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LANGE 2000: A MEDIA PERSPECTIVE

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I INTRODUCTION

The New Zealand media has long been skeptical about the laws of defamation in New Zealand. The 2001 course notes for the respected Massey University journalism course sums up the media's attitude towards defamation in New Zealand.[1]

> The laws govern what the media can publish and broadcast. However they do not set out to protect the freedom of the news media. On some occasions the laws give us privilege to publish things that might be defamatory otherwise, but in general they limit what the media does. Their main concern is to protect reputations.

This is perhaps a surprising statement to make in 2001, given the fact that the 2000 case of *Lange v Atkinson*[2] extended the defence of qualified privilege for the media covering political discussion. This raises a fundamental question about the extent to which recent developments in the law of defamation, and the *Lange* 2000 outcome in particular, have been understood by the media.

This defence of extended qualified privilege for political discussion was accepted by the Court of Appeal in 2000, in the final showdown of what is now probably New Zealand's most famous defamation case; *Lange v Atkinson*[3]. The court in *Lange* 2000 justified their protection of political discussion on the basis that New Zealand is a democracy and thus political discussion should take place as much as possible. The Court of Appeal explained that "In a democratic, constitutional context, the capacities of those who have, or aspire to elected parliamentary and governmental positions, are plainly of great importance."[4]

Lawyers, academics and students of the law have, since, analyzed and reanalyzed the case. Academics have hailed the 2000 *Lange* decision as a dramatic change to the law. John Burrows concludes "the case is a major advance for freedom of expression, it

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[1] "Journalism section – Media Law" Massey University Course Notes (Massey University College of Business 2001) 5.
[2] *Lange v Atkinson* [1998] 3 424, 464 (CA)
[3] *Lange v Atkinson* 2000, above.
[4] *Lange v Atkinson* [1998] 3 424, 464 (CA)

recognises that those who determine the policies that effect our lives are fairer game than others."[5] But little has been said by the people who are most affected by the case – the journalists and editors – the ones who actually indulge in the discussion that the case claims it protects.

This paper will focus on how the case of *Lange v Atkinson*[6] has affected the New Zealand print media and the way they do their jobs. I seek to examine the degree to which the outcome of that particular case, which is claimed to be a "major advance for freedom of expression"[7], is really understood and to what extent it is actually making a difference in practice to political discussion in New Zealand.

A Forms of Research

Two forms of research were undertaken in this paper. The first, a questionnaire[8] that was circulated to all parliamentary press galley journalists working for newspapers around New Zealand. The questionnaire was anonymous so no journalist will be refereed to individually in the paper. 15 press gallery journalists responded to the questionnaire. The second type of research undertaken was a series of structured interviews, based around the questionnaire, with four editors, and various management staff working at newspapers in New Zealand. Also interviewed were two academics teaching at journalism schools in New Zealand.

The first part of this paper outlines *Lange* 2000, and the background to the case. The second part analyses journalists' understanding of the *Lange* case. This part focuses on questions 1 - 6 of the questionnaire given to the press gallery.
The questions were as follows:

- Would the *Lange* defence cover publications critical of the following: Richard Prebble, Mark Blumsky, Christine Rankin, Roger Kerr, Heather Simpson.

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[5] John Burrows "*Lange v Atkinson* 2000: Analysis" 2000 NZ Law Rev 389, 399.
[6] [2000] 3 NZLR 385 (CA).
[7] John Burrows "*Lange v Atkinson* 2000: Analysis" 2000 NZ Law Rev 389, 399.
[8] See Appendix 1.

- Would the *Lange* defence cover a story about a cabinet minister accepting bribes?
- Would the *Lange* defence cover a story about an MP who had been caught shoplifting at age 19, but had never been charged?
- Does the *Lange* defence apply only to opinion columns, news items or both?
- What is required to fit the *Lange* test of "responsible journalism"?

Part three of the paper looks at the effect of the case on the New Zealand print media. This part will focus on questions 6 - 9 of the questionnaire answered by parliamentary press gallery journalists.

The questions were as follows:

- Do you think the *Lange* case:
  (a) gives journalists greater freedom to make political comments,
  (b) restricts their ability to make political comments, or
  (c) does not really change anything?
- Do you think the *Lange* case:
  (a) clarifies the law relating to defamation,
  (b) makes the law more confusing, or
  (c) makes very little difference in practice?
- How often would you consider the *Lange* 2000 case when faced with a defamation issue?

Part four of the essay examines whether there is a 'chilling effect' on New Zealand's print media and if so why. Specifically this part addresses questions 11 - 15

- How often would you leave or severely change a political comment that was considered by you and your organization to be both true and newsworthy, because of concerns about defamation?
- Are there specific politicians or groups that your organisation is wary of publishing material about?
- Who are these people and why are you wary?
- How often do you personally seek legal advice before printing a story?

II BACKGROUND

The *Lange* saga began with a political column written by Joe Atkinson for *North and South* magazine in 1995. David Lange sued Atkinson and *North and South,* claiming the column was grossly defamatory by suggesting he was dishonest, lazy, insincere and manipulative.

A The High Court[9]

The trial began at the High Court in 1997. The defendants raised the defence of political discussion, relying heavily on the case of *Theophanous v Herald & Weekly Times*[10], an Australian case that established that those taking part in political discussion are protected from defamation laws provided they do so in good faith. The High Court accepted the defence as an extended form of qualified privilege.

B The 1998 Court of Appeal[11]

The case was then appealed by David Lange to the Court of Appeal, which accepted the defence while reformulating it. Basically the 1998 Court of Appeal held that statements about MPs are always privileged in the absence of malice. The case was then appealed again by David Lange to the Privy Council[12]. The Privy Council sent the case back to the Court of Appeal in New Zealand, with the proviso that a New Zealand court should decide the matter. The Privy Council explained "The New Zealand courts are much better placed to assess requirements of public interest than their Lordship's board."[13] The Privy Council also wanted the New Zealand Court of Appeal to re-look at the case in light of a similar decision in the UK – *Reynolds v Times Newspapers Ltd* [14]. In *Reynolds* it was

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[9] *Lange v Atkinson* [1997] 2 NZLR 22 (HC).
[10] (1994) 182 CLR 104.
[11] *Lange v Atkinson* 1998, above.
[12] *Lange v Atkinson* [1999] 1 NZLR 257 (Privy Council).
[13] *Lange v Atkinson* [1999] 1 NZLR 257, 262 Lord Nicholls (Privy Council)
[14] *Reynolds v Times Newspapers Ltd* [1999] 3 WLR 1010 (HL).

held by the House of Lords that no generic defence for political discussion should be established, and that the courts should look at each case on the facts, and decide whether the publication was reasonable in the circumstances.

