
DEFAMATION LAW – FOR MATERIAL PUBLISHED AFTER 1 JANUARY 2006

NOTE: This information sheet has been prepared in light of the uniform defamation laws that came into effect on 1 January 2006 (Uniform Defamation Laws). As a result, the defamation laws in each State and Territory are substantially the same, although there are some differences between each Defamation Act. This information sheet is based on the Defamation Act 2005 (NSW) which operates in addition to the common law tort of defamation that continues to apply.

If your material was published before 2006, please refer to our Information Sheet entitled "The Law of Defamation – for material published pre-2006".

Introduction

Defamation is a communication from one person to at least one other that harms the reputation of an identifiable third person, where the communicator (the publisher) has no legal defence. The law of defamation aims to balance the right of free speech with protecting a person's reputation against harm. 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](#)).

The Uniform Defamation Laws and the common law action in defamation

Australian states and territories enacted largely 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. As a result of the legislative reforms, the Uniform Defamation Laws harmonises defamation law across Australia, although these Defamation Acts of each state and territory co-exist with the common law rules as to defamation.

The law of defamation remains complex and the outcome of any defamation action is often unpredictable. Defamation actions can be very costly, difficult to defend and substantial monetary damages can be awarded. In some cases plaintiffs can obtain a court order called an "injunction" that prevents any further communication of the offending publication or material. 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 re-publication of the material (a 'subordinate publisher').

This information sheet focuses on the operation of the Uniform Defamation Laws and it is designed to give a brief overview of the law of defamation, how the risks can be minimised, and what to do if you are threatened with an action. It is outside the scope of this information sheet to set out the differences between the Uniform Defamation Laws and the common law rules as to defamation.

The importance of an apology/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 (ss. 12-20, Defamation Act NSW).

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 (s. 40, Defamation Act NSW). The consequences of refusing to accept a reasonable offer to make amends creates a corresponding benefit to the defendant in any legal action of providing an appropriate apology or offer to make amends for the consequences of the defamation communication or publication.

Making an apology or an offer of amends and the consequences of the failure to accept a reasonable offer to make amends is discussed below.

Defamation on the Internet

Internet message boards and social media websites are publishing platforms rife with instances of online defamation. Some participants get carried away in their discussion and descend into a 'flame war', posting 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 the resources of the courts being applied to trivial claims.

The application of defamation law to the online environment is discussed in the Arts Law information sheet: Defamation Law: Online Publication.

What is defamation?

For a defamation action to succeed, the person complaining of the defamation (the plaintiff) has to prove three things:

1. that the communication has been published to a third person;
2. that the communication identifies (or is about) the plaintiff; and

3. that the communication is defamatory.

The communication has been published to a third person

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

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 because it is no defence to argue that you are only repeating rumours or a comment made by somebody else – you can be liable for a republication.

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
- from the failure to prevent or remove defamatory information published by someone else. For example, you innocently disseminated defamatory material and later receive a complaint but fail to take action to remove the defamatory material or prevent its display.

The communication identifies the plaintiff

The plaintiff has to prove that the plaintiff was the person identified by the communication. This is most straightforward when the plaintiff is named, but other information may be sufficient. Even the use of a false name may not save you if the plaintiff can be identified by other means.

There have been cases where identification has been accidental, for instance when the fictional name "Artemus Jones" happened to have a real-life equivalent.

A class of people cannot be defamed, but a statement denigrating a group may be defamatory of a member of that group. The plaintiff must show that the words would be understood to refer to that plaintiff in particular, which may be the result of the group being small so that the defamatory material can reasonably be understood to refer to any member of the group or because of some information known to some people makes it reasonable to conclude that the plaintiff has been identified within the group referred to in the material. If the group is reasonably large, it is less likely that this can be proven.

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.

The meaning of the material, or the 'imputations' conveyed by the material, can be the ordinary meaning of what is published or a specific meaning that only some people understand because they have particular knowledge of what is published. In defamation law what you mean to say is irrelevant. The literal meaning of the communication is not the only meaning that is considered. 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 could have understood the communication to mean.

It is therefore possible that different imputations 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". Be careful if you are reporting "allegations" – the audience may presume that there is a factual basis to them. It is important to remember that the law uses the "ordinary reasonable reader/listener/viewer" – a hypothetical person – to test whether a publication is defamatory. You cannot avoid a defamation claim by arguing that the words used in the publication have an innocent meaning – a meaning that is not defamatory – if there are other interpretations of the words that carry a defamatory imputation.

