Defamation Law

Introduction

The law of defamation aims to balance the right of free speech in a community with the right to be protected from an attack on an individual's personal reputation in that community. To be actionable there must be a publication (by any means) to a third party which is defamatory (in the sense that fair minded people would think it causes harm to a person's reputation) to a person who can be identified either by name, photo or from facts known to certain persons who know the defamed person.

While the news media tends to be the main target for defamation actions, people have also sued over poems, novels, cartoons, paintings, photographs, artistic criticisms, songs and satire. Threats of defamation actions are often used to stifle criticism or to settle other grievances such as invasion of privacy (see also the Information Sheet: Privacy and the private sector).

Defamation actions can be very costly and difficult to defend. However, where successful, substantial monetary damages can be awarded and in some cases, plaintiffs can obtain a court order called an "injunction" that prevents any further communication of the offending publication or material. This information sheet focuses on how the Uniform Defamation Laws operate and gives a brief overview of the law of defamation, how to minimise risks and what to do if you are threatened with an action. **Legal advice should be sought if you are concerned about defaming someone or think you might have your own claim against someone who has defamed you.**

Each of the Australian states and territories enacted uniform defamation laws (**Uniform Defamation Laws**) that took effect on 1 January 2006. Prior to the Uniform Defamation Laws reform, there was little consistency in the defamation laws in each state and territory. In addition, the defamation laws enacted by government in each state and territory co-exist alongside common law (ie. the body of precedent law set by courts of differing levels across Australia).

Further reforms to the Uniform Defamation Laws (**2021 Amendments**) took place in July 2021 but those reforms were not taken up by WA and NT, which continue to use the Uniform Defamation Laws unamended. This can raise complexities for a nationwide publication.

The 2021 Amendments introduced a number of key changes into the law.

A summary of the new reforms is also provided below under the *current developments – legislative reform* section of this Info Sheet.

Prospective plaintiffs and publishers alike should familiarise themselves with the changes. Additionally, operators of websites and other digital publishers should monitor the progress of the second stage of amendments regarding the application of the Uniform Defamation Laws to digital platforms.

Legislative reform

The 2021 Amendments introduced a number of key changes into the Uniform Defamation Laws (as stated above, outside WA and NT):

- **Serious Harm**

The defamation reforms have introduced a threshold requirement that the allegedly defamatory matter has caused (or is likely to cause) **serious harm** to the plaintiff. A person who wishes to take legal action for defamation must be able to prove that they have suffered, or could suffer, 'serious harm'.

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If a corporation is suing for defamation, it needs to prove that it has suffered 'serious financial loss' as a result of the publication of the allegedly defamatory matter. As described further below, not all corporations can sue for defamation.

- **Defence of Triviality removed**

As the reforms have introduced the threshold 'serious harm' requirement, the defence of triviality has been removed.

- **Public Interest Defence introduced**

A 'Public Interest' Defence has been introduced. This makes it a defence to the publication of defamatory material if the publisher can prove that, in the circumstances:

1. The material concerned an issue of public interest; and
2. The publisher reasonably believed that the publication of the material was in the public interest.

- **Changes to the Qualified Privilege Defence**

The existing defence is modified in light of the introduction of the new Public Interest Defence.

- **Single Publication Rule and amendments to the limitation period**

The defamation reforms have introduced a 'single publication rule,' rather than the 'multiple publication rule' which previously applied. This means that the limitation period for a defamation action is now one year from the date that the allegedly defamatory matter was first published. However, the Court has the power to extend the limitation period to a period of up to three years from when the matter was first published.

This change is particularly important for the online context, as it means that electronic material that is available for access or download online is published only once: when it is first uploaded or sent.

- **Requirement for a Concerns Notice**

The law has now been amended to **require** someone who thinks they have been defamed to provide a 'concerns notice' to the person who they believed has published the defamatory material before they can bring defamation proceedings against them in court.

A concerns notice is a written notice that:

- Specifies the location where the allegedly defamatory material can be accessed (e.g. a website address); and
- Informs the publisher of the defamatory imputations the person believes that the publication contains about them; and
- Informs the publisher of the 'serious harm' that the person considers to have been caused to the person's reputation as a result of the publication of the allegedly defamatory material; and
- Attaches a copy of the allegedly defamatory material to the notice.

A number of other procedural and technical changes relevant to defamation proceedings in court have also been made as part of the defamation amendments. These changes affect the amount of damages you can be awarded by a court, and the process of 'pleading' your claim and defences in court proceedings. They also introduce a defence for material that was published in a scientific or academic journal that was subject to peer review.

Defamation on the Internet: flame wars and online trolls

A unique and evolving area is defamation on the internet. Online message boards and social media websites are rife with examples of defamation. Some participants get carried away in their discussion and descend into a 'flame war', posting

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personal attacks and comments that could be defamatory. The anonymity of the internet also provides an environment for 'trolls' who deliberately make outrageous statements about other people to cause disruption.

As a response to the online environment potentially producing a flood of defamation claims, the courts have attempted to balance the right of a person to seek vindication of his or her reputation through legal action against the need to avoid court resources being applied to trivial claims.

Notwithstanding, this area is constantly evolving and not all aspects of how the law of defamation applies in the online context are settled. Due to the ever-growing relevance of defamation on the internet, issues relating to online defamation are particularly discussed throughout this Info Sheet.

What is defamation?