C The 2000 Court of Appeal Case[15]

Though claiming that the 1998 decision was being followed, it is argued[16] that the Court of Appeal in *Lange 2000*[17] substantially watered down their 'political discussion' defence by adding a further requirement to the defence and extending the concept of malice. It now seems that statements about politicians will normally be privileged, but there may be occasions when they are not. From now on the statement is not to be the only thing that is relevant, but the occasion on which the statement was made. The actions taken by the journalists making the statement must also be taken into account. The 2000 Court of Appeal added this requirement, while at the same time expressly rejecting the *Reynolds*[18] decision.

D Was the Court of Appeal justified in claiming not to follow the Reynolds[19] *decision?*

The Court of Appeal justified their decision not to follow the 'case by case' reasoning in *Reynolds*, partly on the basis that the New Zealand media are very different from their equivalent in the UK. The Court of Appeal held that "Generalizations in this area are dangerous but it is possible to say that New Zealand has not encountered the worst excess and irresponsibility's of the English national daily tabloids."[20]

This reasoning by the Court of Appeal has been criticized by a number of academics. John Burrows considers that this conclusion puts a great deal of responsibility in the

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[15] *Lange v Atkinson* [2000] 3 NZLR 385 (CA).
[16] Bill Atkin and Stephen Price "Lange 2000" [2000] NZLJ 236.
[17] *Lange v Atkinson* 2000, above.
[18] *Reynolds v Times Newspapers Ltd* [1999] 3 WLR 1010 (HL)
[19] *Reynolds v Times Newspapers Ltd*, above.
[20] *Lange v Atkinson* [2000] 3 NZLR 385, 398 para 34 (CA)

hands of the New Zealand media. He claims this may not be a good thing. "One feels some discomfort in that responsibility is an individual virtue, and even a few media agencies abusing trust could lead, over time, to a significant erosion of standards."[21] Geoff McLay also criticized the Court of Appeal, reasoning that they were simply not backed up by hard facts. "The problem was that there is simply a lack of empirical evidence to justify why New Zealand ought to have a defamation rule different from that in England."[22]

Not surprisingly, the media itself does not hold these reservations about the analysis of the media. New Zealand editors are quick to point out that most New Zealand media institutions would never act as unethically as some British tabloids. One example[23] given was the recent story where UK tabloid reporters dressed up as para-medics to gain entry to a hospital to get photos of a patient there. One editor commented "the New Zealand media does not have a tradition of setting people up."[24] Most editors attribute this difference, as did the 2000 Court of Appeal, to the intense competition in the UK between many of the daily papers. One editor concluded, "Here in NZ the media circulate in their own patches, and each have their own part of the market, which reduces the competition factor."[25]

What has been argued[26] however, is that the extension of malice in the 2000 decision makes the test similar to the test in *Reynolds*. John Burrows concludes, "The *Lange* 2000 judgement contains more than a little of *Reynolds*."[27]

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[21] John Burrows "Lange v Atkinson 2000: Analysis" 2000 NZ Law Rev 389, 391.
[22] Geoff McLay "Lange v Atkinson: Not a Case for Dancing in the Streets" 2000 NZ Law Rev 427, 431.
[23] *Kaye v Robertson* [1991] FSR 62 (CA).
[24] Interview with C, anonymous editor for a New Zealand newspaper (the author, Wellington, 25 July 2001)
[25] Interview with C, anonymous editor for a New Zealand newspaper (the author, Wellington, 25 July 2001)
[26] Bill Atkin and Stephen Price "Lange 2000" [2000] NZLJ 236, 236.
[27] John Burrows "Lange v Atkinson 2000: Analysis" 2000 NZ Law Rev 389, 398.

E The conditions set out in Lange 2000 for a Qualified Privilege Defence[28]

(1) The defence of qualified privilege may be available in respect of a statement which is published generally.

(2) The nature of New Zealand's democracy means that the wider public may have an interest in respect of generally-published statements which directly concern the functioning of representative and responsible government, including statements about the performance of or possible future performance of specific individuals in elected public office.

(3) In particular, a proper interest does exist in respect of statements made about the actions and qualities of those currently or formally elected to Parliament and those with immediate aspirations to such office, so far as those activities and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities.

(4) The determination of the matters which bear on that capacity will depend on a consideration of what is properly a matter of public concern rather than of private concern.

(5) The width of the identified public concern justifies the extent of the publication.

(6) To attract privilege the statement must be published on a qualifying occasion.

But these conditions are hardly definitive and raise many questions. How far can the defence be extended beyond members of parliament into the wider realm of "responsible government"? What is a matter of private concern as against public concern? What defines a qualifying occasion? When can the privilege be lost?

It is not only the media who are affected by defamation laws. Individuals can be sued if they publish something defamatory. The majority of defamation cases in New Zealand are however against the media. Plaintiffs prefer an action against the media because they are much more likely to be able to pay large sums in damages. Also, the recognition in *Lange* 2000 that qualified privilege is available for general publications will greatly benefit the media, because it is the media that reaches the public at large.

Against this general background including the academic perspective on the case, this paper will now address the media views on *Lange* 2000, for it is the media rather than academics that are the ones who have to try and interpret the law in a practical, everyday

[28] *Lange v Atkinson* [2000] 3 NZLR 385, 390 para 10 (CA).

sense. So how well do these people understand the case and how is it affecting what they do?

III JOURNALISTS' UNDERSTANDING OF LANGE 2000

A Past, Present and Future MPs

The *Lange* defence is restricted to political discussion about past, present and future MPs.[29] The rational behind this limited category is that voters need to have information about New Zealand parliamentarians in order to cast their votes. Grant Huscroft[30] also adds that the reason the defence is so limited is that the defendants in the 1997 case were trying to make their argument as uncontroversial as possible.