The plaintiff does not have to prove that the imputation is false, that it actually caused them harm, or that you meant it to cause harm. On the other hand, just because an imputation hurts or upsets a plaintiff, does not mean that it is defamatory. It must affect their reputation in a damaging way.

The limits are unclear in relation to humour, cartoons or satire. Words obviously intended only as a joke may be reasonably safe, but there may 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 the target of derision rather than good humour.

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

This can also work in favour of defendants. The plaintiff 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.

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

Personal action

Any person can sue for defamation. As discussed earlier, the principle elements of the cause of action are: (1) the communication has been published to a third person; (2) the communication identifies (or is about) that person; and (3) the communication is defamatory.

Generally, a dead person cannot be defamed, although a living relative may be if the communication defames them by association. An action for defamation is generally viewed as a personal action and does not survive the death of the person claiming to be defamed. Tasmania is the exception to the rule. There, the estate or a personal representative can bring a defamation claim on behalf of a deceased person.¹

Can companies and government bodies sue for defamation?

The Uniform Defamation Laws limits the right of corporations and other organisations to sue for defamation (s. 9, Defamation Act NSW). 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 companies to sue, that depend on the nature of the company and the number of its employees. A corporation can still sue for defamation if:

¹ The cause of action survives through the operation of s. 27 of the *Administration and Probate Act 1935* (Tas).

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 to be taken into account as an appropriate fraction of a full time equivalent.

Corporations may attempt to pursue a claim for defamation through one of its officers or employees who are 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 of the corporation is identifiable and defamed by the communication if that person is considered the 'face' of the corporation.

Another alternative to defamation for a corporation is to bring a claim for misleading or deceptive conduct in trade or commerce, under the Australian Consumer Law. In addition, while a corporation cannot sue for defamation (unless it is an exempt corporation), 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 plaintiff's goods or business;
2. publication of that statement by the defendant to a third person;
3. the matter was published maliciously; and
4. actual damage as a consequence (which may include a loss of business).

Place of publication

A plaintiff 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. It doesn't matter for the purposes of defamation law where the website itself is hosted.

Limitation period

For material published after 1 January 2006 if you wish to sue someone in defamation, you must commence the 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 has been described as a "difficult hurdle", which can only be satisfied in "relatively unusual circumstances". Not having money available to obtain legal advice is not a factor that justifies extending the limitation period.

Examples of unusual circumstances that may justify allowing the extension of the time to issue defamation proceedings are that the plaintiff was not aware of 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. The above highlights the need to not delay perusing remedies after learning of the defamatory publication, such as by issuing a notice describing the defamatory nature of the material (a 'concerns notice') and promptly responding 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. This is because 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.

The ‘multiple publication’ rule

It is important to understand that time for commencing defamation proceedings is not calculated only from the first date of publication. Proceedings can be brought in respect of subsequent publications, such as on the internet. Material that is claimed to be defamatory may have multiple dates of publication. An English court determined that the sale of a single copy of a newspaper 17 years after the date of original publication was a sufficient basis for a defamation action. The High Court of Australia has also rejected the ‘single publication’ rule in relation to publications on the internet.

In *Dow Jones v Gutnick* [2002], which involved publication on the internet, the High Court explained a ‘multiple publication’ rule was justified as a defamatory publication involves both the act of the publishing the material and the damage to reputation caused at the time the material is read, heard or seen: “*Harm to reputation is done when a defamatory publication is comprehended by the reader, the listener, or the observer. Until then, no harm is done by it. This being so it would be wrong to treat publication as if it were a unilateral act on the part of the publisher alone. It is not. It is a bilateral act – in which the publisher makes it available and a third party has it available for his or her comprehension*”²

Consequently, the limitation period for internet publications will be determined by each republication of the material. However this does not mean that the plaintiff can bring multiple legal claims in relation to the same publication.

The Uniform Defamation Laws require the permission of the court to issue more than one action against the same defendants in respect of a multiple publication and determine that the court in which the action should be commenced is determined by the place that has the closest connection to the harm occasioned by the publication.³

Potential defendants

The potential defendants in an action for defamation are anyone involved in the creation, publication and dissemination 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 as their role in the publication process is such that they know or can be expected to take responsibility for reviewing the material being published and who are therefore able to control that content, and if necessary prevent the publication of defamatory material.⁴

² *Dow Jones v Gutnick* [2002] HCA 56 [26],

³ ss, 11 & 23 Defamation Act NSW.