For a defamation action to proceed (that is prior to consideration of any available defences to the publisher), a person who believes they have been defamed (the plaintiff), must establish three things, namely that:

1. the communication was published to a third person;
2. the communication identifies (or is about) the plaintiff;
3. the communication is defamatory of the plaintiff.

The communication was published to a third person

To be defamatory, the material has to be **published** (communicated by any means, including written, orally, pictorially) to at least one person other than the person making the claim. The intention of the publisher does not matter and liability for defamation can arise even from unintended errors.

It is only when a defamatory publication is comprehended by at least one third party reader that harm to reputation will occur. [1] This means that for material displayed online or delivered by electronic communications (such as email), a **publication** needs to consist of two elements – for example, the act of sending an email and someone else receiving it.

A claim for defamation in relation to a publication on the internet may present particular problems to a person seeking to vindicate their reputation. The publication may be anonymous so the person may have practical difficulties in discovering the identity of the person posting the defamatory material. However, if you think you have been defamed by someone posting anonymously on the internet, there are rules contained in the Uniform Civil Procedure Rules (UCPR) of each state and territory, which allows access to information to identify the Internet Provider (IP) address of the person responsible. This is known as preliminary discovery and the court can compel the relevant platform to provide this data. [2]

The plaintiff also has to prove that the alleged defamatory material has been viewed by third parties. If the plaintiff cannot identify people who have viewed the material, or if only a very small number of people have read the material complained of, these can be factors which may lead the court to conclude that there is no serious harm sustained.

Defamation law recognises that liability can arise as a result of:

- a positive act where a person has a role in the process of publishing or who controls the publishing forum (such as a blog) publishes defamatory material; or
- the failure to prevent or remove defamatory information published by someone else. For example, you innocently published defamatory material and later receive a complaint but you failed to take action to remove the defamatory material or prevent its display.

An action for defamation may be brought, not only against the original publisher (the writer/speaker), but also against anyone who takes part in the publication (the 'primary publisher') or republication of the material (a 'subordinate publisher'). This

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means that everyone involved in the publication is potentially liable and each, all, or some can be sued. Writers, publishers, editors, artists and gallery owners must all be aware of the potential dangers, as it is not a defence to argue that you are only repeating rumours or a comment made by somebody else.

This is equally the case for publications occurring online – whether it is in a comment in a discussion forum or through a YouTube video, by forwarding an email or retweeting on Twitter/X, publishing or republishing defamatory material can result in liability. In the landmark Australian case of *Fairfax Media and others v Voller* [2021] HCA 27 , the High Court found that media organisations were the 'publishers' of statements made by third parties in the comments section of each media organisation's Facebook posts. The decision highlights the evolving nature of online defamation, and the risk of facilitating and encouraging the posting of third-party comments on webpages that an organisation controls. The case is discussed in further detail below under the *current developments* section of this Info Sheet.

The communication identifies the person

The plaintiff must establish that they were identified in the communication as the person defamed. This is straightforward when the person is named, but other identifying information, such as their job and where they live, may be enough. Even the use of a pseudonym may not prevent identification, if the person can be identified by other facts in the publication known to certain people. There have been cases where identification has been accidental, for instance when the fictional name "Artemus Jones" happened to be a real-life person.[3]

Although a large class of people cannot be defamed, a statement denigrating a group may be defamatory towards a member of that group or the whole group if sufficiently small (eg. a board of directors).

The communication defames them

The test of whether a communication is defamatory is: "Does the communication lower/harm the plaintiff's reputation, hold the plaintiff up to ridicule, or lead others to shun and avoid the plaintiff?" This is judged from the viewpoint of "ordinary reasonable people in the community in general" and in light of contemporary standards.[4]

The meaning of the material can be the ordinary meaning of what is published, or a specific meaning that only some people understand because they have special knowledge. Importantly, what you intend to say is actually irrelevant – the meaning of what is published is considered in the context of the entire publication and the test applied is what the ordinary reader or viewer would have understood the communication to mean. Furthermore, it is possible that different meanings can reasonably be conveyed by what is published. The courts will expect the ordinary reader or viewer to engage in a "certain amount of loose thinking", to "read between the lines" and to be guided by the idea that "where there is smoke there is fire". You cannot avoid a defamation claim by arguing that the words used in the publication could have an innocent meaning – a meaning that is not defamatory – if there are other interpretations of the words that carry a defamatory imputation. For example, care must be taken when publishing "allegations", as the "ordinary reasonable reader/listener/viewer" may presume that there is a factual basis to them.[5]

To satisfy the test, the person claiming defamation does not have to prove that the imputation is false, that it actually caused them harm, or that the publisher meant to cause harm. On the other hand, just because an imputation hurts or upsets a person, does not mean that it is defamatory. It must be capable of damaging their reputation.

The limits are not always clear in relation to humour, cartoons or satire. Words obviously intended only as a joke may be safe, but there may still be a problem if there are underlying defamatory facts understood by the audience. You can publish photos or film of people in funny situations unless it makes the subject look ridiculous or a target of derision rather than simply humorous.

Context is also important. For example, a picture can become defamatory according to placement and a comment may not be defamatory if told to a limited audience, but may become defamatory when removed from its context and circulated more

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widely. In one case, a plaintiff who told a small group of friends a self-deprecating story about being mistaken for a hangman was able to sue when a local newspaper published the story. However, context can also work in favour of people defending a claim – the person making the claim can't just take one imputation out of context as there may be an "antidote" to a defamatory imputation in other parts of the communication.

