be held to have been made to too wide an audience’.

49 Kenyon, above n 15, at 409.

50 *Lange* (1997) 189 CLR 520 at 569–70.

courts.⁵¹ In *O'Shane*, for example, *Lange* reasonableness was knocked out at first instance because of the absence of a *Morgan* factor⁵² and this was not disturbed on appeal to the NSW Court of Appeal.⁵³ Indeed, Young CJ in Eq expressed the view, by way of obiter, 'that overall, reasonableness in *Lange* tracks reasonableness under s 22'.⁵⁴

However, Walker has highlighted a difference in the subjective elements employed by the two reasonableness requirements: 'not knowing that something is false or untrue [*Lange*] is quite different from a requirement that the defendant had a positive belief in the truth of the imputation [s 22 as interpreted by *Morgan*].'⁵⁵

Walker bolsters this difference by explaining that the High Court's approach in *Lange* did not extend to an analysis of the *Morgan* interpretation and so the High Court should not be taken as approving the *Morgan* subjective belief requirement: 'all it was doing was to approve of a reasonableness requirement in the terms in which it described'.⁵⁶

This difference has been picked up by other commentators⁵⁷ as well as the NSW Task Force which went on to expressly acknowledge that the *Lange* subjective element represents 'a much more practical and achievable test' compared with the *Morgan* subjective element.⁵⁸ Walker also made the point in relation to unintended imputations that on the *Lange* prescription 'the fact that the publisher did not foresee the imputation indicates that it was not aware of its falsity'.⁵⁹

Secondly, as Walker goes on to point out, *Lange* reasonableness also requires an objective test in the form of requiring that 'the defendant had reasonable grounds for believing that the imputation was true'.⁶⁰ The NSW Task Force had also drawn attention to the 'mixed message' character of *Lange* reasonableness, involving as it does both subjective and objective tests.⁶¹

However, *Morgan* reasonableness also puts out a 'mixed message' of sorts for, as already noted, in addition to the subjective belief test, it also carries an objective element in the form of requiring the defendant to establish various matters which would go to making the defendant's 'belief in the truth of that

51 Although the different statutory environment in New South Wales whereby each imputation constituted a separate cause of action, had not gone unnoticed: Kenyon, above n 15, at 418–19 n 102 referring to the observations of Gillard AJA in *Popovic* (2003) 9 VR 1 at [201].

52 Which was one not mentioned in the *Lange* list, viz: *Morgan* proposition 4(b) — 'that his conclusions (whether statements of fact or expressions of opinion) followed logically, fairly and reasonably from the information which he had obtained': *Morgan* (1991) 23 NSWLR 374 at 388. See *O'Shane v John Fairfax Publications Ltd* (2004) NSWSC 140 at [197]–[207] (Smart AJ).

53 *O'Shane* (2005) Aust Torts Reps 81-789.

54 *Ibid.*, at [308], expressly adopting the view of Kenyon, above n 15, at 418–19.

55 Walker, above n 15, at 25–6.

56 *Ibid.*, at 25.

57 See, eg, Chesterman, above n 15, p 143 n 271 ('A significant difference'); Kenyon, above n 15, at 418.

58 NSW Task Force, above n 15, p 27.

59 Walker, above n 15, at 26.

60 *Ibid.*, referring to *Lange* (1997) 189 CLR 520 at 574.

61 NSW Task Force, above n 15, pp 26–7.

information a reasonable one'.⁶² Admittedly, this falls short of the objective test prescribed in *Lange* but nevertheless is one that still has some significant bite as the media defendant in *O'Shane* recently discovered.

So, in terms of their subjective elements, s 22 reasonableness (as interpreted by *Morgan*) may be seen to be more demanding than *Lange* reasonableness. But, in terms of their objective elements, s 22 reasonableness is less demanding than *Lange* reasonableness, although perhaps not as much as may have been thought.

A third potential source of difference relates to the scope of the enquiry provided for in each reasonableness requirement. The *Morgan* propositions arguably specify a greater range of matters for the court to consider compared with the *Lange* matters and so query whether this will encourage a court to cast the reasonableness enquiry over a wider front, and so potentially be more demanding, when determining s 22 reasonableness?

But are these differences more apparent than real? Kenyon's work highlights two potential inhibitors on them being realised in practice. One is that any difference can be 'too fine' to be put in argument before a court.⁶³ Another relates to the recent reminders in the cases of the wider framework in which both requirements operate which emphasise the flexibility inherent in the concept of reasonableness and deny that the matters specified in the requirements are essential or exhaustive.⁶⁴ On this point it is worth recalling that at the end of the day the quest on both enquiries is to determine what is reasonable in the circumstances of the case.

This means that a matter not specifically mentioned in *Lange* reasonableness may yet be relevant (and possibly even decisive) in determining *Lange* reasonableness in the circumstances of a particular case. This works to collapse the third potential difference identified above. It may even undermine the first potential difference in that it is conceivable that there may be circumstances in which a publisher will need to establish the more demanding *Morgan* subjective belief in order to establish *Lange* reasonableness *in all the circumstances of the case*. Indeed this is accommodated by the High Court's preface, 'as a general rule'. And if no *Lange* matter is essential in all cases, then arguably this erodes the second potential difference.

Although largely pursued in the academic arena, the question of sameness/difference in terms of *Morgan/Lange* reasonableness is not a purely academic one for it may have far reaching consequences in terms of the validity and ultimate integrity of the *Morgan* interpretation.

The integrity of the *Morgan* interpretation?

Since its inception, some 15 years ago, there have been developments which threaten the *Morgan* interpretation but also some which may be seen to bolster up this interpretation.

⁶² *Morgan* (1991) 23 NSWLR 374 at 388 (see proposition (4), above n 31 and accompanying text). See also NSW Law Reform Commission, 1993, above n 19, at [9.13].

⁶³ Kenyon, above n 15, at 429 (citations omitted).

⁶⁴ *Ibid*, at 418, referring to *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327 at [30] (Gleeson CJ and Gummow J) (*Rogers*); *Popovic* (2003) 9 VR 1 at [92], [197] (Gillard AJA).

Has *Morgan* reasonableness been superseded by *Lange* reasonableness?

In *O'Shane*, the appellant argued that *Morgan* reasonableness had been superseded by *Lange* reasonableness. But this was rejected by the NSW Court of Appeal. Giles JA pointed out that '[t]he High Court was not giving a detailed explanation [in *Lange*]'⁶⁵ and further that it had been subsequently acknowledged by Gleeson CJ and Gummow J in *Rogers v Nationwide News Pty Ltd* that the *Morgan* interpretation indicated '[s]ome considerations of common relevance'.⁶⁶ Young CJ in Eq also saw the *Rogers* treatment of *Morgan* as a bar to the appellant's argument.⁶⁷

Some retreat from the strict *Morgan* interpretation?

In *O'Shane*, Giles JA also reminded that the *Morgan* interpretation 'should not, however, be treated as a statutory prescription',⁶⁸ drawing on the observation of Gleeson CJ and Gummow J in *Rogers* that 'reasonableness is not a concept that can be subjected to inflexible categorisation'.⁶⁹ Young CJ in Eq also reiterated this observation and consistent with this referred to the *Morgan* propositions as 'guidelines'.⁷⁰ Earlier the NSW Court of Appeal had declared in *Amalgamated Television Services Pty Ltd v Marsden* 'that the journalistic standard' set by s 22 'is not required to rise to some pinnacle of unreal perfection'.⁷¹

Such judicial reminders would seem to pave the way for a retreat from the strict *Morgan* approach to subjective belief so that it may not be seen as 'a critical element in most cases'⁷² and also may not be set at such a demanding level.

This is further facilitated by the interest taken by Gleeson CJ and Gummow J in *Rogers* in 'the circumstances in which daily newspapers are published' when determining reasonableness.⁷³ In Kenyon's view, the provision of such information will assist the courts to strike more realistic journalistic standards.⁷⁴

Has *Roberts v Bass* reinforced the *Morgan* subjective belief requirement?

The s 22 defence will be defeated by proof of malice on the part of the defendant by the plaintiff.⁷⁵ In *Roberts v Bass* the concept of malice was

65 (2005) Aust Torts Reps 81-789 at [83].

66 Ibid, referring to *Rogers* (2003) 216 CLR 327 at [30].

67 Ibid, at [227].

68 Ibid, at [83].

69 Ibid, at [83], quoting from *Rogers* (2003) 216 CLR 327 at [30].

70 Ibid, at [225], [226].

71 [2002] NSWCA 419 at [989] (*Marsden*).

72 See above nn 37 and 38, combining elements from *Barbaro* (1990) 20 NSWLR 493 at 500 (Samuels JA) and *Morgan* (1991) 23 NSWLR 374 at 386 respectively.

73 *Rogers* (2003) 216 CLR 327 at [31].

74 Kenyon, above n 15, at 437.

75 *Austin v Mirror Newspapers Ltd* [1984] 2 NSWLR 383 at 389 (Glass JA) relying on Defamation Act 1974 (NSW) s 11; *Makim v John Fairfax & Sons* (unreported, NSW SC, Hunt J, 15 June 1990); (1990) A Def R (Online LexisNexis AU) at [50,075], although

reformulated by the High Court with the result that the absence of an honest belief in the truth of the matter will no longer be seen as sufficient to constitute malice.⁷⁶ The question that arises is whether, and if so to what extent, this reformulation will impact upon the interpretation of the s 22 reasonableness requirement? In particular, will this ‘squeezing out’ of the absence of honest belief from the determination of malice encourage courts to place greater weight on this matter when determining s 22 reasonableness?

Interestingly, the *Roberts v Bass* position as regards honest belief vis-à-vis malice had already been reached by (some) NSW courts prior to this decision in the context of the first generation s 22 defence.⁷⁷ But this adjustment to malice was made in recognition of the fact that the defendant will be required in most cases to show an honest belief in what the defendant has published in order to establish the defence.⁷⁸

Is the *Morgan* interpretation vulnerable to a *Lange* constitutional challenge?

