

Defamation Handbook



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Content warning: this handbook contains references to sexual assault and rape.

OVERVIEW: WHAT YOU NEED TO KNOW ABOUT DEFAMATION

- 1.1 Defamation is basically any negative thing you say or write about a person that could cause someone else to think less of them or treat them differently. It's a complex area of the law and defending claims can be risky and expensive.
- 1.2 Anything you say, write, post, or otherwise publish can give rise to a defamation claim. That's the case even if you don't name the person you're talking about, or when you share or repost someone else's defamatory story or news article.

Examples of potentially defamatory content:

- Making a disclosure of rape/sexual misconduct via social media.
 - Stating in an interview that another artist or manager is difficult to work with.
 - Reposting another person's complaint about a person organising an event, with or without your own supportive commentary.
- 1.3 There are defences that can protect you, but they're not always straightforward to apply. The most common one is truth. For that you need to consider what are the defamatory meanings that arise from your words, and how you can prove those meanings. The stronger your proof, the stronger your defence. But having a defence won't necessarily stop a person from making a complaint altogether.
 - 1.4 The bottom line for all of this is risk assessment. How controversial is your publication? Is it already in the public sphere? How likely is it that the person you're talking about will take action? Are you prepared for the time, cost, and risk of defending your publication? Make sure you match your risk level to your risk appetite, and when in doubt take legal advice before you publish.

PART A: DEFAMATION BASICS

2. **What is defamation and why should you worry about it?**
 - 2.1 Any publication or statement (written, spoken or visual) that is likely to harm the reputation of an individual is defamatory. This extends to anything which may expose the person to hatred, ridicule, or contempt, and it's no defence if the publication was satirical or intended as a joke.
 - 2.2 Defamation law arises from state and territory defamation legislation and the common law. In Victoria the legislation is the [Defamation Act 2005](#) (VIC). The legislation around Australia is uniform (with a couple of exceptions in WA and NT), and you can potentially be sued in

any jurisdiction where someone reads what you publish. This means that hypothetically you could even be sued by a foreign person in Australia.

- 2.3 You generally cannot defame a company or a dead person. Not-for-profits and small companies (less than 10 employees) are exceptions: they can still claim for defamation. For other companies, the more likely claims if you publish false statements about them are misleading or deceptive conduct or malicious falsehood.
- 2.4 Defamation claims are inherently tricky, time-consuming and very expensive. They are best avoided. Damages awards can also be substantial. The highest payout for a defamation case in Australia to date was for \$2.9 million.

3. Elements of a defamation claim

3.1 Publication

- 3.2 'Publication' occurs wherever the defamatory material is published in a comprehensible form to at least one person other than the claimant. It extends to any communication, including words, images, cartoons, videos, or a combination. You can potentially be sued in any jurisdiction where the content is downloaded or able to be viewed.

- 3.3 A tweet or other social media post with a link to a website or news article is treated as a separate publication i.e., the tweet itself can be defamatory. That means the headlines need to be clear and capable of substantiation without reliance on the body of the article.

Example: A tweet with the news headline 'Treasurer for sale' was defamatory of Joe Hockey because the words could be taken to mean that he took bribes from political donors. However, the same headline in the Sydney Morning Herald accompanied by a full article was not defamatory because it provided context that the money gave access to Hockey, rather than him taking bribes.

3.4 Identification

- 3.5 The defamation claimant must be reasonably identifiable from the material, either by name or implication. All that's necessary is that people can figure out who the publication is referring to, even if it's only a limited number of people with special knowledge.

Example: Christian Porter sued the ABC over a story alleging that a Cabinet Minister was the subject of historical rape allegations. Porter argued that he could be identified based on a range of circumstantial matters (before he outed himself). The issue wasn't ultimately determined because the case settled.

3.6 Imputations

- 3.7 Defamation arises from the defamatory meaning (or imputations) of a publication, rather than the words themselves. Defences often relate to the imputations. For example, in a truth defence you must prove the truth of the imputations rather than the truth of the actual words published.

- 3.8 Imputations are assessed based on the publication’s natural and ordinary meaning, judged from the perspective of the ordinary, reasonable reader. It is up to the claimant to say what imputations arise from a publication.