⁴ *Oriental Press Group v Fevaworks Solutions* [2013] HKCFA 47 [75] (Court of Final Appeal of Hong Kong).

In addition to these primary publishers, defamation law can extend liability to people involved in the distribution or re-publication of material. However these subordinate publishers may be able rely up the defence of innocent dissemination which is discussed below.

Defences

The first step when someone threatens you with defamation is to establish whether they actually have a case. The plaintiff must be able to prove all three elements discussed above – that the material has been communicated to a third person (other than the plaintiff), that the plaintiff is identified in the communication and that 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 at common law)
2. Justification/Truth
3. Qualified privilege
4. Innocent dissemination
5. Triviality
6. Other defences

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

The defence of honest opinion under the Uniform Defamation Laws (s 31, Defamation Act NSW) co-exists with the common law defence of fair comment. There are differences between the statutory defence and the common law defence – the following are general observations on the circumstances in which there may be a defence of honest opinion/fair comment. In general these defences require 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”. That is it is based on material that is
 - a. substantially true; or
 - b. was published on an occasion that attracted the protection of absolute or qualified privilege:
 - i. 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;
 - ii. 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
 - c. contained in public documents.
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.

The defence of honest opinion requires you to prove that the material communicated was an expression of honest opinion rather than a statement of fact, on a matter of public interest and was based on proper material (s. 31, Defamation Act NSW). The defence of honest opinion is obviously very 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.

Defence of justification/truth

The Uniform Defamation Laws provides the defence of justification (s. 25, Defamation Act NSW). This is a complete defence if you can prove the material published was substantially true. This means that if an imputation is found to be defamatory, this defence requires the publisher to prove it to be true in substance or not materially different from the truth. This can be difficult as you can only use evidence that is admissible in court – this means that you will need original documents and/or witnesses who are credible and willing to testify in court.

Your sources have to have firsthand knowledge of the relevant circumstances. The rules against "hearsay" evidence will prevent you putting forward witnesses who "heard something from somebody else".

The publisher may try to prove the plaintiff's imputations (say [a] and [b]) to be true. Or the publisher may say the publications also means [c] and [d] and they are defamatory **and** true in which case the plaintiff can fail because the unproved imputations [a] and [b] do not further injure the plaintiff's reputation. In some states (including New South Wales, Queensland and Tasmania) before the introduction of the uniform laws the defendant was required to establish that the material was published for the public benefit in addition to proving the published material was true. In contrast, under the new uniform laws truth alone constitutes the defence. A possible consequence of these changes is that the publication of private details of person's life will be allowed, provided they are truthfully portrayed, even though there might be no wider public interest in the receipt of those details.

Defence of qualified privilege

The Uniform Defamation Laws provides the defence of qualified privilege (s. 30, Defamation Act NSW). The defence of "qualified privilege" applies when you have an interest or a legal, social or moral duty to communicate something to a person and that person has a corresponding interest or duty to receive the information. The link between you and the person you are communicating the material to is crucial to the defence.

Courts have said that the defence 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 the legitimate purposes of the occasion, the defence of qualified privilege will not be available.

This defence was originally designed for one-to-one 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. Firstly, if you have been attacked publicly you are entitled to make a public response.⁵ 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.⁶

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 additional guidance as to relevant factors going to the reasonableness of the publication. These factors include:

1. the nature of the business environment in which the defendant operates;
2. the extent to which the matter distinguishes between suspicions, allegations and proven facts; and
3. whether it is in the public interest for the matter to be published promptly.

Courts have accepted that a reply to a public attack is one aspect of the defence of qualified privilege. Where you are responding to a public attack by another person, your response must be commensurate with the attack to which you are responding. For example, if a person makes a public attack on the quality of some 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. However a response that goes beyond addressing the specifics of the attack made upon you. For example, if you make accusations as to the criminal conduct, honesty and integrity the person criticising our products or services that you cannot justify, 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.

Qualified privilege traditionally protects communications such as references given by employers or complaints to the police or other relevant authorities. However the defence will fail if the plaintiff can show that you were actually motivated by malice to make the communication. This means that it can be dangerous to attempt to "get even" with someone by bad-mouthing them. If they choose to sue, you may find yourself without a defence.