At present it is reasonably clear that the defence will cover local government as well as central government, as the judges in the recent case of *Vickery v McLean and others*[31] indicated that the defence should be so expanded. Local body politicians fit under the third condition set out in *Lange*, that statements which "directly concern the functioning of representative and responsible government" [32] will attract privilege. The "width of the identified public concern must justify the extent of publication"[33] under *Lange*. Therefore, any publication about a local body representative would probably only be able to be in a regional paper rather than a national paper. So the defence at present covers MPs and local body politicians.

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[29] *Lange v Atkinson* [2000] 3 NZLR 385, 390 para 10 (CA).
[30] Grant Huscroft "David Lange and the Law of Defamation" NZLJ (1997) 112, 113.
[31] *Vickery v McLean and others* CA 125/00, 20 November 2000.
[32] *Lange v Atkinson* 2000, above, 390 para 10.
[33] *Lange v Atkinson* [2000] 3 NZLR 385, 390 para 10 (CA).

1. The press gallery

Members of the press gallery were asked to respond to the question; "Do you think the *Lange* defence covers publications critical of the following:

- Richard Prebble
- Christine Rankin
- Mark Blumsky
- Roger Kerr
- Heather Simpson

Respondents were asked to indicate yes or no to each example. This question was probably the only one in the questionnaire that produced any consensus between the press gallery journalists. All but one respondent indicated correctly that at present the defence only applies to MPs. The remaining respondent indicated that he didn't know who the defence applied to. No respondent indicated that they thought the defence would be available to Mark Blumsky – a local government representative.

2. Editors

Most editors agreed that the defence currently attaches to politicians only, and were unsure about the scope of the third condition in *Lange*, and whether it attached to local body politicians. One editor, concluding that in his understanding the defence probably did cover local body politicians, indicated that his organisation might be willing to push the boundaries and test the limited class in *Lange* by "making some pretty robust comments in this year's local body elections."[34]

All journalists and editors recognised that the defence applies to MPs, but were not aware that it probably also covers local politicians.

3. Expansion of the defence

The issue now is how far the privilege can be extended. Academics generally conclude that the defence should extend to all public officials. John Burrows concluded that "the common law would suggest that there is no reason why senior public officials who frame the policies upon which politicians legislate should not be equally subject to free and frank criticism."[35] He also goes on to note that "If what we wish to facilitate is free public discussion of matters of real public concern, there is no sensible reason why members of the private sector should not be subject to scrutiny as well."[36]

Editors all agreed with this conclusion and confirmed that the defence should be extended, not only to anyone paid by the taxpayer, but also to anyone the public could reasonably be expected to have a legitimate interest in.[37]

B Public and Private Concern

The *Lange* defence only applies to publications about an MP that are a "matter of public concern rather than of private concern" [38]

1. The Vickery Case[39]

The recent case of *Vickey v McLean and others*[40] casts doubt on the private vs public distinction from *Lange*. In *Vickery,* the defendant Mr Vickery wrote to three newspapers accusing the Papakura District Council of bribery and corruption. One newspaper published a story making reference to the subject but did not include the corruption allegations. Three council employees (the CEO, Director of Works and Director of

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[34] Interview with B, anonymous editor of a regional daily newspaper (the author, Wellington, 26 July 2001)
[35] John Burrows "Lange v Atkinson 2000: Analysis" 2000 NZ Law Rev 389, 392.
[36] Burrows, above, 392.
[37] See Part VI of the paper for further discussion of a public interest defence.
[38] *Lange v Atkinson* [2000] 3 NZLR 385, 390 para 10 (CA).
[39] *Vickery v McLean and others* CA 125/00, 20 November 2000.

Finance) sued for defamation and the Court of Appeal held that Mr Vickery could not have a defence of qualified privilege for political discussion. The Court based its decision, in part, on the fact that criminal allegations are very serious and should be referred to the police in the first instance. They held that; "The law has been clear for many years that such allegations, provided they are bona fide, may be made to the appropriate authority under qualified privilege. But the privilege is lost if the allegations are disseminated beyond those whose proper functioning it is to investigate and if appropriate, act on them."[41]

Using this reasoning, any allegation of serious criminal conduct, which quite certainly fits the definition of public facts in the *Lange* decision, could never get qualified privilege. Under *Vickery*[42] all allegations of serious criminal conduct should not be published but referred to the police. This seriously ignores the realities of the media who may put a lot of time and resources into a breaking story about alleged criminal conduct, and who will not want to just turn the material over to the police, subsequently losing a potentially sensational story.

2. *The Press gallery*

In the questionnaire given to the press gallery journalists, two scenarios were presented and questions followed. Question one (a public fact scenario) read "Would the *Lange* defence cover a story about a cabinet minister accepting bribes". Question two (a private facts scenario) read "Would the *Lange* defence cover a story about an MP who had been caught shoplifting at age 19, but had never been charged with an offence?"

The majority of respondents (9 out of 15) concluded that the defence would not be available in either situation. Five respondents indicated the defence would be available in both situations. Most did not identify the private/public distinction in the *Lange* case and were certainly unaware of the *Vickery* case. Many wrote comments that their main

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[40] CA 125/00, 20 November 2000.
[41] *Vickery v McLean and others* CA 125/00, 20 November 2000.
[42] *Vickery v McLean and others*, above 125.

concern in trying to get a *Lange* defence was about trying to act responsibly. The public-private distinction in *Lange* did not seem to be well understood by journalists.

3. The Editors

Most editors found it very difficult to try and isolate specific facts as ones that are of private or public concern, as defined in the *Lange*[43] case. When given the example of an MP caught shoplifting at age 19 from the questionnaire, they refused to consider whether it was of private concern claiming the story would just fall in the "who cares basket"[44] and thus would never need to be published. With the bribery allegation example, the editors again refused to examine if it was a matter of public concern, claiming this story would be published simply on the basis of truth. These responses can mainly be attributed to the fact that the media deal with stories as a whole rather then isolating specific elements, the way legal analysis commonly does.

