

Response from Professor David Rolph:

Will these changes make life easier for investigative journalists?

Will the public interest defence work/make a significant difference?

Can you point to any recent cases where it would have provided a defence – eg Rebel Wilson, Geoffrey Rush, Wagner Family, Chau Chak Wing?

Do the changes go far enough?

If not, what IS needed?

These changes are intended to make investigative journalism and public interest journalism easier. Whether they will in fact do that will ultimately depend upon how they are interpreted and applied.

There are clear textual indications that this defence is intended to protect public interest journalism. It is separate from the older defence of statutory qualified privilege, which tended to be unsuccessful in protecting investigative journalism. It is consciously modelled on the broader English statutory defence, rather than the New Zealand common law defence.

However, the new defence is necessarily cast in open-textured terms so it can apply to a wide variety of circumstances. It remains to be seen how courts will decide whether what has been published concerns an issue of public interest, whether they take a narrow or a liberal view of what constitutes an issue of public interest and how they approach determining whether a defendant's belief as to whether an issue is one of public interest is reasonable.

These questions will need to be determined in all the circumstances of the case. The new defence lists some considerations, many of which are taken from the older defence of statutory qualified privilege. There is the possibility that some cases under the new defence may be determined in a similar way to cases under the older defence of statutory qualified privilege. For example, it may be that a judge will find that, while a defendant has a subjectively honest belief that a matter concerns an issue of public interest, the defendant did not an objectively reasonable belief, which would be necessary for the new defence to succeed.

The English statutory defence built upon almost fifteen years of case law in that country. It was an extension of an existing common law defence. Australia has had none of that context. The public interest defence is a transplant. It may take in a new environment, or it may not, or it may not take in the way that its drafters intend.