

# Fact Sheet #1: Defamation

An understanding of Defamation law is essential for anyone involved in the creation and publication of media content. This fact sheet explains the basics, as well as how to get further information and advice.

## What is defamation law?

Defamation law provides a right for a person to claim monetary compensation when a publication damages their reputation. In rare cases it enables a person to prevent publication of material that would damage their reputation. The law recognises that, in some circumstances, publication of defamatory material is justified. In those cases, a publisher will have a defence to a legal action for defamation.

Before publishing any material, you must consider whether:

1. publication of the material would defame any person; and, if so,
2. there would be a defence to a legal action by the person defamed.

## Who can sue for defamation?

Any living person, not-for-profit corporation, or for-profit company with fewer than 10 employees (that is not related to another corporation as subsidiary or parent) can sue for defamation. Local councils and public authorities cannot sue for defamation. However, any individual who is associated with a company, local council or public authority, and identified in the publication, may be able to sue.

While for profit companies with 10 or more employees can't sue for defamation, they may be able to take other types of legal action over a publication it considers detrimental to its reputation or business.

## What constitutes a defamation?

Defamation occurs when a person publishes material which damages the reputation of, or leads people to ridicule, avoid or despise, another person. There are three elements:

1. Publication
2. Identification; and
3. Defamatory meaning.

### Publication

There must be communication to someone other than the person defamed. Any print, radio, television or online communication is a publication. The publication need not be a mass communication. An email, tweet or Facebook post to a limited audience is considered to be a publication.

**Case study:** Former Federal Treasurer, Joe Hockey won a defamation action against Fairfax over a tweet that contained the print newspaper headline: 'Treasurer for Sale'. This was despite the fact he failed in his claim that the newspaper story itself also defamed him.

**Tip:** Be careful when promoting content or discussing stories on social media and be discreet with what you say to potential sources of information about a person you are investigating, even in conversation.

### Identification

The person defamed must be identified in the publication. Obviously, a person named in a publication will be identified. But a person can be identified in other ways, such as a photograph of them or information about where they live or work, or their job title.

**Example:** *The manager of Cheap Thrills Café in Bondi has been underpaying staff*

**Advice:** While the manager is not named, and is not identifiable to the general public, someone may know who the manager is. A person or company may also be identified by implication or notoriety or by reference to a small group that includes that person. An allegation that staff at the Cheap Thrills Café have been stealing from the till may defame every staff member if there are only a small group of them. Take care with photos and footage to ensure the image is of the person you are referring to, and that because of its context it doesn't inadvertently defame the person depicted. File footage of a surgeon in an operating theatre in a story about bullying in the medical profession may infer the person shown is a bully.

## Defamatory meaning

The publication must convey a defamatory meaning about a person. The test is what the ordinary reasonable reader/audience understands the publication to be saying about a person, regardless of what you intended to say. Does it tend to make people think less of them, or lead people to ridicule, avoid or despise them? Describing a person as dishonest, a murderer, a drug addict, incompetent, unprofessional, or hypocritical is clearly defamatory. But mere abuse, such as calling someone ugly or vermin, or an idiot may not be. Comedy and satire may not convey a defamatory meaning if what is said is clearly absurd and wouldn't be taken seriously. But the fact that a publication is intended as a joke does not in itself mean it won't be defamatory. This is especially the case when the material subjects a person to severe ridicule.

**Case Study:** A former ALP candidate, Nicola Corns, won a defamation action against Network Ten over a clearly tongue-in-cheek comment by Mick Molloy that she had slept with a former AFL player.

**Tip:** The court held that audience members may well have thought there was some truth in the statement and would not have understood it to be a joke. As the imputation of infidelity (Corns was married) was held to have arisen, it could not be defended as true. The question of whether defamatory imputations arise can be difficult to assess, so best to get legal advice if you are unsure.