4. What the Editors thought of the distinction

The editors generally had very negative opinions on the public-private distinction in *Lange*. Many believed it to be far too restrictive and not favoring freedom of expression. One editor concluded, "the distinction between public and private facts is very outdated. If you are a high profile member of parliament or CEO then you need to accept full coverage. Most politicians these days court publicity and so should pay the consequence."[45] Most concluded that anyone who courts publicity or willingly places him or herself in the public eye should not expect the media to respect their private lives. One gave the example that "Christine Rankin should not be entitled to any private facts."[46]

Having concluded that the media should be able to dissect the private lives of New Zealand politicians and business people, most editors went on to say that, given the

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[43] *Lange v Atkinson* [2000] 3 NZLR 385, 390 para 10 (CA).
[44] Interview with C, an anonymous editor for a New Zealand newspaper (the author, Wellington, 25 July 2001)
[45] Interview with A, anonymous editor of a regional daily newspaper (the author, Wellington, 25 July 2001)

chance, most journalists probably wouldn't publish private facts. One editor gave the example of a story that broke in 1989, that an MP was having an affair with his speechwriter. All of the press gallery knew about the affair but no one ever wrote about it. One day the MP's wife actually rang a press gallery member expressing a willingness to talk about the affair, but the story still never went to press. The newspaper involved decided that the affair was private and not something that the New Zealand public would need to hear about. The editor explained the decision "It is often more important to think about the public opinion. We concluded that the public would think that a story on this MP and his affair was invasive and wrong. And that would be bad for business."[47] He concluded that New Zealand has a long tradition of respecting politicians' privacy, "unless that private behavior turns them into a hypocrite."[48] He postulated a theoretical example of a cabinet minister with a reputation for being strictly religious having an affair with a young woman. "Because he has a strong pro-life and Christian stand, it would reflect on his public persona if he was having an affair. It would be acceptable to reveal his affair because of the inconsistency with his public life."[49]

Interestingly, the media's attitude towards private facts is in step with the *Lange* decision even though they found it hard to see the *Lange* private and public distinctions. The case restricts political discussion to statements about a persons "capacity to meet their public responsibilities,"[50] and actions that may effect this capacity. The *Lange* defence would probably protect the statements in the theoretical example above. If the minister had a strongly Christian approach then his affair would inevitably cast doubt on his integrity, thus directly affecting his capacity to meet his public responsibilities. This conclusion is interesting, as the media, though very critical of the judicial public-private distinction, have formulated their own "hypocrisy test" that effectively creates the same outcome. It seems that this part of the *Lange* case is broadly in step with the New Zealand media.

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[46] Interview with A, anonymous editor of a regional daily newspaper (the author, Wellington, 25 July 2001)
[47] Interview with B, anonymous editor of a regional daily newspaper (the author, Wellington, 26 July 2001)
[48] Interview with B, anonymous editor of a regional daily newspaper (the author, Wellington, 26 July 2001)
[49] Interview with B, anonymous editor of a regional daily newspaper (the author, Wellington, 26 July 2001)
[50] *Lange v Atkinson* [2000] 3 NZLR 385, 390 para 10 (CA).

C *Limited to Opinion?*

1. The Press Gallery

Surprisingly, many journalists made the assumption that the *Lange*[51] defence is limited to opinion columns only. The questionnaire given to press gallery media directly asked: "does the *Lange* defence apply to only news items, opinion columns or both?" Half indicated that the *Lange* defence applies to opinion only, with one journalist adding the comment "The case sets a precedent for opinion only, but hopefully this will be expanded upon."[52] This directly conflicts with the *Lange* decision which in no way limited the defence to opinion. The Court of Appeal in the 2000 decision held that "The subject matter [of the *Lange* defence] is tightly defined, but its application is to all manner of publication."[53] This question clearly demonstrated a lack of understanding on the part of the journalists of the court's intention as to political discussion.

2. An explanation from the Editors

Editors were all aware that the defence applied to both news stories as well as opinion pieces. When questioned on the apparent lack of understanding on this among the journalists, editors generally attributed it to journalists relying on chief reporters or editors to advise them on legal matters. One commented "Journalists assume that they are going to be kept in check further up the hierarchy."[54] This seems unfortunate, as the press gallery journalists are the very people who the *Lange* defence was argued for. If they do not know the details of the cases it will be hard for the boundaries of political discussion to be utilized.

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[51] *Lange v Atkinson* [2000] 3 NZLR 385 (CA).
[52] Comment by press gallery journalists on the author's questionnaire (the author, Wellington, 14 June 2001)
[53] *Lange v Atkinson* [2000] 3 NZLR 385, 390 para 8 (CA).
[54] Interview with C, anonymous editor of a regional daily newspaper (the author, Wellington, 25 July 2001)

This finding may mean that journalists are excessively cautious when writing news stories that contain factual political matters and may not be wary enough when writing opinion pieces.

D Circumstances of Privilege

The *Lange* 2000 case held that the occasion of the publication is relevant to an assessment of whether the publication attracts privilege.[55] While the 1998 decision[56] seemed to be stating that political commentary within the specified subject matter would always be privileged, the 2000 case suggests that this may not be the case.

This inclusion is unlikely to be a major burden for reputable New Zealand print media as anything published in a serious newspaper would seem to be exactly the type of "lengthy serious article"[57] that would justifiably attract the privilege. The Court's only example of an occasion where the privilege might be lost is "a one line reference to misconduct of a grave nature on the part of a parliamentary candidate in an article in a motoring magazine."[58]

The Court of Appeal in the 2000 case concluded that, "in reality there is likely to be little uncertainty in this area."[59] And "any bona fide communication in the course of political discussion and within the defined subject matter is very likely to be made on an occasion of qualified privilege."[60] Because this inclusion in the 2000 *Lange* decision is unlikely to effect the print media in New Zealand, the questionnaire did not address it. The only uncertainty in this area for the print media may be satirical cartoons or articles, or short 'briefs' (one paragraph articles) that appear in nearly all New Zealand papers, for example Wellington newspaper The Dominion's 'Diary column'.

[55] *Lange v Atkinson* [2000] 3 NZLR 385, 390 para 10 (CA).
[56] *Lange v Atkinson* [1998] 3 NZLR 424 (CA).
[57] *Lange v Atkinson* [2000] 3 NZLR 385, 391 para 13 (CA).
[58] *Lange v Atkinson* 2000, above 391para 13.
[59] *Lange v Atkinson* 2000, above 388 para 2.
[60] *Lange v Atkinson* 2000, above 393 para 21.