The publication caused or is likely to cause serious harm to the person's reputation

The 2021 Amendments introduce a new 'serious harm' threshold. To satisfy this new element, the publication must have caused, or be likely to cause, serious harm to the reputation of the person. Harm to the reputation of a corporation is not serious harm unless it has caused, or is likely to cause, 'serious financial loss'. As described further below, not all corporations can sue for defamation.

The decision regarding whether the threshold has been reached is a question for the judge, not the jury. The judge is also able to consider this question on their own motion: they need not wait for a party to make an application, although it seems more likely an application will be required.

The amendment also clarifies a number of matters, including that:

- serious harm is a matter for the judge, not jury;
- the issue of serious harm may be determined at any time before (or during) a trial;
- if a party applies for this element to be determined before trial, the judge must determine the issue as soon as is practicable, rather than waiting until the trial (unless there are special circumstances);
- examples of the matters to be taken into account when assessing special circumstances include costs, court resources and the extent to which the serious harm is related to other issues for determination; and
- this element may be determined on the pleadings without the need for further evidence.

Who can sue for defamation? And who can be sued for defamation?

Personal action

Any person can sue for defamation. Generally, a dead person cannot be defamed.

Can companies and governments sue for defamation?

In all states and territories, companies and other organisations with a "legal personality" (e.g. incorporated associations, trade unions, local councils) cannot sue for defamation. There are specific exceptions, however, which allow some corporations (referred to as an **Excluded Corporation**) to sue for defamation if:

1. it is a non-profit corporation and not a public body (such as a local government or public authority); or
2. it employs less than 10 people, is not related to another corporation and is not a public body.

In assessing the number of employees of a company, part time employees are taken into account as an appropriate fraction of a full time equivalent.

Corporations may attempt to pursue a claim for defamation through an officer or employee who is identified by the communication, even though they may not be specifically named. For example, where a defamatory communication is made about a corporation in general, it might be possible to argue that an officer or employee is defamed by the communication if that person is considered the 'face' of the corporation.

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An alternative for a corporation is to bring a claim for misleading or deceptive conduct in trade or commerce, under the Australian Consumer Law. Additionally, a corporation can bring an action for “malicious falsehood” (also known as “injurious falsehood”). In general, the four elements of this action which must be established are:

1. a false statement about the goods or business;
2. publication of that statement to a third person;
3. the statement was published maliciously; and
4. actual damage as a consequence (which may include a loss of business).

Place of publication

A person may sue in any Australian State or Territory in which the communication was published to a third party. In the case of an article or comment on a website, this is the State or Territory in which a person browsing the web reads or downloads that article or comment. For the purposes of defamation law it doesn’t matter where the website itself is hosted. In addition to this, where publication took place either in ACT or NT, the Federal Court has primary jurisdiction for publication in a territory and so for national publications, defamation proceedings can be commenced in the Federal Court without the addition of any cause of action under any Commonwealth law.[6]

Limitation period

You must commence legal action within twelve (12) months from the date of publication. The court has discretion to extend this period for up to three years if the plaintiff can show that it was not reasonable to have commenced an action within the twelve months period. In practice, persuading a court to extend the time to issue defamation proceedings is difficult and will only succeed in “relatively unusual circumstances”.

Examples of unusual circumstances are that the plaintiff was of not aware publication until after 12 months from the date of publication or the plaintiff is not aware of the identity of the publisher. Even if the plaintiff was not aware of the publication or the identity of the publishers, any delay between the point at which the plaintiff becomes aware of those matters and proceeding to issue legal proceedings may result in a refusal to extend the limitation period.

It is important not to delay pursuing remedies after learning of the defamatory publication. For example, one could issue a notice describing the defamatory nature of the material (a ‘concerns notice’) and should promptly respond to any “offer to make amends” provided by the writer/publisher of the defamatory material. If the limitation period is about to expire it is better practice to issue legal proceedings even if there are settlement negotiations taking place. Delay in filing a claim due to settlement negotiations taking place is not likely to be accepted as circumstances that justify the extension of the time beyond the twelve months limitation period. Equally, not having money available to obtain legal advice is not a factor that justifies extending the limitation period.

The 2021 Amendments clarify that the date of publication for electronic material is the day on which the matter was “first uploaded for access or sent electronically”. This means that where the 2021 Amendments apply, the limitation period runs from the date the matter is first *uploaded* to a digital platform, rather than the date of download by a recipient, preventing a “reset” of the limitation period upon each new download.

The “single publication” rule vs. the “multiple publication” rule

For jurisdictions where the 2021 Amendments have commenced, the single publication rule applies to defamatory matter published on and from 1 July 2021. This rule means that the limitation period (of one year) will run from the date the material is first published.

In cases of online or electronic publication the date of first publication, under the single publication rule, is the day the matter was first uploaded for access or sent electronically to a recipient. This is an important change as, under the previous

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legislation, the limitation period for online publications restarts whenever a person downloads and comprehends the material from the internet. This means that in practice there is a potentially an endless limitation period for such publications, which is particularly problematic for media organisations who face the prospect of fresh litigation on each download.

For books, the old law was that if a book was still in a shop or library, it was still being published so the limitation period did not expire. Now there is certainty in that it will expire one year after first publication including subsequent reprints unless there is a material update changing the publication from the original one.

The single publication rule will not apply if the manner of subsequent publication is substantially different from the manner of first publication. What is meant by “manner” remains to be seen and will likely only be clarified as cases progress through the courts.