Can the *Morgan* interpretation be challenged on the basis that it is not compatible with the implied constitutional guarantee of political communication? The question crystallises if it is considered that *Morgan* reasonableness is different to, and possibly more demanding than, *Lange* reasonableness. But, then again, it has even been suggested that *Lange* reasonableness itself may be open to a *Lange* challenge given that it too has proved so difficult to satisfy.⁷⁹

The hurdle is the second limb of the *Lange* test of compatibility and the question becomes whether the *Morgan* interpretation can be characterised as a:

law [which is] reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people?⁸⁰

On the one hand, it could be argued that the *Morgan* interpretation, with its

disagreeing with Glass JA’s explanation in *Austin v Mirror Newspapers Ltd* [1984] 2 NSWLR 383. See also NSW Law Reform Commission, 1971, above n 18, App D [117].

76 (2002) 212 CLR 1 at [75]–[104] (Gaudron, McHugh and Gummow JJ), [185] (Kirby J). Cf *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30 at 50–1 (Hunt J).

77 See *Makim v John Fairfax & Sons* (unreported, NSW SC, Hunt J, 15 June 1990); (1990) A Def R (Online LexisNexis AU) at [50,075], *Morgan v John Fairfax & Sons* (1990) 20 NSWLR 511 at 551 (Hunt AJA). But see *Marsden* [2002] NSWCA 419 at [1020] where it was observed by the NSW Court of Appeal that: ‘There is an overlap between considerations applicable to malice and requirements for establishing reasonableness in the context of s 22(1)(c)’.

78 *Morgan v John Fairfax & Sons* (1990) 20 NSWLR 511 at 551 (Hunt AJA); *Makim v John Fairfax & Sons* (unreported, NSW SC, Hunt J, 15 June 1990); (1990) A Def R (Online LexisNexis AU) at [50,075].

79 Chesterman, above n 15, p 100.

80 *Lange* (1997) 189 CLR 520 at 567, as reformulated in *Coleman v Power* (2004) 220 CLR 1; 209 ALR 112 by the replacement of the phrase, ‘the fulfilment of’ with, ‘in a manner’: at [93]–[96] (McHugh J), [196] (Gummow and Hayne JJ), [211] (Kirby J), affirmed in *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 332; 219 ALR 403 at [58] (McHugh J), [213] (Gummow J), [348] (Kirby J).

demanding subjective belief requirement, is not so 'reasonably appropriate and adapted' given that it has set the bar so high that it has rendered the s 22 defence 'practically useless'.⁸¹ However, on the other hand, there are the recent reminders by the courts about the flexibility of the reasonableness concept and how it is not expected to reach 'unreal perfection' and further that the *Morgan* interpretation is not 'a statutory prescription' and merely a 'guideline'.⁸² The threat of *Lange* incompatibility may work to reinforce these reminders and so further facilitate a retreat from the strict *Morgan* position.

The second generation s 22 defence — renewed promise?

In 2003, s 22 was amended to insert subs (2A) which provided a statutory list of matters a court may take into account when determining whether the publisher's conduct in publishing the matter in question was reasonable for the purposes of this defence.⁸³ What impact would this statutory list have on the way in which second generation s 22 reasonableness is interpreted by the courts? And would it be enough to revitalise the s 22 defence?

The s 22(2A) statutory list of reasonableness matters

Section 22(2A) provided:

In determining for the purposes of subsection (1) whether the conduct of the publisher in publishing matter concerning a person is reasonable in the circumstances, a court may take into account the following matters and such other matters as the court considers relevant:

- (a) the extent to which the matter published is of public concern,
- (b) the extent to which the matter published concerns the performance of the public functions or activities of the person,
- (c) the seriousness of any defamatory imputation carried by the matter published,
- (d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts,
- (e) whether it was necessary in the circumstances for the matter published to be published expeditiously,
- (f) the sources of the information in the matter published and the integrity of those sources,
- (g) 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 publisher to obtain and publish a response from the person,
- (h) any other steps taken to verify the information in the matter published.

The s 22(2A) list was inserted on the recommendation of the NSW Task Force and is similar to, but not identical with, the set of factors recommended by that body.⁸⁴ These in turn were drawn from (although are not identical

⁸¹ Applegarth, above n 10, pp 1–3; Spence, above n 11, p 1.

⁸² See above nn 68–70 and cases cited there.

⁸³ The amending Act — the Defamation Amendment Act 2002 (NSW) — was passed in 2002 but the relevant amendment to s 22 (see Sch 1 [11]) did not come into operation until 17 February 2003.

⁸⁴ NSW Task Force, above n 15, Recommendation 13, p 30.

with) the set of matters proposed by Lord Nicholls in *Reynolds v Times Newspapers Ltd*⁸⁵ for the purposes of determining when common law qualified privilege would extend to media publications, or at least those ‘the public were entitled to know’.⁸⁶

The *Reynolds* expanded common law privilege has been generally welcomed in England and looked on with not a little envy in certain quarters of the Australian defamation community.⁸⁷ However, to date, Australian courts have resisted attempts to import it into Australian common law.⁸⁸ This resistance is fuelled by recognition of the different constitutional environment in which the *Reynolds* privilege developed, informed as it is by the Human Rights Act 1998 (UK) which incorporates several provisions of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1953) including Art 10’s guarantee of freedom of expression; as well as acknowledgement that ‘[t]he proposition that the High Court in *Lange*’s case did not state the law exhaustively is a proposition best left to the High Court to enunciate in the future’.⁸⁹ However it remains to be seen whether and if so to what extent a *Reynolds*-type approach has been transported together with the insertion of what are essentially *Reynolds* factors into the NSW s 22 defence.

Given the judicial interpretation of the first generation s 22 reasonableness, what is immediately striking about the s 22(2A) statutory list is the absence of

85 [2001] 2 AC 127 (HL) (*Reynolds*): see *ibid*, at 28.

86 *Ibid*, at 197. The matters identified by Lord Nicholls are (at 205): (1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. (2) The nature of the information, and the extent to which the subject matter is a matter of public concern. (3) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. (4) The steps taken to verify the information. (5) The status of the information. The allegation may have already been the subject of an investigation which commands respect. (6) The urgency of the matter. News is often a perishable commodity. (7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. (8) Whether the article contained the gist of the plaintiff’s side of the story. (9) The tone of the article. A newspaper can raise questions or call for an investigation. It need not adopt allegations as statements of fact. (10) The circumstances of the publication, including the timing.

Lord Nichols also added that, ‘[t]his list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case’: at 205.

87 Kenyon, above n 15, at 420–34; I Cram, ‘Political Expression, Qualified Privilege and Investigative Journalism: An Analysis of Developments in English Defamation Law Post *Reynolds v Times Newspapers*’ (2005) 11 *Canterbury L Rev* 143 at 151 and see references cited at nn 47, 48. The Combined Media Defamation Reform Group indicated a preference for the *Reynolds* privilege over the *Lange* privilege: Combined Media Defamation Reform Group, *Submission in Response to ‘Outline of Possible National Defamation Law’, Attorney-General’s Discussion Paper — March 2004*, 2004, p 46 <<http://www.astra.org.au/content/pdf/DefamationSubmissionMay04.pdf>>.

88 See *John Fairfax & Sons Ltd v Vilo* (2001) 52 NSWLR 373 at [107]–[112]; *Marsden* [2002] NSWCA 419 at [1165]–[1171].

89 *John Fairfax & Sons Ltd v Vilo* (2001) 52 NSWLR 373 at [108]–[112]; especially at [108], [110]. This reasoning was subsequently endorsed in *Marsden* [2002] NSWCA 419 at [1168]–[1169]. Note that although the decision in *Reynolds* was handed down before the commencement of the Human Rights Act 1998 (UK), the House of Lords was mindful of the demands of that Act in *Reynolds*: see, eg, [2001] 2 AC 127 at 200 (Lord Nicholls).

any reference to subjective belief on the part of the defendant — be it an honest belief in the truth of the matter published or an absence of belief in its untruth! This factor was also absent from the list recommended by the NSW Task Force as well as the *Reynolds* listing.⁹⁰ Also absent from the statutory list is the *Morgan* factor which had caused so much trouble for the defendant in *O'Shane* referred to earlier (that is, 'that . . . [the journalist's] conclusions . . . followed logically, fairly and reasonably from the information . . . obtained').⁹¹

The question that arises then is what will be the impact of the insertion of this statutory list on the way second generation s 22 reasonableness is interpreted by the courts? Assuming the *Morgan* propositions to be still on foot, would they survive to plague second generation s 22 reasonableness? Or would the amendment allow a shutting of the judicial eye to the *Morgan* matters that had caused so much trouble in the past and so work to breathe new life into the s 22 defence? Would out of statutory sight necessarily mean out of judicial mind?

The statutory life of the second generation s 22 defence has been cut short now by the introduction of the uniform defamation legislation. Nevertheless these questions are still relevant to explore: first, for the light they may shed upon the way in which its successor in the uniform defamation era may be interpreted by the courts; and, also in their own right given the transition arrangements put in place for pre- 1 January 2006 publications in New South Wales.⁹²

In considering these questions, it is important to note that the reform agenda that saw the insertion of s 22(2A) into the Defamation Act 1974 (NSW) also resulted in the insertion of a statement of objects into that Act,⁹³ which included, significantly for present purposes, the object:

(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.⁹⁴

According to the Second Reading Speech:

The inclusion of such a statement will send a clear message that the Defamation Act should not be interpreted in a way which unreasonably limits discussion on matters of public importance . . .⁹⁵

This may well have an impact on the way in which s 22(2A) is interpreted by the courts given the current preference for a purposive construction.⁹⁶

90 Its absence from the *Reynolds* listing did not escape the attention of the NSW Task Force: above n 15, p 28.

91 *Morgan*, above n 31, (4)(b) and accompanying text.

92 See above n 17.

93 Defamation Act 1974 (NSW) s 3. This was inserted on the recommendation of the NSW Task Force, above n 15, pp 1–2 (Recommendation 1) by the Defamation Amendment Act 2002 (NSW) s 3 and Sch 1 [1], and commenced operation on 17 February 2003.

94 Defamation Act 1974 (NSW) s 3(b).

95 Second Reading Speech, Defamation Amendment Bill 2002 (NSW), Legislative Assembly, 12 November 2002 (Tony Stewart, Bankstown Parliamentary Secretary, on behalf of Bob Debus, NSW Attorney-General), p 1 <<http://www.parliament.nsw.gov.au>>.

96 See Interpretation Act 1987 (NSW) s 33.

Does the incorporation of what are essentially *Reynolds* matters necessarily import the *Reynolds* approach to those matters?

