

**Response from Dr Matthew Collins AM QC:**

**Will these changes make life easier for investigative journalists?**

The reforms, if passed, will send a clear message from parliament to the courts that they are expected to provide better protection to freedom of expression.

Most attention has been focused on the new public interest defence, which should provide greater protection where investigative journalists responsibly report stories on matters of public interest, even if mistakes are made. But it is not a licence for sloppy journalism.

I predict, however, that the reforms to the defence of truth (section 26) will be the real game changer. They should stop the phenomenon of plaintiffs cherry picking small errors from otherwise defensible stories and concocting extravagant meanings in order to cut off lines of defence that would otherwise be available to publishers. Also to be welcomed are the introduction of a serious harm threshold (section 10A), the modest liberalisation of the defence of honest opinion (section 31) and the new single publication rule for online publications.

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

I expect so, although it will depend upon how courts interpret the new defence and how forgiving juries prove to be of errors made by journalists.

It is good that the new defence copies the UK defence, which has operated successfully in one form or another now for almost 20 years. It was disappointing, however, to see a simply worded and easy-to-understand defence polluted with a list of “factors” that courts may take into account when assessing whether the defence is made out (section 29A(3)). This repeats the error that was made with the existing defence that was supposed, but has completely failed, to protect public interest journalism (section 30). No such list appears in the UK’s legislation, for good reason, and its inclusion in these reforms is a serious mis-step.

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

The new defence will not protect crappy journalism. I don’t believe it would have made any difference in, for example, the Rebel Wilson, Geoffrey Rush or Wagner family cases. The defence will be more likely to operate in cases of serious investigative journalism that relies on whistleblowers and confidential sources or the drawing of inferences after painstakingly piecing together information from disparate sources. I think the new defence, if it had been available at the time, would have been the battleground in cases such as the Joe Hockey ‘Treasurer for Sale’ litigation and Chau Chak Wing’s cases.

## **Do the changes go far enough?**

I don't want to come across as overly critical, because the reforms are to be welcomed and will make a difference, but no.

## **If not, what IS needed?**

I favour reversing the current presumption in Australian law that every defamatory statement is false, and instead requiring plaintiffs who decide to sue to prove that what has been written or said about them is false. That would bring defamation law into line with all other related torts and statutory causes of action. It would make little difference in most cases – most plaintiffs can't wait to prove that what has been written or said about them is false – but it would make a big difference in cases of serious, public interest, investigative journalism that relies on information that plaintiffs have a vested interest in ensuring never sees the light of day.

Round two of the reforms will be important, particularly the treatment of online platforms for defamatory statements posted by internet users.

If I were given a blank slate, I would throw the cause of action for defamation out entirely and start from scratch, by much more crisply identifying the fundamental rights at stake. Has the defendant's publication actually damaged the plaintiff's reputation in some way and if so, how? If the plaintiff's reputation has been damaged, is the public interest in freedom of expression in relation to the defendant's publication such that the plaintiff should be denied a remedy? Not that hard...