## When is it OK to publish a defamation?

While defamation law provides a way for people to protect or restore their reputation, it also recognises that publication of defamatory material is justified in some circumstances, such as when it exposes wrongdoing, informs the public about what goes on in courts and parliament, and enables robust debate, for opinions about issues to be expressed. Material which defames a person can be published if it is protected by one of the recognised defences. The main defences are truth; protected report; honest opinion; and qualified privilege.

### Truth

"Truth" is a complete defence, and no element of 'public interest' is required. While it may be questionable whether there is any public interest in revealing the fact that a politician is having an extra marital affair, as long as it is a fact which the publisher can prove to be true, it can be safely published. Proving a defamatory allegation is true requires admissible evidence, such as documents which directly support the claims being made, and/or witnesses willing and able to give direct evidence in court about what they saw or heard or did. Hearsay, gossip or 'off the record' information, including information from confidential sources, cannot be used to prove truth.

**Example:** Canberra's worst kept secret is that the Minister for Unemployment is having an affair with a colleague. Confidential sources have told the ABC they've seen the Minister and his staffer hold hands, and the ABC has seen an email from the PM to his staff reporting that they were seen at the Hyatt Hotel.

**Advice:** This story is not based on any evidence that could be used to prove the Minister is having an extra marital affair. Rumours, no matter how widespread, are not evidence. Sources who insist on remaining confidential will not give evidence, even if they have some direct knowledge of the relationship. The email is hearsay; it is evidence of nothing more than what the PM says he's been told by someone else.

### Protected Reports

Fair and accurate reports of public documents and proceedings of public concern are protected against action for defamation. This includes proceedings of parliament and the courts (unless excluded by legislation or material that is suppressed), as well as public meetings of shareholders of public companies. 'Accurate'

means only that the report must be a correct summary of the proceedings. 'Fair' means the report must be balanced.

**Case study:** 'A Chinese-Australian real estate developer "co-conspired to bribe" a senior United Nations official, according to claims made in Federal Parliament. Andrew Hastie, who chairs the powerful intelligence and security committee, used parliamentary privilege to claim businessman Chau Chak Wing funded the bribery of former president of the UN General Assembly John Ashe.'

**Advice:** This defamatory allegation could be published by the media, regardless of its truth, as a fair and accurate report of parliament.

### Qualified Privilege

This defence is available to a publisher who may not be able to prove truth but can nevertheless persuade a court that its audience has an interest in receiving particular information, and the conduct of the publisher in communicating defamatory matter in the course of providing that information was reasonable. In considering whether the publisher has acted reasonably, a court will consider a number of matters including:

- the extent to which material is in public interest or relates to performance of a person's public functions;
- the seriousness of the defamatory meanings;
- the extent to which facts are distinguished from suspicions or allegations;
- whether the person defamed was given an opportunity to respond.

A specific form of qualified privilege defence may be available where a publication concerns political or government matters, and the publisher has acted reasonably in the circumstances.

As the courts interpret the qualified privilege defence narrowly, you should always check with a lawyer, and not assume it can be relied on just because the publication concerns, for example the conduct of a politician, or because you have included a response from the person defamed.

### Honest Opinion

It is a defence if the material published is honestly held opinion, or comment, based on fact. The defence protects the expression of subjective opinions on public affairs, but only if based on accurate information, facts. The facts on which the opinion or comment can be based includes books, plays, concerts, or the undisputed conduct of people and events. The facts must be set out in the publication or be widely known. It must be an opinion, and not an allegation of fact. A factual allegation, such as "X is a murderer", cannot be disguised as opinion by prefacing it with words such as 'In my view...'. The opinion must be honestly held but it can be extreme; it need not be reasonable

**Example:** 'The ball tampering incident during the Test against South Africa last year, shows Australia captain Steve Smith is a disgrace to the game and not a fit and proper person to lead the team in the future. He is a failure as a leader and as a person. If I had my way, he would be stripped of Australian citizenship.'

**Advice:** Provided this opinion is honestly held, and based on facts either set out or well know, it does not matter that others might consider it 'over the top' or unfair, and any defamation can be defended.