Kenyon, for one, has seen in the insertion of what are essentially *Reynolds* matters into s 22(2A), the promise of a 'revision' of s 22 reasonableness.⁹⁷ In particular he suggests that s 22(2A)(d) — 'the extent to which the matter published distinguishes between suspicions, allegations and proven facts' — may provide a gateway for a *Reynolds* 'neutral reportage' submission.⁹⁸ If this is the case then the importation of this *Reynolds* feature has the potential to undermine any subjective belief requirement. It is also arguable that this import has the potential to overshadow the other s 22(2A) matters. In *Roberts and Roberts v Gable, Silver and Searchlight Magazine Ltd*,⁹⁹ Eady J expressly recognised 'that Lord Nicholl's tests did not comfortably fit into a *reportage* case'¹⁰⁰ and went on to uphold the *Reynolds* privilege defence in the face of failure on several of the *Reynolds* factors.

Clearly we will want to keep a watching brief on the English reportage cases, but just because a *Reynolds*-type matter has been imported, does that mean that the courts will necessarily take a *Reynolds* approach to that matter?

Kenyon has also highlighted that a *Reynolds* approach would entail a 'checklist'-type approach to the listed matters.¹⁰¹ This could also shut out subjective belief on the basis that it is not mentioned in the s 22(2A) list. This matter is also absent from the *Reynolds* list and although Lord Nicholls stressed that that 'list is not exhaustive',¹⁰² the English Court of Appeal has asserted that:

We do not consider that a newspaper that is raising a defence of *Reynolds* qualified privilege has the onus of establishing an honest belief in the truth of the matter published.¹⁰³

But the *Reynolds* approach has been seen to offer more than a checklist approach. Kenyon has also highlighted its 'flexibility', 'practicality' and 'free speech sensitivity'.¹⁰⁴ In such an environment, restrictive judicial interpretations would find it difficult to seed, let alone flourish.

However, there are signs that *Reynolds* may not be the saviour that some have hoped it to be. One English commentator has suggested that the *Reynolds* honeymoon is over and that the English courts have now moved into a

97 Kenyon, above n 15, at 435.

98 Ibid, at 412–14, 435. By 'neutral reportage', Kenyon was referring to 'media reports of allegations being made by others, at times without publishers even attempting to verify the allegations' and drew particular attention to *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2002] EMLR 215: at 412–13.

99 [2006] EWHC 1025.

100 Ibid, at [35] (emphasis in original). Eady J also emphasised 'that reporting both sides, in a disinterested way, is an important element in the doctrine of *reportage*' (emphasis in original).

101 Kenyon, above n 15, at 412 and see references cited at nn 45, 46.

102 *Reynolds* [2001] AC 127 at 205.

103 *Loutchansky v Times Newspapers Ltd (Nos 2–5)* [2002] QB 783 at [79] (Lord Phillips MR delivering the judgment of the English CA).

104 Kenyon, above n 15, at 408, 412.

'period' of 'a less indulgent attitude towards investigative journalism and political expression'.¹⁰⁵ According to Cram, this 'post *Reynolds* phase 2' period is characterised by three 'troubling features':

a failure on the part of the courts (including juries) to appreciate the circumstances in which news-gathering occurs . . . the malleability of the Nicholls' checklist . . . [and] the refusal to reduce the *Reynolds* defence to a test of 'responsible journalism'.¹⁰⁶

It is also arguable that the *Reynolds* approach may become bogged down by the 'valuable corpus of case law' that Lord Nicholls foreshadowed would develop around its factors.¹⁰⁷ Although providing guidance, this may also expose it to a creeping rigidity.

And then there are the recent observations of the English Court of Appeal in *Jameel v Wall Street Journal Europe APRL (No 2)* opening the door for a defendant to raise subjective belief in order to establish 'responsible journalism' on its part.¹⁰⁸ But could this be the slippery slope to *requiring* defendants in England to demonstrate an honest belief in the truth of what they have published?

Nevertheless, to the extent that the *Reynolds* approach has liberalising benefits to offer, the question remains whether NSW courts will necessarily take this approach to the s 22(2A) matters?

This approach is open on the face of s 22(2A), but there is nothing expressly stated in that section to compel or drive it or indeed to even thwart the survival of the burdensome *Morgan* interpretation. There is not even a clear statement to this effect in the extrinsic materials that may be called in aid when interpreting s 22. There is no reference to *Reynolds* in either the Explanatory Notes or the Second Reading Speech, with the latter simply suggesting that the list has been inserted to provide 'a practical means of interpreting what is and what is not reasonable'.¹⁰⁹ The NSW Task Force does refer to the *Reynolds* list however and notes that it does not include the defendant's subjective belief but does not complete the picture by explaining what it hopes to achieve by recommending the insertion of what are essentially *Reynolds* factors into the s 22 defence.¹¹⁰

Further, there is not the legal and constitutional backdrop that now prevails in England, by virtue of the Human Rights Act 1998 (UK), to propel a *Reynolds*-type approach in New South Wales. This backdrop is apparent in Lord Nicholls' plea:

Above all, the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the

¹⁰⁵ Cram, above n 87, at 152.

¹⁰⁶ *Ibid.*, at 155.

¹⁰⁷ *Reynolds* [2001] AC 127 at 205.

¹⁰⁸ [2005] EWCA Civ 74 at [27] (Lord Phillips MR delivering the judgment of the English CA).

¹⁰⁹ Second Reading Speech, Defamation Amendment Bill 2002 (NSW), above n 94, p 2; Explanatory Notes, Defamation Amendment Bill 2002 (NSW) <<http://www.parliament.nsw.gov.au>>.

¹¹⁰ NSW Task Force, above n 15, p 28. But see below n 126 and accompanying text.

public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication.¹¹¹

On the contrary, second generation s 22 reasonableness will have to shake off baggage without the assistance of Lord Nicholls' concession:

it should always be remembered that journalists act without the benefit of the clear light of hindsight. Matters which are obvious in retrospect may have been far from clear in the heat of the moment.¹¹²

It is also arguable that although travelling over similar ground, the *Reynolds* exercise is directed to a different end than the s 22 reasonableness exercise and so may not be completely responsive to the latter's needs. Consideration of the s 22(2A) matters is directed towards determining whether the defendant's conduct in publishing the matter in question was reasonable in the circumstances. Consideration of much the same matters in a case where the *Reynolds* privilege is raised is directed to weighing up matters for the purposes of determining whether the common law duty/interest requirement has been satisfied.¹¹³ Although reasonableness has been substituted for the common law duty/interest requirement in the s 22 defence, they are not necessarily the same thing. And although the term 'responsible journalism' has featured in the *Reynolds* context, there has been resistance to allowing it to supersede the traditional common law duty/interest formulation.¹¹⁴ Even if it does then it is arguable that 'responsible journalism' is not necessarily on all fours with the concept of 'reasonableness of conduct'.

So, although potentially offering certain liberalising benefits, at the end of the day, there is no guarantee (apart from somewhat oblique references in extrinsic materials), that the courts will take a *Reynolds* approach to the s 22(2A) matters.

Will the *Morgan* interpretation survive to plague the second generation s 22 defence?

Given the problems caused in the past by the stringent subjective belief element of the *Morgan* interpretation, the main focus of this enquiry again will be to examine whether, and if so to what extent, this element survives to plague the second generation s 22 defence? In any event it is anticipated that much of the discussion in relation to this element will probably be applicable to other elements of the *Morgan* interpretation.

There are several dimensions to this issue.

Can a court still take account of the absence of an honest belief?

The first question that arises is whether a court can still have regard to the belief of the defendant in the truth of what he or she has written when called

111 *Reynolds* [2001] AC 127 at 205.

112 *Ibid.*

113 A distinction between the 'weighting exercise' of *Reynolds* and the 'reasonable test' of s 22(2A) of the Defamation Act 1974 (NSW) was also drawn by the Combined Media Defamation Reform Group, above n 87, p 52.

114 See *Jameel v Wall Street Journal Europe SPRL (No 2)* [2005] EWCA Civ 74 at [87] (Lord Phillips MR delivering the judgment of the English CA).

upon to determine second generation s 22 reasonableness even though this matter is not specifically mentioned in the s 22(2A) statutory list?

There is nothing expressly prohibiting consideration of such a matter and it is submitted that just because it is not expressly mentioned in s 22(2A) will not of itself preclude a court from having regard to it when determining s 22 reasonableness.

In the first place, s 22(2A) does not purport to establish an exhaustive list of relevant matters. On the contrary, the opening words of the subsection expressly provide that when determining s 22 reasonableness the court may take into account the listed matters ‘*and such other matters as the court considers relevant*’ (emphasis added). So it can be argued then that s 22(2A) is creating an *expansive* (as opposed to an *exhaustive*) list of relevant matters which means that even though a matter is not expressly mentioned it can still be taken into account by a court if considered relevant.

The counter argument might be put however that, granted a court may have regard to matters not expressly listed in s 22(2A), nevertheless the type of (unspecified) matters that may be considered is somehow circumscribed by the nature of the specified matters which appears to be exclusive of subjective belief; although, it is arguable, that s 22(2A)(f) — ‘the sources of the information in the matter published and the integrity of those sources’ — provides a gateway to considering matters which at least go to establishing honest belief.¹¹⁵ Be that as it may, this *expressio unius*-style argument is not of itself always compelling¹¹⁶ and it flies in the face of the very clear authority given to the courts in the opening words of s 22(2A) to go outside the specified list.

Nevertheless a further countervailing argument may be mounted having regard to the purpose of the legislation, especially as stated in s 3(b), along the lines that a construction that would allow regard to be had to the honest belief of the defendant would ‘place unreasonable limits on the publication and discussion of matters of public interest and importance’ and so does not promote the purpose of the legislation in which case it ‘cannot prevail’ in accordance with s 33 of the Interpretation Act 1987 (NSW).¹¹⁷

But again there is the very clear statutory authority given to the courts in the opening words of s 22(2A) to go outside the specified list and merely considering a potentially limiting matter would not seem to be ‘unreasonable’ and so frustrate the object stated in s 3(b). However this line of argument would depend on what weight a court decided to put upon this matter.

Turning next to extrinsic materials.¹¹⁸ Unfortunately the Second Reading Speech is not particularly helpful here. It neither expressly confirms nor

¹¹⁵ NSW Law Reform Commission, above n 21, at [10.12], [10.21].