There is a further question as to whether this rule protects both first publishers and secondary publishers. This is relevant, for example, when people access older articles through secondary publishers like search engines, where the operators have little to no control over the content appearing in search results. Although it seems unlikely that secondary publishers will be protected, this may be clarified in the second round of reforms or otherwise when cases progress through the courts.

Prior to the 2021 Amendments, the relevant rule was the multiple publication rule. This rule still applies for jurisdictions which are yet to implement the 2021amendments (Northern Territory and Western Australia) or where the defamatory matter was published prior to 1 July 2021. Where the 2021 Amendments have commenced, the multiple publication rule is no longer relevant and the single publication rule applies.

Potential defendants

A person who is sued for defamation may be anyone involved in the creation, publication anddissemination of the material. An employer may be held vicariously liable for the actions of employees. This means a company or partnership may be responsible for the defamatory publication where they have the right, ability or duty to control the activities of their agents or employees.

The author of material, such as a journalist, has a primary liability for what is written and published. The primary liability for traditional print publications also extends to editors, printers and the legal entity responsible for the publication. Defamation law operates on the basis that these people or legal entities have the primary liability under defamation law. This is because their role in the publication process means they know the content of (or can be expected to take responsibility for reviewing) the material being published. Therefore they are able to control that content and prevent the publication of defamatory material.

As discussed above, in addition to these primary publishers, liability can extend to people involved in the distribution or republication of material. These “subordinate publishers” may rely upon the defence of innocent dissemination, discussed below.

Defences

The first step when someone threatens you with defamation is to establish whether they can establish all three elements discussed above: the material has been communicated to a third person (other than the person claiming defamation), the person claiming defamation is identified in the communication and the communication defames him/her.

The next step is to consider whether you have a defence under the law of defamation. Defences include:

1. Honest opinion (also known as defence of fair comment)
2. Justification/Truth
3. Qualified privilege

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4. Innocent dissemination
5. Public Interest
6. Triviality
7. Other defences

Defence of honest opinion (defence of fair comment at common law)

The defence of honest opinion under the Uniform Defamation Laws co-exists with the common law defence of fair comment. The defence of honest opinion is relevant for reviewers and critics, but it can also be useful for satirists, comedians and other artists whose work incorporates an element of social commentary. In general the defence requires you to prove that:

1. the communication must be an expression of opinion rather than a statement of fact; and
2. the opinion related to a matter of public interest; and
3. the opinion is based on "proper material", meaning it is based on material that:
    - is substantially true; or
    - was published on an occasion that attracted the protection of absolute or qualified privilege:
        - Absolute privilege offers complete protection from liability in defamation but it only applies to statements made members of parliament in the course of parliamentary proceedings, statements made in legal proceedings etc;
        - Qualified privilege protects some defamatory statements made by you if you reasonably believed the statement was true or you had the legal, moral, or social duty to make it and the recipient has a corresponding interest in receiving it. The defence of qualified privilege cannot be used if it can be proved that the defamation was motivated by malice; or
    - is contained in public documents; and
4. the facts upon which the opinion is based must be stated unless they are widely known. This is required so that the readers/viewers/listeners are able to form their own views on the facts. These facts have to be known to you when you make the communication. It is very important that the comment is clearly distinguishable from the facts upon which it is based.

"Fair" comment does not mean objectively reasonable and there is no suggestion that the statutory defence of honest opinion requires that the opinion be reasonable. The opinion can be extreme, as long as it is honestly held by the communicator. This means that you have to be very careful in responding to an initial complaint. If you say that you "didn't mean it" this could subsequently make it very difficult to raise the defence of honest opinion.

Defence of justification/truth

It is a complete defence to a defamation action if you can prove the material published was true in substance or not materially different from the truth. A 'complete defence' means that even if an imputation is found to be defamatory, the publisher is not liable. It can be difficult to prove that an imputation is true because you can only use evidence that is admissible in court. You will need original documents and/or witnesses who are credible and willing to testify in court. Your sources have to have first-hand knowledge of the relevant circumstances. The rules against "hearsay" evidence will prevent you putting forward witnesses who "heard something from somebody else".

Public Interest Defence

The 2021 Amendments introduce a new defence to the publication of defamatory matter, which applies if the defendant can show:

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- the matter concerns an issue of public interest; and
- the defendant reasonably believed that publication of the matter was in the public interest.

The new provision requires the court to take into account all circumstances of the case and sets out a list of factors the court may (but does not have to) take into account in assessing the circumstances.

Defences of qualified privilege

There are two distinct defences under the heading of qualified privilege. Firstly, common law qualified privilege and secondly, statutory qualified privilege under Uniform Defamation Laws . The reason for two defences existing is that the common law defence only applies where publication is to people who have an interest beyond curiosity in the subject matter (eg. a complaint to the police about a neighbour). This defence is not available to media publications so statute created one where the interest group may be large, but the publisher then has to establish that its conduct was reasonable in accordance with a checklist of factors.

Common law qualified privilege – The defence was eloquently summed up by the High Court in *Roberts v Bass* (2002) 212 CLR 1:

> 'The common law protects a defamatory statement made on an occasion where one person has a duty or interest to make the statement and the recipient of the statement has a corresponding duty or interest to receive it. Communications made on such occasions are privileged because their making promotes the welfare of society. But the privilege is qualified – hence the name qualified privilege – by the condition that the occasion must not be used for some purpose or motive foreign to the duty or interest that protects the making of the statement'.