E Misuse of Occasion

The *Lange* 2000 case introduced a standard of 'responsibility' that is an extension of the Defamation Act's formulation of malice.[61] Instead of the previous law that required actual malice to be shown to defeat qualified privilege, all the *Lange* case requires is lack of responsibility by the journalist. Now, journalists may lose the political discussion defence if the plaintiff can show that the defendant did not act responsibly in the circumstances of the publication. This element of the defence is separate from the relevant consideration of whether, on the facts, the discussion is privileged. If a plaintiff can show that the journalist has not acted responsibly then he or she will be regarded as having misused the occasion of privilege and will lose the defense. Specifically the test set up in the *Lange* case was: "Has there been a failure to give such responsible consideration to the truth or falsity of the statement as should have been given in all the circumstances."[62]

This introduction clearly places a focus on the defendant's conduct. The test puts the burden of proof on the plaintiff to prove that the defendant did not act responsibly and therefore should be denied the privilege. But the defendant may also have an active part to play in proving that he was acting responsibly. The 2000 Court of Appeal concluded that if a defendant does not produce evidence of responsible journalism then the jury might infer that the occasion was misused.[63]

The *Lange* case is vague about what it means by the term responsible. Its states that to assess what is responsible one needs to look at the circumstances of the particular publication. "Those circumstances will include such matters as the identity of the publisher, the context in which the publication occurs, and the likely audience, as well as the actual content of the information."[64] Though rejecting the *Reynolds*[65] 'reasonable test' for misuse of the privilege, the difference between responsible journalism and reasonable

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[61] Defamation Act 1992, s 19.
[62] *Lange v Atkinson* [2000] 3 NZLR 385, 401 para 47 (CA).
[63] *Lange v Atkinson* 2000 above, 400 para 43.
[64] *Lange v Atkinson* 2000 above, 391 para 13.

journalism seems minimal in reality.[66] Both will involve an assessment of the nature of the allegation and the intended dissemination. Though it must be noted that in *Reynolds* the reasonable standard goes to the availability of privilege, rather than defeating the privilege as it does in *Lange.*

1. The Press Gallery

The questionnaire asked journalists to respond to the two theoretical situations posed from the private-public question.[67] First, the bribery allegation against a minister and secondly, the shoplifting example. Journalists were asked to identify what actions would be essential for a *Lange* defence in each scenario. The actions identified were: calling the subject for comment, trying for independent verification and investigation of sources. The aim of this question was twofold. Firstly to see if journalists would consider that the two scenarios would require different actions as they vary in seriousness. And secondly to see which actions the journalists would consider being necessary to fit the *Lange* definition of responsibility.

The court in *Lange* concluded that the seriousness of the allegation is very relevant to the consideration of responsibility. The more serious the allegation, the more likely the court is going to require that the journalist seek independent comment from the plaintiff.

No journalists identified different actions for the more serious bribery allegation in their responses to the questionnaire. All identified the same actions in both scenarios. All journalists seem to consider that being responsible did not differ according to the seriousness of the allegation. The only differences were that two respondents commented that the more serious the allegation, the more sources should be consulted.

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[65] *Reynolds v Times Newspapers Ltd* [1999] 3 WLR 1010 (HL).
[66] Bill Atkin and Steven Price "Lange 2000" [2000] NZLJ 236.
[67] Section III B.

There seemed to be a clear split among the press gallery journalists on what is 'responsible' in particular circumstances. All indicated that the reliability of the source was very important in both scenarios.

But half of all respondents went on to indicate that to be responsible, the subject of any story that looks potentially defamatory should always be contacted for comment so that a publication is balanced. All of these respondents indicated that calling the subject for comment was essential in both scenarios.

Half of the respondents did not indicate that contacting the subject was necessary in either scenario. One respondent went on to comment that seeking comment can result in an unnecessary burden on journalists, because an injunction may be sought by the subject of any critical publication.

In *Reynolds* the court formulated ten factors to be considered when assessing whether a journalist has acted reasonably. (This reasonable assessment in *Reynolds* goes to whether the privilege is to be awarded, rather than whether the privilege should be lost like New Zealand, though the difference between the two approaches seems purely semantic in reality). One of the ten factors included is verification of the information and the reliability of the source. Another factor for consideration indicates that seeking comment from the plaintiff is not always necessary, indicating that whether contact with the victim was justified should be a judgement call based on the particular facts.

The case of *Lange v Australian Broadcasting Corporation*,[68] an Australian qualified privilege case, formulated a definition of reasonableness, in relation to misuse of the occasion, that requires a journalist "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 true."[69] The case, which is similar to *Reynolds*[70], again does not expressly require that the

[68] (1997) 145 ALR 96.
[69] *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96, 118.
[70] *Reynolds v Times Newspapers Ltd* [1999] 3 WLR 1010 (HL).

journalist seek comment from the plaintiff. But again, the *Vickery* case may cast doubt on whether very serious allegations will attract the privilege at all.

Both cases do not always require journalists to seek a reply from the person being defamed. Both cases however require a judgment call by the journalist on whether comment should be sought, from an assessment of the seriousness of the allegation and the intended width of the publication.

2. *The Editors*

All editors spoken to agreed that seeking verification of all sources and information was essential to responsible journalism. Most also went on to conclude that giving the target of a story a chance to comment is a clear step towards fitting the test. "The notion of responsibility should be decided in the specific context. But by giving the target of the story a chance to reply you should definitely fit the *Lange* 2000 test."[71]

The major criticism by editors of the extension of malice is that it makes everything so uncertain. One commented that "basically we are being told that we can take more risks but that those risks need to be taken responsibly. We are really flying blind until that word 'responsible' is defined for us."[72] But this may not be completely the fault of the law. It may also be a result of a lack of understanding on the side of the media.