¹¹⁶ D C Pearce and R S Geddes, *Statutory Interpretation in Australia*, 5th ed, Butterworths, Chatswood, 2001, at [4.26]–[4.27]: ‘Because of these problems with respect to its use, *expressio unius est exclusio alterius* rule is applied by the courts with extreme caution. When it is followed, it is used more often as a bolster to a predetermined interpretation than as a rule that in fact produces a result in itself . . .’.

¹¹⁷ *Kingston v Keprose* (1987) 11 NSWLR 404 at 423 (McHugh JA).

¹¹⁸ Courts interpreting NSW legislation may have regard to extrinsic materials via s 34 of the Interpretation Act 1987 (NSW) (provided one of the conditions set out in s 34(1) is satisfied) or relying on the common law: *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *Newcastle City*

denounces consideration of the subjective belief of the defendant. As already noted, it does suggest however that the list of matters was inserted into s 22 so as to provide ‘a practical means of interpreting what is and is not reasonable’;¹¹⁹ although it does not go further and explain what it means by ‘a practical means’. Nevertheless, perhaps an argument could be made from the use of the word, ‘practical’, that it somehow excludes matters of subjective belief given the recognised difficulty of proving such matters. But, then again, this is a little cryptic (even for Second Reading Speeches) and may overwork the word ‘practical’, not to mention the use to which extrinsic materials can be legitimately put in the light of the guidance provided by Mason CJ, Wilson and Dawson JJ in *Re Bolton; Ex parte Beane*.¹²⁰ But more than this, it does not really get over the clear statutory authority provided in s 22(2A) to go outside the statutory list.

Similarly, the Report of the NSW Task Force, which preceded the statutory amendment, contains no express direction regarding subjective belief but it is arguable that it evinces an attempt to close out consideration of this matter. Subjective belief does not appear in the proposed statutory list and there is no provision in the proposed amendment specifically authorising a court to go outside the statutory list.¹²¹ This proposed statutory silence also comes in the context of the NSW Task Force calling attention to the problem posed by the ‘restrictive’ judicial interpretation of s 22 reasonableness.¹²² Further the ‘clear Australian analogy’ drawn to the listing of ‘best interests of the child’ factors in the then s 68F(2) of the Family Law Act 1975 (Cth)¹²³ suggests that the NSW Task Force had in mind a ‘checklist-type’ approach to its proposed statutory list; but, s 68F(2) also contained an invitation to consider other relevant matters.¹²⁴

Be that as it may, whatever can be made of the NSW Task Force’s omission of such an invitation, this omission did not make it into the legislation for as already noted the opening words of s 22(2A) contain clear statutory authority for a court to go outside the statutory list.

There is also the argument that if the legislature wanted to prohibit courts from considering the subjective belief of the defendant then it could have taken the opportunity to insert an express provision to this effect when amending the section, and it did not.

So, it is submitted that, failing to specify the belief of the defendant in the truth of the imputation as one of the relevant matters in s 22(2A) will not of itself preclude a court from considering this matter when called upon to determine second generation s 22 reasonableness — putting this matter out of statutory sight is not necessarily enough to put it out of the court’s mind.

Council v GIO General Ltd (1997) 191 CLR 85 at 99–100 (Toohey, Gaudron and Gummow JJ) and at 112–13 (McHugh J); 149 ALR 623. And see Pearce and Geddes, above n 115, at [3.6].

119 Second Reading Speech, Defamation Amendment Bill 2002 (NSW), above n 94, p 2.

120 (1987) 162 CLR 514 at 517–18.

121 NSW Task Force, above n 15, p 30.

122 *Ibid*, p 24.

123 *Ibid*, p 29. Note that s 68F of the Family Law Act has been recently repealed by the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth).

124 Family Law Act s 68(F)(2)(1) provided: ‘The court must consider . . . (1) any other fact or circumstance that the court thinks is relevant.’

But will a court necessarily have regard to an absence of honest belief?

So accepting that it is still open to a court to have regard to the belief of the defendant in the truth of what he or she has written, the next question is, will a court necessarily have regard to this matter?

By specifying a set of relevant matters, the temptation may be for courts to treat this as a *checklist* for determining s 22 reasonableness. On this approach, a court would work its way through the list, systematically checking off and rating the defendant's case on each matter. Because it is not one of the listed matters, it may be that the belief of the defendant will be overlooked notwithstanding the 'gateway' provided in the opening words to s 22(2A). (And after all, the court will have enough to do dealing with each of the listed 8 matters!)

As already noted, this seems to be the approach taken in England to the *Reynolds* matters. And it was also noted then that there is English Court of Appeal authority to the effect that a defendant is not required to show an honest belief in the truth of the matter in question in order to rely on the *Reynolds* privilege. But as discussed, there is no guarantee that the *Reynolds* approach will be taken to s 22(2A) and further the *Reynolds* approach does not guarantee that a defendant's subjective belief will be ignored.

But, moreover, given the previous judicial attitude to this matter in New South Wales, what plaintiff is not going to agitate a court to not only have regard to the belief of the defendant in what he or she has written but also to continue to accord this matter the same prominence it enjoyed prior to the insertion of the s 22(2A) statutory list under the *Morgan* interpretation?

So the question becomes whether absence of an honest belief will be as critical for second generation s 22 reasonableness?

Will the absence of an honest belief be as critical?

Certainly there is no express denouncement in the amended s 22 along the lines of a statement to the effect that 'it is not necessary for a defendant to show that he or she believed in the truth of the imputation in order to establish that his conduct in publishing the matter in question was reasonable in the circumstances'.

However it could be argued that by specifying a wide range of reasonableness matters and failing to specify an honest belief in the truth of the imputation in s 22(2A), parliament's intention was to diminish the importance of this matter in the determination of s 22 reasonableness. In this way the statutory list may be seen as performing an *extending* function: encouraging the courts to extend the parameters of the reasonableness enquiry. So while it is still open to a court to have regard to this matter, the absence of an honest belief in the truth of the imputation on the part of a defendant will generally not be fatal to establishing s 22 reasonableness.

To counter this, it could be argued that parliament's intention in specifying relevant matters was to make it clear, whereas there may have been doubt before, that the particular matters specified could be taken into account in determining s 22 reasonableness. So in this way the statutory list is performing a *legitimising* or *authorising* function. On this view, it could be argued that there was no need to mention an honest belief in the truth of the imputation

because it was already so well accepted by the courts as a relevant matter and indeed in most cases would be a critical matter in the determination of s 22 reasonableness.

On the other hand, looking to the specific matters mentioned in s 22(2A), and in particular '(d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts', it is arguable that this provides a way of undermining and possibly overriding an honest belief requirement. This may be assisted, as suggested by Kenyon, by the *Reynolds* neutral reportage cases, although, as already discussed, there is no guarantee that the *Reynolds* approach will be taken by the courts.¹²⁵

Further, having regard to the purpose of the legislation (especially as stated in s 3(b)), it might be argued that a construction which grafts the *Morgan* subjective belief view on to s 22 works to 'place unreasonable limits on the publication and discussion of matters of public interest and importance', given that such a view has severely curtailed the availability of an important defence for publishers, and so does not promote the purpose of the legislation, and so 'cannot prevail' in accordance with s 33 of the Interpretation Act 1987 (NSW).¹²⁶

Looking to the Second Reading Speech, it does not expressly devalue the defendant's belief in the imputation except to the extent that the desire to provide 'a practical means' for determining s 22 reasonableness can be pressed to argue against the continuation of almost unachievable requirements.

Similarly, the NSW Task Force did not expressly denounce a requirement on the defendant's part to show that he or she believed in the truth of the imputation although it did declare that the statutory list of relevant matters:

ought to make clear to decision makers that it is not necessary for a publisher who wishes to invoke qualified privilege to prove that they had *objective* grounds for believing in the truth of the matter published.¹²⁷

This is perhaps a little unexpected given the problem conceived by the NSW Task Force for defendants wishing to rely on the s 22 defence was the judicial requirement 'to prove that they believed in the truth of what was published'.¹²⁸ But, then again, as noted earlier, the NSW Task Force also highlighted the 'mixed message' character of the *Lange* test of reasonableness, requiring as it does an *objective* element in addition to a *subjective* element,¹²⁹ and so perhaps the thrust of the NSW Task Force's quest then was to thwart the grafting on to s 22 reasonableness of the *Lange* objective requirement (namely, that 'the defendant had reasonable grounds for believing that the imputation was true')¹³⁰

However further support for diminishing the importance accorded to the

125 See above nn 96–113 and accompanying text.

126 *Kingston v Keprose* (1987) 11 NSWLR 404 at 423 (McHugh JA).

127 NSW Task Force, above n 15, p 29 (emphasis added).

128 *Ibid*, p 24 (citations omitted).

129 *Ibid*, pp 25–6.

130 *Lange* (1997) 189 CLR 520 at 574. Although, with all due respect, query how this desire could hope to be realised in the absence of an express statutory provision given the almost irresistible invitation to at least go down this path provided by a listing of matters which largely go to establishing this objective element?

defendant's belief in the truth of what he or she has written may be drawn from the apparent recent softening of the court's attitude to the application of the *Morgan* interpretation to the first generation s 22 defence noted earlier.

So the provision of a statutory listing of reasonableness matters, exclusive of subjective belief, may distract a court from according the honest belief of the defendant *Morgan* prominence, especially if a checklist approach is taken and especially in the light of the object stated in s 3(b) and encouraged by an apparent recent relaxation in judicial attitude to the application of *Morgan* generally. But, it is submitted, that this second generation form of the s 22 defence is not cast in bold enough terms to completely block this severely inhibiting interpretation. If this was the desired outcome then a stronger indication in both the legislation and the related extrinsic materials would be have been helpful.

What about dropping to a less demanding subjective belief?