The philosophy behind this defence is that certain defamatory statements warrant protection, not for the benefit of the person making the statement, but for the benefit of the general community on the basis that certain statements should be freely made without fear of the threat of litigation. Communications to interested persons such as employment references or to government authorities or even community groups including Facebook closed groups for example, will have the benefit of this defence, even if it turns out to be incorrect. As long as the person making it did so honestly and not for an improper motive (eg. to harm the plaintiff) known as malice, it will be a complete defence.

This defence was originally designed for limited communications. It is less likely to be successful when your communication is published to a wider audience because you have to demonstrate the corresponding interest or duty with each member of the audience. There are two important exceptions to this. Firstly, if you have been attacked publicly you are entitled to make a public response.[7] Secondly, the High Court has recognised a corresponding duty and interest between members of the Australian community in publishing and receiving information about government and political matters.[8]

Courts have accepted that a reply to a public attack is one aspect of the defence of common law qualified privilege where the interest group can be substantial. Where you are responding to a public attack by another person, your response must be commensurate to the attack to which you are responding. For example, if a person makes a public attack on the quality of a product or service that you supply, the law would recognise that you have an interest in responding to the attack and that the general public have an interest in hearing your side of the story. It is important to be careful that your response doesn't go beyond addressing the specifics of the attack made upon you. For example, if you make unjustifiable accusations as to the criminal conduct, honesty and integrity of the person criticising your products or services, then your response goes beyond a reasonable or commensurate response to the attack and you will lose any protection provided by the defence of qualified privilege.

Statutory qualified privilege – The Uniform Defamation Laws provide that there is a defence if the defendant proves that:

1. the recipient has an interest or 'apparent' interest in having information on some subject, and

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2. the matter is published to the recipient in the course of giving to the recipient information on that subject, and
3. the conduct of the defendant in publishing that matter is reasonable in the circumstances.

Courts have said that the defence of qualified privilege will not be available if the limits of the interest or duty have been exceeded. In other words, if the information communicated was not reasonably appropriate to achieve the publisher's purpose, the defence of qualified privilege would not be available.

In some instances the success of the defence will depend upon the "reasonableness" of the publisher's conduct in the circumstances surrounding the publication. The Uniform Defamation Laws provide guidance as to factors going to the reasonableness of the publication.

Prior to the 2021 Amendments, these factors included:

1. the extent to which the matter published is of public interest;
2. the extent to which the matter published relates to the performance of the public functions or activities of the person;
3. the seriousness of any defamatory imputation carried by the matter published;
4. the extent to which the matter published distinguishes between suspicions, allegations and proven facts;
5. whether it was in the public interest in the circumstances for the matter published to be published expeditiously;
6. the nature of the business environment in which the defendant operates;
7. the sources of the information in the matter published and the integrity of those sources;
8. 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;
9. any other steps taken to verify the information in the matter published; and
10. any other circumstances that the court considers relevant.

In light of the new Public Interest Defence, the 2021 Amendments narrow the list of factors assessing reasonableness to **only:**

1. the seriousness of the imputations;
2. the extent to which the matter distinguished between suspicion, allegations and proven facts;
3. the nature of the defendant's business environment;
4. whether it was appropriate in the circumstances to publish expeditiously; and
5. any other steps taken to verify the matter published.

It is no longer necessary to prove that the matter published concerned an issue of public interest. The narrowed list of factors are to be taken into account to the extent the court considers them applicable – the list is not exhaustive, meaning that other factors may be considered, and not all, or any, need to be established.

The defence of qualified privilege (common law and statutory versions) will fail if the plaintiff can show that the publisher was motivated by malice to make the communication. Courts have stated that malice is commonly understood as ill-will toward someone, but it also relates to any indirect motive that conflicts with the sense of duty created by the privileged occasion. Ultimately, whether a publication is motivated by malice is a complex question. Courts have accepted that irrationality, stupidity or refusal to face facts that are obvious are not conclusive proof of malice. Equally, the mere failure to make enquiries, apologise or correct the untruth when discovered is not evidence of malice. To establish malice, the plaintiff must show that the dominant purpose or motive of the defendant in making the publication was improper.

Courts have accepted that the defence of qualified privilege allows for vigorous public debate on political issues. In relation to the implied constitutional freedom of communication of political speech, the High Court of Australia has stated that:

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"[t]here is nothing improper about publishing relevant material with the motive of injuring the political reputation of a candidate at an election and causing the candidate to lose office – as that is central to the electoral and democratic process – provided that the defendant is using the occasion to express his or her views about a candidate for election".[9]

In the context of political commentary, malice may be established by showing that the defendant knew that he or she was not telling the truth or was reckless as to the truth of what was being published.

Defence of innocent dissemination

The defence of innocent dissemination under Uniform Defamation Laws is not available to the author and primary publisher of the material. These people have 'primary liability' for what is written and published. Their role in the publication process means they know, or can be expected to take responsibility for reviewing, the content of the material being published. They are therefore able to control that content and prevent the publication of defamatory material.[10] Courts in other jurisdictions have decided that the primary liability for publications extends to writers and editors in addition to the legal entity responsible for the publication.

The defence of innocent dissemination *is available* to subordinate publishers (those who disseminate content created by someone else). Indicators of whether someone is a primary publisher or a subordinate publisher include the opportunity to prevent publication and the editorial control over the publication process.[11] The defence is available to subordinate publishers who can demonstrate that:

- they neither knew, nor ought reasonably to have known, that the matter was defamatory; and
- this ignorance was not due to their own negligence.