Example: A high-profile male actor sued the Daily Telegraph over articles titled “King Lear” making allegations about his behaviour towards another female actor during the STC production of King Lear. He said the articles gave rise to a range of imputations, including that he engaged in scandalously inappropriate behaviour in the theatre, engaged in inappropriate behaviour of a sexual nature in the theatre and committed sexual assault in the theatre.

- 3.9 Serious harm threshold

- 3.10 A defamation action only arises if a claimant suffered serious harm (this rule has not yet taken effect in WA and NT as at May 2023). This requires the harm to be more than trivial or just hurt feelings.

4. Common defences

- 4.1 If you consider that your piece might contain defamatory comments and you need to assess defences, then you should always seek legal advice before you publish.

- (a) Truth: This is the strongest defence because it is the most straightforward to establish. To succeed, you must prove the truth of the imputations arising from the publication. The language you use can narrow the possible imputations and make the defence easier to establish. For example, saying someone ‘plays dirty games’ is harder to defend than saying someone ‘worked with X in order to do Y’. The former can have a range of meanings, of which you would need to prove the truth, even if that’s not what you meant. A truth defence will be easier if you stick with simple statements of fact that you can prove.
- (b) Honest opinion: Statements of opinion (rather than statements of fact) are defensible if the opinion is honestly held, is based on true material which is stated in the publication, or is notorious and relates to a matter of public interest. This often seems an appealing defence but is very tricky in its application. Seek legal advice before publishing if you intend to rely on this defence.
- (c) Public interest defence: In all jurisdictions (except WA and NT, as at May 2023), there is a new defence which is aimed at public interest investigative journalism but, in theory, could be relied on by any defendant. To establish the defence, the matter must concern an issue of public interest and the publisher must reasonably believe that publication is in the public interest. As with honest opinion, this is a tricky defence and new in Australia. Seek legal advice before you rely on it.

5. Damages and legal costs

- 5.1 To run or defend a defamation claim through to trial, your own legal fees might cost at least \$300,000, but could be substantially more than that. Further, an unsuccessful party must usually pay the successful party's legal costs.
- 5.2 Claimants can seek compensation for the harm caused to their reputation, called general damages. The current cap for general damages is \$443,000. If there are aggravating circumstances (e.g., the defendant was deliberate or reckless about the defamation) then the cap may not apply.
- 5.3 The courts can also award economic loss if the person can show that the defamatory publication has caused them to miss out on paid job opportunities, which can add up to a hefty sum for celebrities and executives in the entertainment and music industries.

PART B: PRACTICAL GUIDANCE

6. Evidence supporting a publication

- 6.1 If your story contains any defamatory comments or statements and you are considering your defences, then you need to have an idea of what evidence you will rely on prior to publication. The more serious the defamation, the stronger the proof you should have. Consider the following:
 - (a) try to obtain primary sources for facts e.g., firsthand accounts, government reports. There's a risk if you rely on secondary sources alone, like other journal articles or news reports, as these might be inaccurate and generally aren't admissible in court as proof of the facts;
 - (b) keep records of all sources;
 - (c) consider the reliability of any witness, whether they have their own agenda and if they are prepared to give a sworn statement. This is particularly significant in the context of any #metoo related stories, which are high risk and often not supported by documentary evidence. If a source wants to remain anonymous, think about whether they can give quality information and consider how strong your defence is without them (because you can't rely on their information in court); and
 - (d) for high-risk stories, prepare statements and gather your evidence prior to publication.

Example: In 2017 New Matilda published a story on prominent barrister Charles Waterstreet, containing #metoo allegations. New Matilda identified the story as high risk, given the seriousness of the allegations and the likelihood of a barrister to consider taking the matter to court. Knowing it was high risk, before publishing it went beyond speaking to the woman

making the allegation. New Matilda took a statement from her, collected records of messages she sent which corroborated her statement, followed up other witness leads she identified, and from them gathered further evidence. New Matilda ended up receiving similar disclosures from other women, further enhancing its position. Waterstreet did not ultimately sue.