If subjective belief has survived the statutory amendment as a relevant, if not 'a critical element in most cases',¹³¹ in the determination of s 22 reasonableness then an interesting question arises as to whether a persuasive case can be made in favour of dropping the level of subjective belief down to the less demanding *Lange* requirement that 'the defendant did not believe the imputation to be untrue'?¹³²

As noted earlier, this was acknowledged by the NSW Task Force to be 'a much more practical and achievable test' compared with the *Morgan* prescription.¹³³

Use of the word 'practical' also resonates well with the Second Reading Speech and so it might then be argued that the less demanding form may better assist the amendment's goal of providing 'a *practical* means of interpreting what is and is not reasonable'¹³⁴ than does requiring an honest belief in the truth of the imputation. However, comments buried in extrinsic materials are not necessarily determinative of statutory meaning.¹³⁵

On another tack, dropping to the less demanding form will bring s 22 reasonableness into line with *Lange* reasonableness — at least in terms of their subjective elements. But, as was noted earlier, the less demanding subjective belief has been accepted in *Lange* in the context of simultaneously requiring a more demanding objective element, namely, that 'the defendant had reasonable grounds for believing that the imputation was true'. So would dropping down to the less demanding subjective test lead to the imposition of a more demanding objective requirement for s 22 reasonableness?

It could if the desire to maintain parity with *Lange* reasonableness is strong enough (at least in terms of its articulation). But to do so would apparently fly in the face of the express direction given to the contrary by the NSW Task Force.¹³⁶ But this direction did not find specific statutory expression in the

131 See above n 72.

132 *Lange* (1997) 189 CLR 520 at 574.

133 NSW Task Force, above n 14, p 27.

134 Second Reading Speech, Defamation Amendment Bill 2002 (NSW), above n 94, p 2 (emphasis added).

135 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518 (Mason CJ, Wilson and Dawson JJ).

136 See above n 126 and accompanying text.

amendment to s 22. Nor did it even find specific expression in the amendment recommended by the NSW Task Force. So, with all due respect, how was this position to be made ‘clear’? Simply not imposing a requirement does not necessarily guarantee that a provision will not be interpreted to incorporate that requirement: out of statutory sight does not necessarily mean out of judicial mind. And, again, extrinsic comments will not necessarily be given effect by the courts when interpreting legislation.¹³⁷ So while support to ward off the imposition of an objective test may be drawn from the purpose of the legislation, buoyed by comments in extrinsic materials, these are not the most solid grounds on which to rely especially in the face of the almost irresistible invitation to go down this path sent out by the nature of the matters listed in s 22(2A).¹³⁸

Likely distraction, but at what cost?

We have seen that specifying a range of matters may have the effect of distracting attention away from those not expressly mentioned (and subjective belief in particular) but at what cost does this distraction come? Will it have the effect of casting the reasonableness net so wide that it erects another difficult hurdle for defendants to jump?

This will depend on the way in which courts approach the statutory list in s 22(2A). Will they consider themselves obliged to consider *all* of the matters listed when determining s 22 reasonableness? If they do then, having regard to the nature and number of matters listed, this will work to cast the reasonableness enquiry over a very wide ground and so potentially impose a very onerous burden on publishers.¹³⁹ Or, will courts see the list as simply authorising or legitimating (if there was any doubt) consideration of the particular matters listed leaving it then to them to pick and choose which matters are actually considered relevant in any case?

It is submitted that the wording and structure of s 22(2A) work towards supporting the *pick-and-choose* approach in preference to the *checklist* approach. First, the opening words of s 22(2A) provide that ‘a court *may* take into account the following matters . . .’¹⁴⁰ and traditionally the word ‘may’ is interpreted as conferring a discretion rather than imposing an obligation.¹⁴¹ Further the matters in the list that follows are not connected by ‘and’ which is the usual trigger for a cumulative listing.¹⁴²

However it seems that the NSW Task Force may have had a *checklist* approach in mind when it drew what it described as the ‘clear Australian analogy’ to what it proposed with the statutory list of ‘best interests of the

¹³⁷ *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518 (Mason CJ, Wilson and Dawson JJ).

¹³⁸ Although admittedly s 22 falls short of imposing an objective grounds test, see above n 42 and accompanying text.

¹³⁹ Gillooly has drawn attention to this potential in relation to both *Lange* reasonableness as well as s 22 reasonableness and laments that ‘the range and breadth of the reasonableness requirement renders it an unsuitable mechanism for striking the appropriate balance between quality and quantity of information flow’: Gillooly, above n 12, pp 158–61.

¹⁴⁰ Emphasis added.

¹⁴¹ Pearce and Geddes, above n 115, at [11.5]; although this is not a hard and fast rule and there have been cases where the courts have interpreted ‘may’ as ‘imposing an obligation’: see Ch 11.

¹⁴² *Ibid*, at [2.25], and see also [12.2].

child' factors contained in (the now repealed) s 68F(2) of the Family Law Act,¹⁴³ although it did not go all the way with this analogy in the terms of the amendment it proposed.

Section 68F(2) set up a statutory list of *must-consider* factors when determining the best interests of a child. This was made clear in s 68F(1) and reinforced in the opening words of s 68F(2) as well as the use of 'and' between the last two matters in the listing.¹⁴⁴

The amendment proposed by the NSW Attorney-General's Task Force does not go this far and lacks the express direction found in the former ss 68F(1) and 68F(2). Even so, there is no discretion conferred in the opening words to the proposed statutory list and this list uses 'and' between the last two matters.

But, what was finally enacted differs from what was recommended by the Task Force in two important ways: first, the opening words of s 22(2A) appear to confer a discretion; and, secondly the trigger for a cumulative listing is absent. And so it is arguable that parliament did not intend to create a checklist of *must-consider* matters to be taken into account when determining s 22 reasonableness.

This view may also be supported by having regard to the purpose of the legislation, especially as stated in s 3(b), in that a checklist of *must-consider* matters may cast the reasonableness enquiry so wide as to work to deny a defence and so it may be argued that a construction which mandates this approach does not promote the purpose of the legislation and so in accordance with s 33 of the Interpretation Act 1987 (NSW) 'cannot prevail'.¹⁴⁵ And again it is worth reminding about the constraint on the use of extrinsic materials as an aid to statutory interpretation referred to earlier.

Nevertheless while s 22 may not require a *must-consider* checklist, it may still be open to a court to consider all of the matters listed in s 22(2A) in any particular case. And the courts *may* be encouraged to do this by the approach taken by English courts to the *Reynolds* factors. However there will be some tricky issues to be worked out by the courts in terms of the weighting to be accorded to each factor: are some matters more significant or to be weighted more than other matters? Will any matters be determinative? What will be sufficient to neutralise a poor rating on a particular matter? To the extent that the analogy with the former s 68F(2) 'best interests of the child' factors is relevant then it is interesting to note the observations of Dickey:

The 12 considerations set out in s 68F(2) are not listed in order of importance or priority. Accordingly, no one consideration has any greater significance than any other. Some considerations may overlap with others . . . [And] the relevance of each consideration naturally depends upon the particular issues involved in any case.¹⁴⁶

This, it might be recalled, echoes the *Reynolds* approach.¹⁴⁷

On the other hand, the *pick-and-choose* approach is not without its issues. In particular, it does not eliminate the weighting issue and may also be

143 NSW Task Force, above n 15, p 29.

144 See A Dickey QC, *Family Law*, 4th ed, Lawbook Co, Pyrmont, 2002, pp 404–6.

145 *Kingston v Keppose* (1987) 11 NSWLR 404 at 423 (McHugh JA).

146 Dickey, above n 143, p 406 (citations omitted).

147 See above n 85.

unpredictable as regards which factors may be selected in any case and so lead to uncertainty.

What do the cases say?

It is still relatively early days in the short life of the second generation s 22 defence and at the time of writing the author was not aware of a reported case in which the courts had clarified the impact of the insertion of a statutory list of reasonableness matters on the operation of the s 22 defence. In the meantime however the NSW Court of Appeal has expressed the view that the *Morgan* propositions and s 22(2A) are 'not inconsistent'.¹⁴⁸ Although obiter,¹⁴⁹ it does open the door to the survival of the *Morgan* propositions into the s 22(2A) era.

So, where does this leave the second generation s 22 defence?

The statutory list of reasonableness matters was inserted into s 22 '[s]eemingly in an attempt to alter . . . [the] balance' in favour of plaintiffs wrought by previous judicial interpretation.¹⁵⁰ However while this amendment provides several opportunities for reviving the s 22 defence, it does not necessarily block the previous demanding judicial interpretation. Consequently the second generation s 22 defence may still be vulnerable to constraint along *Morgan* lines.

So, what does all this mean for the s 30 statutory qualified privilege defence in the uniform defamation legislation era?

Section 30 of the uniform defamation legislation¹⁵¹ 'is based on' the second generation s 22 defence,¹⁵² and so we might expect that the s 30 defence will operate in much the same way as its NSW predecessor including being plagued by much the same problems. But will this necessarily be the case given that s 30 also lives in a different context to its predecessor?

148 *John Fairfax Publications Pty Ltd v Zunter* [2006] NSWCA 227 at [23] (Handley JA with whom Spigelman CJ and McColl JA agreed) endorsing the view expressed in the court below, see *Zunter v John Fairfax Publications Pty Ltd* [2005] NSWSC 759 at [32] (Simpson J). Simpson J was mindful that the s 22(2A) 'catalogue' does not include the honest belief of the defendant: at [33].

149 As the publication date in question predated the commencement of s 22(2A). See *O'Shane* (2005) Aust Torts Reps 81-789 at [223] (Young CJ in EQ).

150 M Sexton and T K Tobin, *Australian Defamation Law and Practice*, Online LexisNexis AU, at [14,115].

151 This is a reference to Defamation Act 2005 (NSW). See above n 1, and see n 9 for the relevant provisions in the other Acts forming the uniform defamation legislative scheme. As references to the uniform defamation legislation are references to Defamation Act 2005 (NSW), references to extrinsic materials will be to extrinsic materials associated with the that Act unless otherwise indicated.

152 Second Reading Speech, Defamation Bill 2005 (NSW), Legislative Assembly, 13 September 2005, p 5 (Bob Debus, NSW Attorney-General, Minister for the Environment and Minister for the Arts) <<http://www.parliament.nsw.gov.au>>; Explanatory Notes, Defamation Bill 2005 (NSW), p 8 <<http://www.parliament.nsw.gov.au>>.