That is, they must prove that they did not know and would not, with the exercise of reasonable care in the relevant circumstances, have known that the material contained defamatory content. If you have innocently published defamatory material you must take reasonable steps to remove the defamatory material as soon as you are aware of it, otherwise you will be deemed to have published the material.

This defence is designed to protect booksellers, newspaper and magazine vendors, broadcasters of live radio or TV programs and copying and printing or distribution services. Circumstances where an innocent dissemination defence may arise are:

a. During the live broadcast of a current affairs program via the internet, a panel member makes defamatory comments about a named person.
b. On a forum hosted by an arts organisation, defamatory comments are made by users and automatically published on a web streaming services.
c. A newsagent sells a magazine containing defamatory material.
d. An organisation hosts a public meeting about arts funding where a guest makes defamatory comments about particular corporate executives who have sponsored the event.

There will be circumstances where this defence will not apply to live programs, for example where the defendant was the originator of the material and had the capacity to exercise editorial control. Where a program has been pre-recorded and edited, there is an expectation that content will be checked prior to broadcast.

There are also unresolved questions about how the defence of innocent publication applies in the online context.

There can be differences between the standard of care expected of online publishers. The operator of a discussion forum that has an express purpose to conduct a critical campaign would be expected to exercise particular care in respect of potentially defamatory comments posted at the site;[12] whereas a lower standard of care would be applied to a discussion forum dedicated to a more neutral topic.[13] However once notice is given the operators of a discussion forum need to have taken

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reasonable steps to limit further dissemination of the material alleged to be defamatory – or risk being liable for damages in a defamation action.

There are differences between online content and service providers, such as search engines, ISPs, hosting services, content platforms and online content providers,[14] with each type of service provider having a different potential liability for online content that is defamatory. If any of these entities have a compelling basis to say they are 'mere conduits' or 'passive facilitators' of the content, the consequence is that they can then argue they are not 'publishers' of the content.

It is important to understand that the Australian courts have still to establish clear rules as the circumstances in which an application service provider (search engine) and the other online entities described above, can rely upon the defence of innocent publication. Google has been involved in litigation in Australian relation to defamatory imputations that were argued to flow from how the search engine presents the results of a web search. However Australian judges who have considered the application of the innocent publication defence to search engines, have come to different conclusions.[15] It is outside the scope of this information sheet to attempt to reconcile these cases.

Other defences

Other defences set out in the Uniform Defamation Laws include:

- any defence or exclusion of liability that exists under general law which allows you to assert any defence or exclusion that is recognised in the common law;
- the defence of contextual truth; i.e. where you are able to prove that the most serious imputations is substantially true which can absolve you of liability for defamatory imputations do not further harm the reputation of the plaintiff;
- the defence of absolute privilege; i.e. the reporting of things said in the course of an occasion of absolute privilege, which includes matters published in the course of parliamentary proceedings or proceedings of a court or tribunal;
- the publication of public documents; i.e. you are free to publish reports of matters contained in public documents or a fair summary or extract from a public document, such as any judgment of a court or parliamentary proceedings or reports published by a parliamentary body; and
- the defence of a fair report of proceedings of public concern; i.e. a fair report of proceedings in a court or an arbitral tribunal; parliamentary body or local government body and meetings of public bodies such as a trade association or sport or recreation association.

Apology: the importance of an offer to make amends

One of the objectives of the Uniform Defamation Laws is to promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter. In order to promote dispute resolution, the Uniform Defamation Laws provide incentives for those seeking vindication of their reputation to accept an apology and, if appropriate, a negotiated amount of damages and the payment of legal costs.

The failure of a plaintiff to accept a reasonable offer to "make amends" can act as a defence to the defamation claim or can result in a successful plaintiff not being awarded an order that the defendant pay legal costs.

The Uniform Defamation Laws set out a formal process that describes:

1. what is an 'offer to make amends';
2. when an offer to make amends may be made;
3. the contents of an offer to make amends;
4. when an offer to make amends can be withdrawn;

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5. the effect of acceptance of an offer to make amends; and
6. the consequences of the failure to accept a reasonable offer to make amends.

If a publisher receives written notice from a person claiming to have been defamed (a 'concerns notice'), the publisher can make an offer to make amends. An offer to make amends need not contain an apology, however if an apology is made it may be taken into consideration to mitigate damages awarded at trial. The key element in an offer to make amends is that it must include an offer to publish or join in publishing a reasonable correction of the matter that is asserted to be defamatory. It is possible to make an offer of amends that is limited to any particular defamatory imputations that have been identified in the published material.

An offer to make amends is significant because it is a way for parties to speedily resolve disputes. If an offer to make amends is accepted the plaintiff cannot then bring a claim at a later date. The failure to accept a reasonable offer to make amends can act as a defence to the defamation claim or can result in a successful plaintiff not receiving an award of the costs they have incurred. This means that the plaintiff who does not accept a reasonable offer to make amends risks more if the matter goes to court. Publishers are free to withdraw or renew offers to make amends. In deciding whether an offer to make amends is reasonable, a court will consider the extent to which a correction or apology was brought to the attention of audiences including its prominence (eg. on a page or screen), how much time has passed between publication of the apology, the seriousness of the imputations, what steps the publisher has taken to correct the matter with third parties and any compensation offered.

Note that an offer to make amends cannot be made if 28 days have elapsed since the publisher was given a written statement of the defamatory imputations that are of concern to the aggrieved, or if a defence has been served in an action brought by the aggrieved person against the publisher. If the time to offer to make amends has passed, a publisher and aggrieved person can still participate in settlement negotiations in relation to the publication.