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[71] Interview with D, anonymous senior executive member at a regional daily newspaper (the author, Wellington, 26 July 2001)
[72] Interview with C, anonymous editor of a regional daily newspaper (the author, Wellington, 25 July 2001)

Most editors found the inclusion of the "responsible" test in the *Lange* 2000 decision a major step back for freedom of speech from the initial decision. One editor described the 1998 *Lange* decision as "a breathtaking leap forward which would have done much to remove the chilling effect of the defamation laws."[73] However, he then describes the malice extension in the 2000 decision as "pretty much taking us back to where we were in 1997."[74]

3. Criticism of the Involvement of the Judiciary

Another strong criticism is that the court may look at what is 'responsible in the circumstances' in a completely different way to the media. One editor explained his concern: "When you are up against a deadline and you have to make a decision in 10 minutes, of course this decision may be at odds with a court that has 10 weeks to make the same decision."[75] Most editors have a real concern that court-formulated standards of responsibility will not recognise the realities of a New Zealand newspaper. These views are echoed by the defence in *Lange* 2000 who argued that the reasonable standard in *Reynolds*[76] "was in the nature of a hindsight test, which created real difficulties for editors and their advisors in deciding whether or not to publish."[77] Also the court in *Reynolds* noted that "journalists act without the benefit of a clear line of hindsight. Matters which are obvious in retrospect may have been far from clear in the heat of the moment."[78]

The requirement of responsibility obviously adds to the uncertainty the media are faced with when trying to decide whether a publication may attract a *Lange* defence. Until the case is worked through, the media may at times be overly cautious in what they publish and it seems that they will often seek the comment of the victim. Whether this will

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[73] Interview with A, anonymous editor of a regional daily newspaper (the author, Wellington, 25 July 2001)
[74] Interview with A, anonymous editor of a regional daily newspaper (the author, Wellington, 25 July 2001)
[75] Interview with A, anonymous editor for a regional daily newspaper (the author, Wellington, 25 July, 2001)
[76] *Reynolds v Times Newspapers Ltd* [1999] 3 WLR 1010 (HL).
[77] *Lange v Atkinson* [2000] 1 NZLR 385, 392 para 17 (CA).
[78] *Reynolds v Times Newspapers Ltd* [1999] 3 WLR 1010, 1034 Lord Nicholls (HL).

promote more responsible journalism or whether it will simply add to the chilling effect is not known.

IV THE EFFECT OF THE LANGE DECISION

Metro writer Nicole Legat concludes, "academics usually concur that greater freedom of speech is the outcome of this expensive five year battle."[79] And they do. Read any article about the *Lange* case[80] and you will find some sweeping statements about freedom of expression. John Burrows concludes "*Lange* 2000 endorses the importance of freedom of speech in a democracy and acknowledges that if the law of defamation remains as rigid as it has been in the past, it will have a chilling effect on the free flow of information."[81]

Most editors reacted negatively to being presented with the "academic" interpretation of the case. One editor claiming that: "Academics are far removed from daily journalism and a long way from the reality of the media."[82]

A Freedom of Expression

To get the perspective of the press gallery on the effect of the 2000 *Lange* decision, the questionnaire posed the question "Do you think the *Lange* decision either gives journalists greater freedom to make political comments, does not really change anything or restricts journalists' ability to make political comments?"

Half the respondents indicated that they thought the decision gave them greater freedom to make political comments. The other half indicated that they thought the case did not change anything in practice.

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[79] Nicole Legat "David and Goliath" (May 2001) *Metro* Auckland 45.
[80] *Lange v Atkinson* [2000] 3 NZLR 385 (CA).
[81] John Burrows "Lange v Atkinson 2000: Analysis" 2000 NZ Law Rev 389, 399.

Most editors agreed with the latter group of journalists, unanimously concluding that the case had very little practical effect in New Zealand, much less than was originally predicted. One described the effect as "more in principle than in practice"[83] and another concluded "I would say the case is a small step in the right direction, but it will take a long time to work through."[84]

One editor, though agreeing the case has made little difference to him personally, added that the case did give him more confidence in the media's right to freedom of expression. He concluded "Since the case, in my view, the media have had some reassurance that there is a backstop they can depend on, but day to day I do not think we are any more courageous than we were three years ago when we didn't have this supposed privilege."[85]

A professor of Journalism at Massey University had an interesting view of the practical effect of the case. "There is a preconception of a press victory which is very useful to the media. Subsequently it is the view that politicians are less likely to sue."[86]

B Effect on the Clarity of the law

The questionnaire posed the question to the press gallery; "Does the 2000 *Lange* decision either clarify the law relating to defamation and political expression, make it more confusing and complicated, or make very little difference in practice?"

This question produced an even spread of replies. Half of the respondents indicated that the decision made very little difference in practice, a quarter indicated that it made the law more confusing and complicated. The remaining quarter indicated that it clarifies the law.

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[82] Interview with C, anonymous editor for a New Zealand newspaper (the author, Wellington, 25 July 2001)
[83] Interview with C, anonymous editor of a regional daily newspaper (the author, Wellington, 25 July 2001)
[84] Interview with C, anonymous editor of a regional daily newspaper (the author, Wellington, 25 July 2001)
[85] Interview with A, anonymous editor of a regional daily newspaper (the author, Wellington, 25 July 2001)
[86] Interview with J, anonymous journalism professor at Massey University (the author, Wellington, 30 July, 2001)

This interesting spread of results may be explained by the answers to another question in the questionnaire. In a subsequent question journalists were asked to indicate how often they would take into account the *Lange* case when they had fears of defamation. Again there was a great mixture of responses. Very few (2 out of 15) indicated that that they always considered the case, most (9 out of 15) indicated that they hardly ever considered the case and few (3 out of 15) indicated that they never considered the case. One added the comment in relation to this question "It [the *Lange* case] has crossed my mind. But only once seriously, during a debate with a filing editor. He didn't care and cut my piece to shreds."[87]

C Use of the Lange Case in Daily Media Practice

Interestingly, the answers to the previously discussed three questions were related. The journalists who concluded that the *Lange* 2000 case clarified the law of defamation and political comment were also the ones who always considered the case when faced with the possibility of defamation. Their respondents also indicated that the *Lange* case gave them greater freedom to make political comments.

There seems to be substantial variation in understanding of the *Lange* case among the press gallery journalists. I have concluded that the journalists who understand the case more clearly (who are in the minority)[88], used the case much more in practice, and subsequently seem to have much more confidence in the practical significance of the case.