7. **Content**

7.1 Your choice of language can assist you in relying on a truth defence. More specific language will narrow the potential imputations that you need to prove. Think about the evidence you have and then tie your language carefully to those facts, as this can narrow the scope of the potential imputations that arise.

7.2 It's not enough to use the word 'alleged' to make an unproven accusation. You can write about allegations, but you should also include the accused person's position e.g., if they deny the accusation, say so.

8. **What if I'm just re-publishing someone else's story?**

8.1 If you republish other people's defamatory material, including articles and comments, you can be held liable as a publisher in the same way as the original source.

9. **Liability for third-party comments**

9.1 You can be liable for a defamatory comment on your article or social media post made by someone else. The main way you become liable is if you leave a defamatory comment up after you've received a complaint about it.

9.2 To avoid this, you should monitor your contact points (DMs, email, etc.) for complaints after you have posted something that might trigger defamatory comments. The highest risk posts will be those that contain serious allegations against high-profile individuals or covers sensitive or controversial topics, as these can be viewed as an invitation for others to comment on that person, which can very easily lead to defamation.

9.3 If you do this and act promptly on complaints when you receive them, then you don't need to monitor to the comments constantly. Following this 'notice and take down' process should still generally allow you to access a defence called innocent dissemination.

9.4 New laws may be introduced soon, making it easier for publishers to manage the risk of liability for third-party comments.

10. **What to do if you receive a concerns notice**

10.1 A concerns notice is normally the first notice you would receive that someone claims you have defamed them. It is a letter issued under rules in the Defamation Act which must:

- (a) identify the publication in question;

- (b) state the defamatory meanings;
- (c) state how it has caused serious harm of their reputation; and
- (d) as a matter of practice, the letter will normally also state what resolution they want. This might include a request that you delete the article or post, issue an apology, and in some cases, pay their legal costs and possibly a sum of money for damages.

10.2 If you receive a concerns notice:

- (a) If it contains a demand for action, then you should consider whether you prefer to meet the demand and avoid further action.
- (b) Even if you plan to meet the demand, consider taking legal advice. For example, if you are paying money you may also wish to have the complainant sign a document releasing you from further liability. And if you are considering not meeting the demand, then it is important to understand the extent of your exposure.
- (c) The Defamation Act also has rules for making an ‘offer of amends’ after you receive a concerns notice. If you make an offer under these rules:
 - (i) If the complainant accepts it, then the Defamation Act says they have no further claim.
 - (ii) If they don’t accept it, and the terms were reasonable, you can rely on the offer as a further defence in defamation proceedings.
- (d) An offer of amends must comply with rules in the Defamation Act including that it is written and identified as an offer of amends, must be open for at least 28 days, must include an offer of a correction/clarification of the matter in question, and include an offer to pay reasonable legal expenses of the complainant. If you're making an offer of amends, a lawyer can help make sure it complies with all the applicable legal rules.
- (e) If you want to defend your publication, then you should take advice on the strength of your defences, consider your appetite for a fight, and whether you can afford the time, cost and risk involved. Your options include responding to the concerns notice or ignoring it altogether. The next step then for the complainant would be to either abandon their claim or commence proceedings.

11. Overall risk analysis

11.1 Ultimately, considering a potentially defamatory publication is a question of risk. If you want to avoid the risk altogether then don’t publish. Otherwise, consider the following and take legal advice if in doubt.

- (a) Who is the target? Are they a high-profile celebrity or politician? Are they known to sue?

- (b) How serious is the defamation and what you're saying? Are you making criminal allegations or allegations which will hurt them in their profession? Those are generally the most serious.
- (c) How strong is your proof? Is it one person's word? Can you gather more evidence to strengthen your position?
- (d) Are you the first person to make the claim or allegations? Breaking a story is higher risk. Talking about an existing story is generally lower risk (unless the target has already indicated an intention to sue).
- (e) How important is it to you to publish? Are you prepared for the cost, time and risk of defending your publication?

ABOUT MARQUE LAWYERS

Marque Lawyers is a boutique law firm based in Sydney and a proudly certified B Corp. We practice across all areas of commercial law including media and defamation, where we act for media companies, agencies, content makers, creatives and advocacy organisations.

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