Damages & legal costs

The Uniform Defamation Laws contain provisions that limit the amount of damages that can be awarded and restrict the categories of damages that are available. A plaintiff cannot be awarded damages that are intended to punish the defendant rather than provide compensation for loss or damages suffered.

The plaintiff can be awarded damages for non-economic loss, meaning compensation for harm the plaintiff has suffered which was not financial. Generally, the maximum amount of damages for non-economic loss that may be awarded in defamation proceedings is $250,000. The courts retain the discretion to make an award of aggravated damages if satisfied that the circumstances of the publication of the defamatory matter warrant additional compensation for exceptional harm resulting from the defamatory publication.

A plaintiff can also seek damages for financial losses which were a consequence of the defamatory statement. An example is a reduction in income that can be attributed to the damage a plaintiff's reputation suffered. The Uniform Defamation Laws say that these two factors might reduce ('mitigate') the available damages:

- the defendant has made an apology, or
- the defendant has published a correction of the defamatory matter, or
- the plaintiff has already recovered damages or compensation for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter.

In addition to damages for harm, the court will usually make an award of costs in favour of the winning party. This applies to the defendant as well as the plaintiff, however it's important to be aware that even if you win you may not recover all your legal costs. Matters that the court may have regard to in awarding costs include:

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- the way in which the parties to the proceedings conducted their cases (including any misuse of a party's superior financial position to hinder the early resolution of the proceedings); and
- if the plaintiff was successful, whether the defendant unreasonably failed to make a settlement offer or agree to a settlement offer; or
- if the defendant was successful, whether the plaintiff unreasonably failed to accept a settlement offer.

Risk management of publications

Before you publish

1. Consider the communication as a whole including any headlines, the introductory paragraph, photo captions or illustrations. Consider the context. Ask yourself – which groups or individuals have been identified? What imputations arise? Are they defamatory? Try to put yourself in the position of potential plaintiffs;
2. See if editing or clarification can remove any unintended defamatory imputations;
3. Check who is identified in the communication. Avoid potential problems by narrowing the scope of the article or removing details that can lead to identification.
4. Consider the benefits of publishing against the risk of being sued for defamation;
5. What defences might be relevant? If it is meant to be a comment, ensure that it is clearly identified as such (for example by adding "In my opinion…" and that the facts on which it is based are stated or obvious); and
6. If you want to argue that the defamatory imputations are true, how can they be proved? What has been done to verify their accuracy? Remember proof must meet the stringent standards demanded by a court. Sources need to be first hand so consider whether they wish to remain confidential.

If you're threatened with an action for defamation

1. Determine whether all the elements for defamation are there:
    - Has a statement with a defamatory meaning been made? Remember that just because a communication is insulting, annoying, false or damaging to someone's business doesn't meant that it is necessarily defamatory.
    - Has the person been identified?
    - Has the statement been published?
2. Consider what, if any, defences might be applicable.
3. Decide whether you can apologise, correct, clarify, or retract the defamatory statement. The new Uniform Defamation Laws provide mechanisms and timing requirements for making an offer to make amends. An offer will not constitute an admission of fault or liability but may be taken into account in mitigation of damages if the plaintiff is successful in court.
4. Seek legal advice before responding. It is important to get legal advice promptly.

Current developments in Australian defamation law

Recent cases

Sydney seems to be the global capital for defamation litigation, but only a small proportion of plaintiffs since 2013 have been high-profile individuals. It appears that in the age of social media it is becoming more common for ordinary people to experience defamation. The law of defamation has been caught in the public eye due to the recent publicised cases:

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***Wilson v Bauer Media Pty Ltd & Anor* [2017]**

This case was brought by Rebel Wilson, who was awarded one of the largest damages sums in Australian defamation history. On appeal, those damages were decreased because the Court found that the "grapevine effect" hadn't been made out. According to the Court, the lack of publication on global platforms mean that Wilson had not experienced as significant a loss in Hollywood. Most of the social damage had only occurred within Australia and had not grossly affected her career on the international stage.

***Rush v Nationwide News & Anor* [2019]**

The case concerned allegations of inappropriate behaviour made by a co-star of Geoffrey Rush following Sydney Theatre Company's production of King Lear. Although the woman who raised the allegations did not speak to the media, the Daily Telegraph published information about the allegations. Rush took action against the Telegraph arguing that they portrayed him as a "sexual predator" and "pervert". In 2019, It was decided that the publications made against Rush were defamatory and he was awarded appropriate damages. Despite Rush 'winning' the case, it is clear from the public commentary and news reporting of the allegations that there can be social costs to bringing a defamation action. This case highlights that one must be cautious about what they publish and to consider the potential burden of what a defamation case may bring.

***Voller v Nationwide News Pty Ltd* [2021]**

The third case was brought by Dylan Voller, an Aboriginal man who became the subject of public debate and attention in July 2016 due to his mistreatment while in youth detention. Voller sued three media organisations over a series of defamatory comments that were made in the comments sections of public Facebook pages controlled by these organisations. The media defendants sought a preliminary determination on the issue of publication alone (saying they were not a publisher of third party comments). At first instance and in the Court of Appeal it was held they were a publisher.

The media organisations appealed to the High Court who, in dismissing the appeal, found that, by creating a public Facebook page and posting content, the Media Outlets had facilitated the publication of the third-party comments – and were therefore *publishers* of these third-party comments on their Facebook pages. In reaching this conclusion, the Court rejected the argument that, to be a publisher, a person must know of the defamatory material and intend to convey it. Although the High Court cleared up the question of who the publisher is, the other legal questions including the defence of innocent dissemination remained unresolved. The case was referred back to the Supreme Court to consider whether the comments were defamatory and whether any defences applied but, the case settled prior to the filing of any defences for an undisclosed amount.