Qualified privilege and malice

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. To establish malice, the plaintiff must show that the dominant purpose or motive of the defendant in making the publication was improper.

Whether a publication is actuated by malice is a question of some complexity as courts have accepted that irrationality, stupidity or refusal to face facts that are obvious is not conclusive proof of malice. The mere failure to make enquiries or apologise or correct the untruth when discovered is not evidence of malice.

Courts have accepted that the defence of qualified privilege allows for vigorous public debate on political issues. In relation to the implied constitution freedom of communication of political speech, the High

⁵ *Harbour Radio Pty Ltd v Trad* [2012] HCA 44.

⁶ *Lange v ABC* [1997] HCA 25.

Court of Australia has stated that “[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”.⁷ However political commentary should not be viewed as mosh pit where anything goes. Malice may be established by showing that the defendant either 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

Who can rely on the innocent dissemination defence?

The defence of being an innocent disseminator of defamation material is not available to the author and primary publisher of the material. The author of material, such as a journalist, has a primary liability for what is written and published. Australian courts have not had the opportunity to consider whether the innocent dissemination defence that is set out in the Uniform Defamation Law will apply to people engaged in digital publications such as publishing a blog some other online publication that other people can contribute comments or upload material. Courts in other jurisdictions have confirmed that the primary liability for publications also extends to writers and editors as well as the legal entity responsible for the publication. The courts have accepted that these people have the primary liability under defamation law as their role in the publication process is such that they know or can be expected to take responsibility for reviewing the content of the material being published and who are therefore able to control that content, and if necessary prevent the publication of defamatory material.⁸

However, the defence of innocent dissemination (s 32, Defamation Act NSW) is available to subordinate publishers (those who disseminate content created by someone else) if they meet the requirements of that defence. So if you publish something that is written or created by someone else and if you can prove that you did not know and would not, with the exercise of reasonable care in the relevant circumstances, have known that the material contained defamatory content. The types of people this defence is designed to protect are booksellers, newspaper and magazine vendors, broadcasters of live radio or TV programs, copying, printing or distribution services (hard copy or electronic material). There are unresolved questions as to the application of the defence of innocent publication to online service providers – the question as to who is a ‘publisher’ of online content is discussed in the Arts Law information sheet: Defamation Law – Online Publication.

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

However the Uniform Defamation Law has extended what is understood to be a ‘subordinate distributor’ to include providers of electronic publishing services and “a *broadcaster of a live programme (whether on television, radio or otherwise) containing the matter in circumstances in which the broadcaster has no effective control over the person who makes the statements that comprise the matter*”.⁹

The opportunity to prevent publication and the editorial control over the publication process, appear to be important indicators of the person being a primary publisher as compared to being a subordinate

⁷ *Roberts v Bass* [2002] HCA 57 [107].

⁸ *Oriental Press Group v Fevaworks Solutions* [2013] HKCFA 47, [75] & [90] (Court of Final Appeal of Hong Kong).

⁹ s. 32 (3) (e) *Defamation Act 2005* (NSW).

publisher.¹⁰ The Australian cases that consider the innocent dissemination defence have established that 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.

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.

A person or legal entity relying of the defence of innocent dissemination is required demonstrate that:

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

Defence of triviality

Under the Uniform Defamation Laws it is a defence to the publication of defamatory material if you can prove that in the circumstances, the plaintiff was unlikely to sustain any harm (s. 33, Defamation Act NSW). This means that you need to show that the matters complained about do not seriously affect the plaintiff's reputation or standing in the community.

The triviality of the defamatory material is also linked to the power courts have to control the cases it hears. Courts can dismiss, sometimes permanently, cases where the claim is way out of proportion to the interest at stake and would otherwise be a waste of the court's time and resources (an "abuse of process"). In deciding whether a claim is disproportionate, courts will consider whether in the circumstances:

- a. The real issue in the proceedings is someone trying to protect their reputation or for some other motive.
- b. What the costs of hearing the case are likely to be in light of the financial position of both parties.
- c. The extent of any damages that are likely to be payable.
- d. Whether an apology has been made.