One journalist commented on his dissatisfaction with the defamation laws but attributed the problem directly to media organisations and journalists themselves and their lack of understanding of legal issues. He claimed that the media in general had a "lack of up to date training about the law that is standardized,"[89] and he believed that training for journalists needs to "start from the basis of what can we possibly publish in every

[87] Comment by press gallery journalists on authors questionnaire (the author, Wellington, 14 June 2001)
[88] Indicated by answers from the press gallery in part III sections B, C and D.
[89] Comment by press gallery journalists on authors questionnaire (the author, Wellington, 14 June 2001)

circumstance in which legal issues arise."[90] This seems to make sense, as legal understanding by journalists is the only way the case will really be expanded upon.

He went on to add that there is also a lack of understanding of legal issues by media management and "a lack of ability by legal advisors to work from a media perspective based on the dictum: publish as much as is legally possible."[91]

An academic supported this view, claiming "it is unlikely that the perceived benefits of the *Lange* case will transfer into practice. I attribute this mainly to the younger and less experienced nature of the press gallery reporters who seem to be in and out of the gallery at speed."[92]

V THE CHILLING EFFECT IN NEW ZEALAND

A The Press Gallery

To establish how much the current defamation laws hinder political discussion, the questionnaire circulated to press galley journalists, posed the question: "How often would you leave or severely change a political comment that was considered by you and your organization to be both true and newsworthy, because of concerns about defamation?" Ten journalists answered "rarely" which was encouraging but only one respondent indicated "never" and four respondents indicated "sometimes".

The editors generally agreed that "sometimes" was the best indication of how often the public missed out on a valuable political story because of concerns about defamation. One editor commented "a day would not go by that a staff member wouldn't ask – I want

[90] Comment by press gallery journalists on authors questionnaire (the author, Wellington, 14 June 2001)
[91] Comment by press gallery journalists on authors questionnaire (the author, Wellington, 14 June 2001)
[92] Interview with J, anonymous journalism professor (the author, Wellington, 30 July 2001)

to say this, how far can I go? And we have to find a way to water down the story."[93] All editors concluded that the chilling effect does exist in New Zealand.

B Real examples of the Chilling Effect Alive and Well in New Zealand

A number of journalists provided examples of when this has happened.[94] The first example was where a journalist had documented evidence of a minister telling a lie. Because of concerns of defamation the journalist watered down the potentially sensational story claiming only that the minister had made a mistake.

A second example concerned a series of accusations of personal misconduct directed against a government minister that were circulating in Wellington. The journalists involved decided not to publish after hearing that the minister's lawyer was threatening to sue anyone who printed a story about the accusations.

The third example involved a minister who specifically hired a consultant to "put a different gloss" on a departmental report in order to have it conform to his own declared policy. Again this story never went to press, as the organisation decided that the minister involved was very likely to sue.

All three examples deal with facts about MPs that are most certainly of public concern, being directly related to their capacity to do their jobs, so would seem to fit a *Lange* defence. In all three cases the journalists involved believed that the stories they watered down or did not publish, were not only newsworthy, but also true. Though only one side of the story is being presented here, the three examples show that there may be chilling effect on the media in New Zealand.

One editor explained the chilling effect by suggesting that to know something is true, but being able to prove something is true, are two entirely different things. "Newspapers only

[93] Interview with D, anonymous senior executive member at a regional daily newspaper (the author, Wellington, 26 July 2001)
[94] Comments by press gallery journalists on authors questionnaire (the author, Wellington, 14 June 2001)

publish a fraction of what we could publish because we cannot be absolutely sure about stories; it is one thing to know something is true and quite another to satisfy a court."[95]

A number of editors commented however, that the laws, though chilling, might not be completely undesirable. One editor claimed that "The restrictive nature of the laws do make journalists more responsible."[96] One academic, who previously worked as a journalist before teaching journalism, concluded that the laws are not too restrictive: "journalists must accept some responsibility for their freedom of expression. Generally, if you commit time and resources to a story then you are usually OK."[97]

What can be concluded is that, in general, the laws of defamation in New Zealand are very restrictive. Most of the time this restrictive nature means that, to print material journalists are obligated to be very responsible and to be active about checking sources. The laws do mean however, that from time to time newsworthy stories do not get printed because the media does not want to risk a defamation suit.

C What contributes most to the Chilling Effect?

The questionnaire asked journalists to indicate whether there were specific political individuals or groups that they were wary of publishing material about. Journalists were then asked why they were wary of these people.

Eight of the respondents indicated that there were particular people they were wary of publishing material about. Of those eight, most identified particular ministers or MPs. When asked why they were wary, seven indicated that the individual had a past track record that showed that they favoured litigation. Four also indicated that these individuals had the ability to finance legal proceedings.

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[95] Interview with D, anonymous senior executive member at a regional daily newspaper (the author, Wellington, 26 July 2001)
[96] Interview with D, anonymous senior management member at a regional daily newspaper (the author, Wellington, 26 July 2001)

One editor claimed that New Zealand politicians make up a good number of this group (people who his organisation are wary of publishing material about). He went on to say "New Zealand politicians are the biggest beneficiaries of the defamation laws."[98] Another editor went further claiming that "New Zealand politicians like the protection offered by our draconian defamation laws. They can say what they like about others under the protection of parliamentary privilege, and they appear to say things with careless abandon and without proper checking, but they demand the full protection of the law when something is published that they don't like."[99]

D How often do journalists seek legal advice?

All but two respondents to the questionnaire indicated that they would seek legal advice on a story prior to its publication, on average about once a month or less. Four of these respondents indicated they would seek advice on average once a year or never. These responses seem slightly worrying in view of the apparent lack of legal understanding by the press gallery journalists. Had their lack of understanding been attributed to heavy reliance on legal assistance, then a conclusion that the *Lange* case is still being used in reality may have been possible. Unfortunately it seems that most journalists who responded to the survey are very unaware and perhaps unconcerned by legal issues. This lack of legal assistance may be attributable to an inability of legal advisers to work from a media perspective as previously suggested.[100]

VI A PUBLIC INTEREST DEFENCE?

Most editors spoken to concluded that ideally they would like to see the extension of qualified privilege develop into a public interest defence for all political coverage. Their ideal formulation of the defence was similar to the recommendations put forward by the

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[97] Interview with J, anonymous journalism professor (the author, Wellington, 30 July 2001)
[98] Interview with B, anonymous editor of a regional daily newspaper (the author, Wellington, 25 July 2001)
[99] Interview with A, anonymous editor of a regional daily newspaper (the author, Wellington, 25 July 2001)
[100] Refer to Section IV B.