***Wagner & Ors v Harbour Radio Pty Ltd & Ors* [2018] QSC 201**

This case concerned allegations of defamatory broadcasts relating to the 2011 Grantham floods made by radio host, Alan Jones. The court found the allegations were extremely serious and of the gravest kind, including blaming the Wagner family for the deaths of 12 people, including children, when the family's wall collapsed. The Supreme Court of Queensland found that the Wagner family was successful in their claim for defamation and that Alan Jones had made 27 defamatory broadcasts. Alan Jones was found vicariously liable as he engaged in unjustifiable conduct and was motivated by a desire to injure the plaintiffs' reputations, which increased harm to the plaintiffs' feelings and reputation. The court also explored the importance of individuals not being able to rely on section 18 of the *Defamation Act, QLD*, where an offer to make amends is not reasonable or proportionate to the harm. The court ordered Alan Jones and radio stations 2GB and 4BC to pay $3.74 million in damages to the Wagner family. In addition, Alan Jones is subject to injunctions about further commenting on the matter. The case reinforces the powerful remedies that can be awarded by courts to both compensate and restrain the publication of defamatory material.

***Newman v Whittington* [2022] NSWSC 249**

The Supreme Court of NSW handed down its first judgment in Australia considering the new serious harm element under s 10A of the *Defamation Act, NSW.* The case was brought by a family dispute practitioner against a charity founder, Adam

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Whittington, for publishing defamatory content online via Facebook. Section 10A places the onus on the plaintiff to prove that the publication has caused or is likely to cause serious harm to their reputation. In her statement of claim, Ms Newman alleges that the publications posed an ongoing personal security threat and that the publications caused serious harm to her reputation, both generally and professionally as a family mediator. The court found that the statement of claim did not clearly articulate an arguable case in relation to serious harm and granted the plaintiff leave to replead her case. In considering the matter, Sacker J suggested that UK case *Lachaux v Independent Media* should be followed in Australia. This found that the serious harm threshold abolished the common law presumption of damage – that damage would be presumed and not proved in defamatory cases. Instead, the current law relating to the serious harm threshold must be proved by evidence of the actual impact of the publication. The case is significant as it clarifies the serious harm threshold, noting that plaintiffs are obliged to provide serious harm as a fact in every case.

John Barilaro v Google [2022]

John Barilaro sued Google, the owner of YouTube, after it refused to remove a series of videos from the platform that he claims are defamatory. The videos raised questions about Barilaro's honesty and credibility and tied it with racist and stereotypical remarks. The videos were published by internet comedian Jordan Shanks (known as Friendly Jordies), however, Barilaro previously settled the claim against him after Shanks apologised through his barrister and edited parts out of the videos. Google initially defended the case but has now withdrawn most of its defences and conceded that the imputations in the videos defamed Barilaro. Google tried defending the proceedings under the new public interest defence in section 29A of the *Defamation Act* (NSW). Google justified that the videos made numerous references to mainstream media stories about Barilaro in office and therefore it was in the public interest to not remove the videos. The Federal Court awarded Barilaro $715,000 in damages over the two YouTube videos. Justice Rares stated that Google had failed to take responsibility for its conduct as a publisher.

Further information

The News Manual, Defamation in Australia

Brian Martin, Defamation law and free speech

Electronic Frontiers Australia, Defamation Laws & the Internet

Environmental Defender's Office Western Australia: Defamation and safe speech

Queensland Public Interest Law Clearing House Incorporated (QPILCH), Defamation fact sheet

Steven Price, How to avoid defamation

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[1] *Dow Jones v Gutnick* [2002] HCA 56 at paragraph [26].

[2] For example: *Kabbabe v Google LLC* [2020] FCA 126

[3] *E Hulton & Co v Jones* [1910] AC 20

[4] *Radio 2UE v Chesterton* [2009] HCA 16 at paragraph [36]

[5] *Lewis v Daily Telegraph* [1963] AC 234 at 285

[6] *Crosby v Kelly* [2012] FCAFC 96

[7] *Harbour Radio Pty Ltd v Trad* [2012] HCA 44.

[8] *Lange v ABC* [1997] HCA 25.

[9] *Roberts v Bass* [2002] HCA 57 [107].

[10] *Oriental Press Group v Fevaworks Solutions* [2013] HKCFA 47, [75] & [90] (Court of Final Appeal of Hong Kong).

[11] *Dr Yeung, Sau Shing Albert v Google* [2014] HKCFI 1404 [76]. (Court of First Instance of Hong Kong).

[12] e.g. *Kaplan v Go Daddy Group* [2005] NSWSC 636 (operation of "www.hunterholdensucks.com"); *Wishart v Murray* [2013] NZHC 540 (Facebook page called "Boycott the Macsyna King Book").

[13] *Oriental Press Group v Fevaworks Solutions* [2013] HKCFA 47 (4 July 2013) [92].

[14] For example, see the ALRC Report 118, Australian Law Reform Commission (2012) *Classification – Content Regulation and Convergent Media* Section 5, paragraph [5.62].

[15] *Bleyer v Google* [2014] NSWSC 897 (12 August 2014); c.f. *Trkulja v Google (No 5)* [2012] VSC 533 (12 November 2012).

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