The s 30 statutory qualified privilege defence

A quick comparison of s 30 and its s 22 predecessor reveals that their terms are almost identical, although there are some differences. Of note, in relation to the list of reasonableness matters, is: the extension by way of the addition of 'the nature of the business environment in which the defendant operates' in s 30(3)(e); the replacement of the necessity criterion in s 22(2A)(e) for publishing expeditiously with one of 'public interest' in s 30(3)(e); and, the joining of the reasonableness matters in s 30(3) with the word, 'and', whereas there is no conjunction in the s 22(2A) listing. There is also a 10th matter in the s 30(3) list but para (j) merely encapsulates the invitation in the opening words of s 22(2A) to go outside the statutory list to consider 'any other circumstance that the court considers relevant'. Modifications to the statutory list were described as 'minor' in the NSW Second Reading Speech.¹⁵³ There is also a new subsection making it clear that the statutory qualified privilege defence will be defeated by proof of malice on the plaintiff's part (s 30(4)).

Given s 30's pedigree, we would expect that much of the discussion concerning the meaning and effect of the second generation s 22 defence would be applicable to the s 30 defence. Based on the foregoing analysis, we might expect then that the s 30 defence may also be threatened by the troublesome *Morgan* interpretation with its demanding subjective belief requirement.

However s 30 lives in a different context to that of its predecessors and the question that arises is whether and if so to what extent features of this different context may bring different considerations to bear?

Section 30 lives in uniform national legislation

The most apparent contextual difference is that s 30 lives in uniform national legislation whereas s 22 was housed in ordinary (NSW) state legislation.

This means that courts other than NSW courts may be called upon to interpret and apply the s 30 defence: courts which do not share the same allegiance to NSW jurisprudence as NSW courts may do. They will probably be aware of the pedigree of s 30¹⁵⁴ and mindful of the problems and frustrations that have plagued its predecessor, such as the notoriety of the first generation s 22 defence. And so they may be minded to take opportunities to adopt an interpretation that avoids these difficulties while being consistent with the terms of s 30. And this impetus may even be more stronger in those jurisdictions (namely, Queensland and Tasmania) where defendants have enjoyed statutory qualified privilege defences free from the burden of having to establish an honest belief in the truth of the imputation.¹⁵⁵

If a less demanding interpretation was forthcoming then there would be

¹⁵³ Although only the first two modifications were noted: Second Reading Speech, Defamation Bill 2005 (NSW), above n 151, p 5.

¹⁵⁴ For example via the extrinsic materials.

¹⁵⁵ See the former statutory qualified protection defences in 16 of the Defamation Act 1889 (Qld) and s 16 of the Defamation Act 1957 (Tas) respectively. These defences required the publication to be 'made in good faith' but this concept used the less demanding subjective belief element of 'not believ[ing] the defamatory matter to be untrue' [see Defamation Act 1889 (Qld) s 16(2); Defamation Act 1957 (Tas) s 16(2)]; and, 'the burden of proof of the

certain pressure on subsequent courts (including courts in other states and territories) to follow this in the interests of maintaining uniformity, ‘unless convinced that that interpretation was plainly wrong’.¹⁵⁶

Another possible source of difference may arise to the extent that there is variance from the NSW purposive and extrinsic materials provisions in ss 33 and 34 of the Interpretation Act 1987 (NSW) respectively in the various jurisdictions participating in the uniform scheme.

Section 30 also lives in a different legislative context

Although the uniform defamation legislation largely reflects the Defamation Act 1974 (NSW), there are some important differences. And so the question here is whether and if so to what extent these differences may impact upon the operation of the s 30 defence?

Differences in the wording of s 30(3)

First, in terms of s 30 itself, as already noted, s 30(3) is set up a little differently to its s 22(2A) predecessor in that each of the matters in s 30(3) is connected with ‘and’ whereas the matters in s 22(2A) are not. It is not clear why there has been a change in wording and neither the NSW Second Reading Speech nor the NSW Explanatory Notes sheds any light on this. It may be that by inserting ‘and’ between the matters there is a stronger argument in favour of a checklist approach whereby a court will consider all the matters listed. However there is still the discretion in the opening words to s 30(3) and so it is arguable that the section simply authorises consideration of the various matters listed rather than mandates their consideration although, as pointed out earlier, even on this view, it would still be open for a court in any case to proceed to consider each of the matters listed in s 30(3).

Secondly, there is the new matter inserted in the statutory list of reasonableness matters in s 30(3), namely ‘(f) the nature of the business environment in which the defendant operates’. This was not specifically recommended by the NSW Task Force. Nor does it feature in the *Reynolds* list. There is also no explanation in the NSW Second Reading Speech or the NSW Explanatory Notes as to why this matter was included or what it means. Nevertheless it should come as no surprise, especially in view of the encouragement given by Gleeson CJ and Gummow J in *Rogers* to adduce evidence of ‘the circumstances in which daily newspapers are published’.¹⁵⁷ The potential of such material to assist in the setting of more realistic journalistic standards has already been noted.¹⁵⁸ However query whether s 30(3)(f) may also provide a gateway to wider considerations going more directly to, and possibly even countering an absence of, subjective belief of the defendant? Could it, for example, open another door to neutral reportage, if, say, the defendant was in the business of investigative journalism?

absence of good faith’ was cast on the plaintiff: Defamation Act 1889 (Qld) s 17; Defamation Act 1957 (Tas) s 19. See also Gillooly, above n 12, pp 148–9.

156 *ASC v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ). See also A MacAdam and J Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia*, Butterworths, Sydney, 1998, at [715]–[7.17].

157 *Rogers* (2003) 216 CLR 327 at [31].

158 See above nn 72–3 and accompanying text.

A broader objects clause

The statement of objects in the uniform defamation legislation, while ‘very similar’ to s 3 of the Defamation Act 1974 (NSW),¹⁵⁹ is arguably broader than its predecessor, especially the s 3(b) object which reads:

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 (emphasis added).

So arguments based on a purposive approach to the interpretation of the uniform defamation legislation arguably have a broader base now from which to work and one which would favour a less strict interpretation of s 30 compared with its predecessor.

Abandonment of the NSW imputation system

A third difference relates to the abandonment of the NSW imputation system whereby each imputation constituted a separate cause of action¹⁶⁰ in preference for the general law position that the publication of defamatory material constitutes the cause of action.¹⁶¹

According to the NSW Second Reading Speech, this is ‘a significant but very welcome change’ which ‘will . . . put an end to . . . needless complexity’ in New South Wales.¹⁶² That remains to be seen. But, in the meantime, query what (if any) impact this change will have on the operation of the s 30 defence?

One change which has already been suggested is that the defendant will no longer be required to show reasonableness in relation to the imputations pleaded by the plaintiff and found to be defamatory (which may be unintended by the defendant).¹⁶³

Expansion of the role of juries (in most jurisdictions)

Another potential difference relates to the expansion of the role of juries wrought by the uniform defamation legislation.

Previously, in New South Wales, all aspects of defences (questions of fact as well as law) were determined by the judge.¹⁶⁴ However, under the uniform defamation legislation, a jury (where one is elected) will determine the defences¹⁶⁵ — at least, in most jurisdictions.¹⁶⁶

159 Second Reading Speech Defamation Bill 2005 (NSW), above n 151, p 2. Apart from of course containing the additional object relating to the desire to promote a uniform national defamation law (see s 3(a)). Interestingly the object contained in Defamation Act 1974 (NSW) s 3(d) did not make it into s 3 of the uniform national defamation legislation.

160 See Defamation Act 1974 (NSW) s 9(2).

161 See Defamation Act 2005 (NSW) s 8.

162 Second Reading Speech, Defamation Bill 2005 (NSW), above n 151, p 2.

163 George, above n 6, at [25.3]. See *Wright v Australian Broadcasting Commission* [1977] 1 NSWLR 697 at 705 (Moffitt P); *Morgan* (1991) 23 NSWLR 374 at 390; and more recently *Evatt v Nationwide News Pty Ltd* [1999] NSWCA 99 at [26] (Giles JA with whom Powell and Shellar JJA agreed).

164 Defamation Act 1974 (NSW) s 7A(4)(a).

165 See, eg, Defamation Act 2005 (NSW) ss 21, 22, and esp s 22(2).

166 As noted earlier, the use of juries is a point on which uniformity was not achieved, see above n 2.

We might expect that a change in decision-maker could have an effect on the way a defence operates. But query whether this change is more apparent than real for the s 30 defence?

Section 22(5)(b) of the Defamation Act 2005 (NSW) provides:

Nothing in this section: . . .

(b) requires or permits a jury to determine any issue that, at general law, is an issue to be determined by the judicial officer.

‘[G]eneral law’ is defined in s 4 to mean ‘the common law and equity’. Common law assigned the task of determining whether an occasion was privileged to the judge, leaving the jury (where there is one) to decide contested questions of fact underpinning that determination.¹⁶⁷

So how does this fit with the s 30 defence? Can we say that determining whether there is a defence under s 30 is tantamount to determining whether there is an occasion of qualified privilege? If so, then this would be a question for the judge and not the jury.

This was the position in relation to the s 22 defence prior to the withdrawal of all aspects of the defences from the jury in New South Wales in 1995.¹⁶⁸ However this division of function between judge and jury was supported by s 23 of the Defamation Act 1974 (NSW).¹⁶⁹ Case authority then confirmed that it was for the jury to decide any underlying questions of fact in accordance with the common law position.¹⁷⁰

However there is no direct counterpart to s 23 in the Defamation Act 2005 (NSW). Nor is there a provision which equates establishing a defence under s 30 with an occasion of qualified privilege as there was under s 20(1)(c) of the Defamation Act 1974 (NSW) in relation to s 22.¹⁷¹ But there is a reference in s 31(5)(b) of the Defamation Act 2005 (NSW) to ‘an occasion of absolute or qualified privilege (whether under this Act or at general law)’ which seems to acknowledge that other provisions in the Act set up occasions of qualified privilege, although this does fall short of an express equation of the two situations.

167 *Calwell v Ipec Australia* (1975) 135 CLR 321 at 329 (Mason J with whom Barwick J (at 325); Gibbs J (at 325); Stephen J (at 325) and Jacobs J (at 334) agreed).