A challenge to a defamation action as being an abuse of process can be made early in conduct of the proceedings and the defence of triviality in the Uniform Defamation Laws can also be argued at the trial of the claim. Australian courts have struck out defamation claims as being as abuse of process because of the expected costs are disproportional to any vindication that could flow from the legal

¹⁰ *Dr Yeung, Sau Shing Albert v Google* [2014] HKCFI 1404 [76]. (Court of First Instance of Hong Kong).

action.¹¹ Australian courts have also rejected claims on the basis that the plaintiff's failure to carry out the steps necessary to conduct the proceedings or a failure to comply with court directions results in the proceedings being an abuse of process. The reasoning is that court resources should be used efficiently and the costs of the parties are disproportionate to what the plaintiff can hope to achieve through pursuing the claim.¹²

Other defences

The Uniform Defamation Laws preserve any defence or exclusion of liability that exist under general law (s. 24, Defamation Act NSW). This allows you to assert any defence or exclusion that is recognised in the common law. However the discussion of any differences between the Uniform Defamation Laws and common law defences is outside the scope of this information sheet.

- There are other defences set out in the Uniform Defamation Laws, however the discussion of them is outside the scope of this information sheet. They include: 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 (s. 26, Defamation Act NSW);
- 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 (s. 27, Defamation Act NSW);
- 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 (s. 28, Defamation Act NSW);
- 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 (s. 29, Defamation Act NSW).
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Apology: the consequences of a failure to accept 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 (ss. 12-20, Defamation Act NSW). The Defamation Act sets 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 and offer to make amends can be withdrawn;
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.

¹¹ *Bleyer v Google Inc* [2014] NSWSC 897 (12 August 2014); *Freeburn v The Cake Decorators Association of NSW Inc. (No 2)* [2014] NSWDC 173 (22 October 2014).

¹² *Ghosh v TCN Channel Nine Pty Ltd & Ors (No 4)* [2014] NSWDC 151 (17 September 2014).

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 resolve disputes speedily. 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 (s. 40, Defamation Act NSW). 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 (e.g. 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 person (a 'concerns notice'), or a defence has been served in an action brought by the aggrieved person against the publisher in relation to the matter in question. However a publisher or aggrieved person are still able participate in settlement negotiations and make and accept a settlement offer in relation to the publication of the matter in dispute.

Damages & legal costs

The Uniform Defamation Laws contain provisions that limit the amount of non-economic damages that can be awarded and restrict the categories of damages that are available (a plaintiff cannot be awarded exemplary or punitive damages that are intended to punish the defendant rather than provide compensation for loss or damages suffered).

The maximum amount of damages for non-economic loss that may be awarded in defamation proceedings is \$250,000; although the maximum damages amount can be changed by executive order. 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.

The courts are required to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded. Notwithstanding the cap on non-economic losses, a plaintiff can seek an award of damages related to economic losses or financial losses which are demonstrated as being the consequence of the defamatory statement, such as a reduction in income that can be attributed to the damage to reputation. The Uniform Defamation Laws also describe the factors that are relevant to the mitigation of damages – the factors include:

- 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 another publication of matter having the same meaning or effect as the defamatory matter.

An award of costs will usually be made in favour of the successful party in any defamation action. However, even if you win, you may not recover all your legal costs. Matters that the court may have regard to in awarding costs include:

- 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);
- if the plaintiff was successful - the defendant unreasonably failed to make a settlement offer or agree to a settlement offer; or if the defendant was successful - the plaintiff unreasonably failed to accept a settlement offer.

Risk management

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 has to be to the stringent standards demanded by a court. Sources need to be first hand (what if they wish to remain confidential?)

If you're threatened with an action for defamation

1. Check whether they have a case by determining whether all the elements for defamation are there: defamatory meaning, identification, and publication. Remember that just because a communication is insulting, annoying, false or damaging to someone's business doesn't mean that it is necessarily defamatory.
2. Consider what, if any, defences are applicable to you.
3. Decide if you wish to apologise, correct, clarify, or retract. 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.

Further changes to defamation law in Australia

If you are printing out this information sheet for future reference please note that the Commonwealth Government has indicated that there will be further reforms to Australian defamation law. Please check

the Arts Law website for new updates to this information sheet as legislative changes occur, or contact Arts Law for further information if you are unsure.

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](#)

Arts Law publishes '*Visual Artists and the Law*' by Shane Simpson. 3rd Edition by Annabel Clemens (2013) in [EPUB format](#), [MOBI format](#) & [eBook - PDF format](#); which provides a commentary on legal issues relevant to visual artists including insurance and liability (Ch 16).

Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (**Arts Law**) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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