Committee on Defamation in 1977.[101] This proposal recommended that a provision be enacted that would enable news media defendants to plead qualified privilege where they have acted with reasonable care in publishing material that is of public interest and they have offered to publish a right of reply.[102] The committee believed that the requirement of the right of reply gave more certainty to the media and protection to the plaintiff.

Most editors agreed that a public interest test, with a right of reply, would achieve greater certainty for the media in relation to qualified privilege, and would get away from the vague conditions in *Lange.*

VII CONCLUSION

The *Lange* case has been heralded by academics and judges alike, as expansion of freedom of expression for the news media. This paper has shown that journalists and editors may not share these views. While John Burrows may conclude that "in the end most editors will be grateful that the law now favours them more than it did even two years ago,"[103] most editors claimed that the 2000 decision has no real effect on them.

This paper has identified an apparent lack of understanding by some press gallery journalists of many elements of the *Lange* case. The questionnaire responses demonstrated that journalists are not aware that the limited application of *Lange to* MPs can reasonably be expanded to include local body politicians, and probably others who are elected to public office. This will mean that the defence may rarely be utilized if it is perceived to be only available for MPs.

A second misunderstanding was that a number of journalists believed the *Lange* defence to be limited to opinion pieces only. This may result in a news media that are over-cautious with news stories, yet under-cautious with opinion pieces. The media also had

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[101] Committee on Defamation "Report on the Recommendations on the Law of Defamation 1977" 57.
[102] Committee on Defamation "Report on the Recommendations on the Law of Defamation 1977" 57, para 268.
[103] John Burrows "Lange v Atkinson 2000: Analysis" 2000 NZ Law Rev 389, 399.

difficulty with the private/public distinction in *Lange* and the concept of responsible journalism. No journalist picked up on the fact that the seriousness of the allegation being published is very relevant to the consideration of responsibility in *Lange*.

It would appear that these misunderstandings are not being ameliorated by legal advice. Almost all press gallery journalists indicated that they rarely sought legal advice. Even where they do seek legal advice, comments from journalists indicate that legal advisers may lack an ability to work from a media perspective.

If the *Lange* case is to have practical significance in reducing the chilling effect that this paper has suggested, it needs to be understood and appreciated by the media. While editors may have a clearer understanding of the case, it is the journalists who are making the political discussion that the case protects. Perhaps with a clearer understanding of the law, those journalists who indicated that the defence has had little practical effect in New Zealand, may have more faith in its effect as an expansion of freedom of expression. One could argue that not only is the law far removed from daily journalism, but also the media appear to be somewhat removed from the realities of the law.

APPENDIX ONE – QUESTIONAIRE ANSWERED BY PRESS GALLERY JOUNALALISTS

Please respond to the following questions by circling the statement that best represents your view.

1. **Do you think the "Lange defence", from the 2000 Court of Appeal decision, covers publications critical of: (please circle)**

Richard Prebble yes / pretty sure it does / don't know / pretty sure it doesn't / no

Christine Rankin yes / pretty sure it does / don't know / pretty sure it doesn't / no

Mark Blumsky yes / pretty sure it does / don't know / pretty sure it doesn't / no

Roger Kerr yes / pretty sure it does / don't know / pretty sure it doesn't / no

Heather Simpson yes / pretty sure it does / don't know / pretty sure it doesn't / no

2. **Would the Lange defence cover a story about a cabinet minister accepting bribes?**

   yes / pretty sure it does / don't know / pretty sure it doesn't / no

3. **Would it cover a story about an MP who had been caught shoplifting at age 19, but had never been charged with an offence?**

   yes / pretty sure it does / don't know / pretty sure it doesn't / no

4. **What steps are necessary to be responsible and get a Lange defence in the situation in question 2? (circle any that apply)**

A. Calling the subject for comment (even if there is a risk that the he/she will seek an injunction)
B. Try for independent verification
C. Investigate reliability of source
D. don't know

5. **What steps are necessary to be responsible and get a Lange defence in the situation in question 3? (circle any that apply)**

A. Calling the subject for comment (even if there is a risk that the he/she will seek an injunction)
B. Try for independent verification
C. Investigate reliability of source

D. Don't know

6. From your understanding of the Lange 2000 case, does the defence relate only to: (circle one only)

A. News stories

B. Opinion columns
C. Both news stories and columns

7. Do you think the Lange decision: (circle one only)

A. Clarifies the law relating to defamation and political comment
B. Makes the law more complicated and confusing
C. Makes very little difference in practice
D. Don't know

8. Do you think the Lange decision: (circle one only)

A. Gives journalists greater freedom to make political comments
B. Does not change anything in practice
C. Restricts journalists ability to make political comments
D. Don't know

9. When writing a political comment, do you consider the Lange case if you have fears of defamation?

Yes / sometimes / hardly ever / never

10. What proportion of defamation complaints received by your organisation relate to a political comment?

Only a few / less than half / about half / a lot / almost all

11. Who do initial complaints go to in your organisation?

Chief reporter / Sub-editor / News editor / Editor / Lawyer / Upper management

12. How often do you personally seek legal advice before printing a story?

Daily / weekly / monthly / yearly

13. What proportion of your stories have been changed because it has been concluded that the story may be defamatory?

All / some / very few / none

14. Who in your organisation decides whether and how to change a story?

Chief reporter / Sub-editor / News editor / Editor / Lawyer / Upper management

15. How often do you worry about the possibility of a defamation claim when writing a political comment?

All the time / often / sometimes / rarely / never

16. How often do you change or leave stories because you are worried about defamation?

All the time / often / sometimes / rarely / never

17. How often would you leave or severely change a story that was considered by you and your organisation to be both true and newsworthy, because of concerns about defamation?

All the time / often / sometimes / rarely / never

Please describe an occasion where this has happened (no names required)

_____

_____

_____

_____

18. Are there specific politicians or groups that your organisation is wary of publishing material about?

Yes / no

19. Who are they?

_____

_____

20. Why are you wary?

A. The group or individual has a propensity to sue
B. The group or individual has the ability to finance legal proceedings
C. The past track record of the group/individual shows that they favour litigation

_____