168 Defamation (Amendment) Act 1994 (NSW) inserted s 7A into the Defamation Act 1974 (NSW) effective from 1 January 1995, see especially s 7A(4)(a). See *Austin v Mirror Newspapers Ltd* [1984] 2 NSWLR 383 at 387–8 (Glass JA); *Barbaro* (1990) 20 NSWLR 493 at 497 (Samuels JA, with whom Hope AP and Priestley JA agreed); *Morgan v John Fairfax & Sons Ltd* (1990) 20 NSWLR 511 at 517 (Samuels AP), 526 (Mahoney JA), 538–40 (Hunt AJA); *Morgan* (1991) 23 NSWLR 374 at 382 (Hunt AJA with whom Samuels JA agreed); and more recently, *Evatt v Nationwide News Pty Ltd* [1999] NSWCA 99 at [14] (Giles JA with whom Shellar JA and Powell JA agreed).

169 This provision was recommended by the NSW Law Reform Commission so as to ‘make explicit’ the position in relation to the proposed statutory qualified privilege defences: NSW Law Reform Commission, 1971, above n 18, App D [112].

170 ‘As both statutory and common law defences co-exist, and indeed as both may be relied upon by the defendant in the same action, it would be extraordinary if the division of functions in relation to each were to be different’: *Morgan v John Fairfax & Sons Ltd* (1990) 20 NSWLR 511 at 539. See also the cases cited above n 167.

171 In *Austin v Mirror Newspapers Ltd* [1984] 2 NSWLR 383 at 388 Glass JA also relied on this provision to import the common law division of function between judge and jury to the s 22 defence. However, as pointed out by Gillooly, this statutory equation is arguably only for the purposes of s 20: above n 12, p 140 and n 160.

Hence the argument for importing the common law division of function between judge and jury into the s 30 defence may not be as strong as it was in relation to its s 22 pre-1995 predecessor under the Defamation Act 1974 (NSW) and may have to rely on the reference in s 30 itself to '[t]here is a defence of qualified privilege . . .'.

However if it does succeed then the question of reasonableness would also be one ultimately for the judge as it constitutes '[one] of the essential elements of the defence'.¹⁷² This was the position in relation to the s 22 defence (prior to 1995)¹⁷³ and there is also authority that this is the position in relation to the *Lange* extended common law qualified privilege defence.¹⁷⁴ To the extent that it accords with the common law position then it may draw support from s 22(5)(b) of the Defamation Act 2005 (NSW) assuming the primary link between establishing the s 30 defence and an occasion of qualified privilege can be made in the first place.

We will have to wait for clarification from the courts but at this stage it looks as though the question of reasonableness will remain largely in the hands of the judges with juries (where they have been elected) only having input on underlying disputed questions of facts. This means that the apparent change in decision-maker wrought by the uniform defamation legislation may not have as much impact for the s 30 defence as may have first appeared, well, at least not in terms of the way in which the defence is applied.

But the involvement of a jury under this division of function may well have a significant adverse impact in terms of litigating the s 30 defence, especially if juries are bombarded with the detailed and lengthy sets of questions in relation to the s 30(3) matters their English counterparts have experienced in relation to the *Reynolds* matters when the *Reynolds* privilege has been argued.¹⁷⁵ Kenyon's research found that 'practitioners (both here and in England) supported juries having a *general* role in addressing reasonableness'.¹⁷⁶ It is interesting to note that this preference has recently found expression in 'the defence of fair and reasonable publication' provided for by the Defamation Bill 2006 (Ireland).¹⁷⁷

172 *Morgan v John Fairfax & Sons Ltd* (1990) 20 NSWLR 511 at 540 (Hunt AJA).

173 *Barbaro* (1989) 20 NSWLR 493 at 496–9 (Samuels JA with whom Hope AP and Priestley JA agreed), *Morgan v John Fairfax & Sons Ltd* (1990) 20 NSWLR 511 at 540 (Hunt AJA).

174 *Popovic* (2003) 9 VR 1 at [118] (Gillard AJA with whom Winneke ACJ and Warren AJJA agreed on this point at [12] and [509] respectively).

175 As highlighted by Kenyon, above n 15, at 413–14, 426–7.

176 *Ibid*, at 430–1 (emphasis in original).

177 Defamation Bill 2006 (Ireland), s 24 <<http://www.oireachtas.ie/ViewDoc.asp?fn=/home.asp>>. This is a 'new' defence for Ireland: Explanatory and Financial Memorandum, Defamation Bill 2006 (Ireland) at [25] <<http://www.oireachtas.ie/ViewDoc.asp?fn=/home.asp>>. It is akin to the Australian s 30 defence though differs in a number of important respects including expressly casting the jury as decision-maker on the question of whether publication has been 'fair and reasonable': s 24(2), (5). Another important difference is that it is expressly provided that the defence 'shall fail unless . . . the defendant proves that — (a) at the time of the publication he or she believed the statement to be true . . .': s 24(4)(a).

Link to *Reynolds* in extrinsic materials

On the question of the application of a *Reynolds* type approach to the s 30(3) reasonableness matters, it is arguable that stronger support may be gleaned from the associated extrinsic materials with an express link to *Reynolds* having been made in the NSW Explanatory Notes (though not in the NSW Second Reading Speech) and recognition there that the s 30(3) matters 'largely mirror' the *Reynolds* matters.¹⁷⁸ But again it does not go further and expressly encourage a *Reynolds* type approach to that list. And again the reminder about the tenuity of arguments based on extrinsic comments as to statutory meaning.

So, where does this leave the s 30 defence?

The s 30 defence looks and feels like the s 22 defence from the Defamation Act 1974 (NSW) albeit with some little change in its wording. So it is understandable that there will be an expectation that the s 30 defence will operate in the same way as its s 22 predecessor. But what exactly does that mean?

As far as the writer is aware, the courts had not yet clarified the effect of the insertion of a statutory list of reasonableness matters on the operation of the s 22 defence before its life was cut short by the introduction of the uniform defamation legislation and so we do not really know how the second generation s 22 defence operates. Certainly we know that the availability of the first generation s 22 defence had been very severely curtailed by the constricting way in which it had been interpreted by the courts especially under *Morgan* and its demanding subjective belief requirement. But just because a statutory list has been inserted which looks like the *Reynolds* list does not necessarily mean that it will bring about a *Reynolds* approach or lead to a *Reynolds*-type defence. More particularly, just because this list does not include the subjective belief of the defendant does not necessarily mean that it will be stripped of its relevance, if not *Morgan* prominence — out of statutory sight does not necessarily mean out of judicial mind.

So although arguments can be made to thwart carrying over the *Morgan* subjective belief requirement, it is arguable that the second generation s 22 defence is still vulnerable to this interpretation. And there is authority, albeit obiter, to this effect.¹⁷⁹

Similar arguments can be made to thwart the export of this judicial interpretation to the s 30 defence in the uniform defamation legislation. And certain further arguments along this line can be crafted, drawing upon the different context in which the s 30 defence appears. But at the end of the day there is still no guarantee that s 30 will be shielded and protected from *Morgan* demands.

If this is the case then s 30 may well suffer the same unhappy fate as befell its statutory grandmother and be left with little real work to do.

The foregoing analysis has concentrated on the possible survival of the *Morgan* subjective belief requirement. However this is not the only source of

¹⁷⁸ Explanatory Notes, Defamation Bill 2005 (NSW), above n 151, p 8.

¹⁷⁹ *John Fairfax Publications Pty Ltd v Zunter* [2006] NSWCA 227.

constriction flowing from *Morgan*. There is proposition 4(b) — ‘that . . . [the defendant’s] conclusions . . . followed logically, fairly and reasonably from the information . . . obtained’¹⁸⁰ — which proved to be the stumbling block for the defendant in *O’Shane*. This was presumably perceived as burdensome by the Commonwealth Attorney-General as it was specifically excluded from his proposal for a statutory ‘reasonable publication’ qualified privilege defence.¹⁸¹ This matter has also not made it into either the s 22(2A) listing or the s 30(3) listing of reasonableness matters but many of the arguments that were advanced in relation to the continuing relevance of the *Morgan* subjective belief requirement to s 30 could also apply to the relevance of *Morgan* proposition 4(b) to that defence.

In addition, the persistence of the *Morgan* interpretation is not the only potential source of restriction on s 30 reasonableness. Some of the specifically listed s 30(3) reasonableness matters hold further potential in this regard depending on how that list is approached and interpreted by the courts. Possible problem spots include s 30(3)(h) — ‘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’. It was one of its *Reynolds* cousins that largely foiled the success of the privilege defence in that case.¹⁸² And the second aspect (relating to seeking a response) has been exposed by Chesterman as:

not sympathetic to the pressures to meet deadlines that normally affect the media and at worst might give the plaintiff an opportunity to delay, if not prevent, a wholly justifiable publication by instituting proceedings for an injunction to restrain publication.¹⁸³

Although query whether and if so to what extent this may be counterbalanced in the s 30 context by considerations going to s 30(3)(f) (‘the nature of the business environment in which the defendant operates’) and also possibly s 30(3)(e) (‘whether it was in the public interest in the circumstances for the matter published to be published expeditiously’)? Moreover there is authority for the view that the absence of this factor is not necessarily fatal to the *Lange* extended defence,¹⁸⁴ although it might be recalled that *Lange* reasonableness expressly provides for an out where it ‘was *not practicable* or it was *unnecessary* to give the plaintiff an opportunity to respond’.¹⁸⁵ There is also authority for the view that the absence of this factor was not necessarily fatal to the first generation s 22 defence.¹⁸⁶ And then there is the prospect of having to reveal sources raised by s 30(3)(g). The *Reynolds* cousin is tempered by Lord Nicholls plea that ‘[i]n general, a newspaper’s unwillingness to

180 *Morgan* (1991) 23 NSWLR 374 at 388.

181 Commonwealth Attorney-General, *Revised Outline*, above n 14, 22 and cl 14 of the proposed Defamation Bill Provisions.

182 Namely, *Reynolds* matter (8) — ‘Whether the article contained the gist of the plaintiff’s side of the story’. See *Reynolds* [2001] AC 127 at 206 (Lord Nicholls).

183 Chesterman, above n 15, pp 101–2 (citations omitted).

184 See, eg, *Brander v Ryan* (2000) SASC 226 (SA SC Full) at [124] (Lander J, with whom Prior and Bleby JJ agreed).

185 *Lange* (1997) 189 CLR 520 at 574 (emphasis added).

186 *O’Shane v John Fairfax Publications Ltd* (2004) Aust Torts Reps 81-733 at [204], Smart AJ found:

disclose the identity of its sources should not weigh against it’;¹⁸⁷ but we will have to wait and see whether this sentiment will be applied to s 30(3)(g).

Looking forward . . .

It is not really clear why the NSW model for a statutory qualified privilege defence was incorporated into the uniform defamation legislation. According to the NSW Second Reading Speech:

Essentially, the [Defamation] bill retains some of the best features of the present New South Wales Defamation Act 1974, jettisons some of its more problematic provisions, and introduces some worthwhile reforms.¹⁸⁸

But based on the foregoing analysis, it is difficult to class the s 22 defence as one of the ‘best features’ of NSW defamation law! It may well operate however as a counterbalance to some of the early assessments that the uniform defamation legislation is pro-defendant.¹⁸⁹

The shortcomings of the s 22 model however seemed to have been appreciated by the Commonwealth Attorney-General in his proposal for a uniform defamation code.¹⁹⁰

The Commonwealth proposal incorporates two types of statutory qualified privilege defences. One is a group of qualified privilege defences in specified circumstances which draws largely from s 16(1) of the Defamation Act 1889 (Qld).¹⁹¹ And the second is a ‘reasonable publication’ qualified privilege defence¹⁹² which, though ‘broadly modelled’ upon the second generation s 22 defence,¹⁹³ differs from that defence in several important ways. Notably, the subjective belief of the defendant is included in the cl 14(2) list of reasonableness matters although the less demanding form is specified (namely, ‘whether the defendant believed that any facts conveyed by the matter were untrue’);¹⁹⁴ there is no invitation to go outside the list of specified matters when determining reasonableness; the opening words of cl 14(2), and

It was not unreasonable for (the journalist) not to have made any enquiries of or sought a response from (the plaintiff, a magistrate) prior to the publication. The conduct of a judicial officer, as to the court cases heard and decided, is evaluated on what that person says and does in court.

187 See *Reynolds* matter (3); *Reynolds* [2001] AC 127 at 205.

188 Second Reading Speech, Defamation Bill 2005 (NSW), above n 151, p 2.

189 See, eg, The Hon David Levine RFD QC, Former Justice of the Supreme Court of NSW, and Adjunct Professor, UTS Faculty of Law, (Speaker at the ‘Defamation and Seditious Laws “A New Way of Talking” Public Seminar’, UTS, Sydney, 3 April 2006), reproduced on ABC Radio National, ‘Uniform Defamation; and the Cost of Celebrity Journalism’, *Media Report*, 13 April 2006, p 2 <<http://abc.net.au/rn/mediareport/stories/2006/1614411.htm>>; Richard McHugh, (Defamation Seminar, Commercial Law Association’s Leading Edge Seminar Series, Sydney, 25 May 2006), as reported by Y C Kux, ‘Notes from a Defamation Seminar’ *Gazette of Law and Journalism*, 25 May 2006, <http://www.lawpress.com.au/genews/ge171_Defamation_seminar_250506.html>.

190 Commonwealth Attorney-General, *Revised Outline*, above n 14, see cls 13 and 14 of the proposed Defamation Bill Provisions.

191 *Ibid*, pp 20–1 and cl 13 of the proposed Defamation Bill Provisions.

192 *Ibid*, pp 21–3 and cl 14 of the proposed Defamation Bill Provisions.

193 *Ibid*, p 21.

194 *Ibid*, cl 14(2)(b) of the Defamation Bill Provisions.

especially the use of 'regard may be had to *any or all* of the following',¹⁹⁵ suggest that the list is not intended to be a checklist of must-consider matters; and, apparently the defence will not be defeated by malice.

It was claimed that differences in the operation of the proposed cl 14, compared with the s 22 defence, would work to shield the proposed defence from the s 22 judicial interpretation.¹⁹⁶ But that would not come without certain costs. For example, constructing an exhaustive list of reasonableness matters (assuming this has been achieved, which is in doubt) may shut out the more demanding *Morgan* subjective belief requirement¹⁹⁷ from the reasonableness enquiry but this in turn restricts the scope of that enquiry and so may inject a measure of inflexibility into that enquiry.

It is a shame that the opportunity to rethink the statutory qualified privilege defence was not taken by the states and territories when drafting their model defamation provisions. Achieving uniformity was clearly the top priority of the stakeholders,¹⁹⁸ and what energy (and political will) there was left over for reform just seemed to be channelled elsewhere. And then there was the ever-pressing Commonwealth Attorney-General's deadline to comply with.¹⁹⁹

But it is never too late for reform! Now we have achieved uniformity, the holy grail for defamation law reform is to refine and improve the uniform defamation legislation. And we have a commitment to reform supported by an intergovernmental agreement between the states and territories.²⁰⁰ There is also the statutory promise of a review of the uniform defamation legislation after five years.²⁰¹ This is a plea then for the s 30 defence to be put on the reform agenda and attended to at the earliest possible opportunity.

The starting point for any review should be to consider the rationale for a statutory qualified privilege defence, heeding Henskens' insight that without 'a clear policy basis', the courts have 'been inclined to interpret s 22 in a conservative fashion'.²⁰²

Any review should also examine alternate models for a statutory qualified privilege defence — s 22 with its reasonableness requirement is not the only model for a statutory qualified privilege defence. Nor is the Commonwealth Attorney-General's model. There have already been reminders of the

195 Emphasis added.

196 Commonwealth Attorney-General's Department, *Revised Outline*, above n 14, p 22.

197 As well as the other troublesome *Morgan* matter, namely that proposition 4(b) 'that his conclusions . . . followed logically, fairly and reasonably from the information which . . . [the publisher] had obtained': *Morgan* (1991) 23 NSWLR 374 at 388.

198 Second Reading Speech, Defamation Bill 2005 (NSW), above n 151, p 6.

199 Commonwealth Attorney-General's Department, 'States Move Forward on Defamation But Still Not Uniform', Media Release 178/2004, 5 November 2004, <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases>; Commonwealth Attorney-General's Department, 'States & Territories Must Enact Workable Defamation Laws', Media Release 031/2005, 5 March 2005, <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases>; Commonwealth Attorney-General's Department, 'Belated State Defamation Laws', Media Release 237/2005, 15 December 2005, <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases>.

200 Second Reading Speech, Defamation Bill 2005 (NSW), above n 151, p 6.

201 See, eg, Defamation Act 2005 (NSW) s 49.

202 Henskens, above n 13, at 268. According to Henskens, the NSW Law Reform Commission failed to provide this in its 1971 Report.

Queensland and Tasmanian Code models.²⁰³ And Gillooly has proposed yet another model which protects publishers ‘when they have made an honest and reasonable mistake, which they have used their best endeavours to rectify’.²⁰⁴ And this is not an exhaustive list of the possibilities.

Opening the door to alternate models of course brings the reasonableness of conduct requirement to centre stage. Any review should examine carefully the rationale for retaining this requirement. As justification, the Commonwealth Attorney-General relied on the observations of Tipping J in *Lange v Atkinson*:

It could be seen as rather ironical that whereas almost all sectors of society, and all other occupations and professions have duties to take reasonable care, and are accountable in one form or another if they are careless, the news media whose power and capacity to cause harm and distress are considerable if that power is not responsibly used, are not liable in negligence, and what is more, can claim qualified privilege even if they are negligent. It may be asked whether the public interest in freedom of expression is so great that the accountability which society requires of others, should not also to this extent be required of the news media.²⁰⁵

However Gillooly has challenged the retention of this requirement as a ‘quality control mechanism’ arguing that while it may be appropriate in the tort of negligence arena it does not work so well in the defamation context, reminding that:

It is not just the interests of plaintiffs and defendants which are at stake, but also those of the recipients of the defamatory communications.²⁰⁶

Understandably this point was also pressed by the Combined Media Defamation Reform Group when it proposed abandoning a reasonableness requirement.²⁰⁷

And if it is considered desirable to retain a reasonableness of conduct requirement then there are further issues that need to be explored. Based on the forgoing analysis, these include:

- (a) the role (if any) of the defendant’s subjective belief in the matter published in determining reasonableness and the nature of that subjective belief. The Combined Media Defamation Reform Group has provided the following food for thought:

Democratic societies rely on debate, disagreement, accusation and rebuttal. Requiring the media to, in effect, believe such material to be true is too high a standard and out of step with the underlying objective. For example, in a developing scandal, how is the media to formulate belief in the truth and still produce timely, relevant reports to the public? The whole point of such a story is that the truth is unknown and that various facts and points of view are emerging.²⁰⁸

203 See, eg, Applegarth, above n 10; Spence, above n 11.

204 Gillooly, above n 12, p 163. This is set out and explained at pp 163–5.

205 *Lange v Atkinson* [1998] 3 NZLR 424 at 477, as quoted in Commonwealth Attorney-General’s Department, *Revised Outline*, above n 14, p 22.

206 Gillooly, above n 12, p 159. See also pp 160–1.

207 Combined Media Defamation Reform Group, above n 87, pp 45, 46, 50.

208 *Ibid*, p 47.

- (b) the role (if any) of requiring demonstration of objective grounds for the defendant's belief.
- (c) the relationship between reasonableness and malice.
- (d) the proper division of function between judge and jury. Kenyon's work suggests that it may be better in terms of 'practice' to put the general question of reasonableness to the jury rather than burdening it with a multitude of specific questions.²⁰⁹
- (e) overall, what is an appropriate, and workable, standard of reasonableness? The New South Wales experience is that if it is pitched too high then we could lose a potentially valuable defence.

Such a review should also afford tighter drafting so that desired outcomes are not dependent upon uncertain statutory interpretation principles and promising comments buried in extrinsic materials. Out of statutory sight does not necessarily mean out of the court's mind (and certainly not that of a plaintiff).

As reiterated by the High Court in *Lange*:

The purpose of the law of defamation is to strike a balance between the right to reputation and freedom of speech.²¹⁰

But simply keeping a defence on the books which has no work to do is surely only to pay lip-service to freedom of speech. And simply transplanting failing features of particular states' and territories' gardens into the new Australian uniform defamation landscape will not necessarily be enough to breathe new life into those features. Something more may be needed. It is hoped that the s 30 defence will not have to wait too much longer for careful attention.

²⁰⁹ Kenyon, above n 15, at 419, 430–1, 433–4.

²¹⁰ *Lange* (1997) 189 CLR 520 at 568 (citations omitted).