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Not-for-profit organisations that publish information, including online and via social media, should be aware of the risks of publishing defamatory material.

Defamation laws seek to balance freedom of expression with the protection of reputations.

It is important for not-for-profit organisations to understand the potential risks of publishing defamatory material, including via social media or online. Defending a defamation claim can be extremely stressful and costly in terms of time and money, but it is important to remember that there are options for resolving the issue that don't involve going to court.

On the other hand, not-for-profit organisations may wish to understand their options where the organisation, or a person involved in the organisation, believes they have been defamed.

Defamation is a very complex area of law which has some differences between states and territories. The information below is a summary of the key concepts and is only a guide. For more detailed information, please see the resources listed at the end of this fact sheet.

NOTE – REVIEW OF DEFAMATION LAWS AND POTENTIAL LAW REFORM

In late 2018, the Council of Attorneys-General (**CAG**) formed a Defamation Working Party (**DWP**) to examine Australian defamation laws and recommend areas for reform. This followed a review of the *Defamation Act 2005* (NSW), conducted by the New South Wales Government, the findings of which were reported in June 2018.

Not-for-profit Law will provide updates on the DWP's review process, and any changes to defamation laws, in the Not-for-profit Law E-Newsletter Update – subscribe at <https://nfplaw.org.au/subscribe>.



Defamation laws in Australia

All Australian states and territories have enacted largely uniform defamation laws (**Uniform Defamation Laws**) that took effect on 1 January 2006. The Uniform Defamation Laws have a focus on promoting speedy and non-litigious methods of resolving disputes about publication of defamatory material.

Prior to the adoption of the Uniform Defamation Laws, the defamation laws in each state and territory differed widely. As noted above, there are still some differences in the various state and territory laws.

In addition to the legislation in each state and territory (listed under 'Resources' at the end of this fact sheet), courts are still guided by previous court decisions (known as the 'common law'), provided that those court decisions are not inconsistent with the Uniform Defamation Laws.

What is defamation?

Defamation refers to injuring a person's reputation (and, in some circumstances, the reputation of an organisation) without a lawful reason or defence.

To make a successful claim in defamation, the following elements must be proven:

- the material has been **published to a third party**
- the material is **about the plaintiff** ('plaintiff' is the term used to describe the person or organisation claiming they have been defamed, should the matter proceed to court), and
- the material **defames the plaintiff**.

Each of these elements, and the available defences, are discussed below.

If the above elements are proven in court, and no defence applies, then an award of damages (a sum of money) can be made by the court. The court will seek to award damages that are proportionate to the harm caused to the plaintiff's reputation.

NOTE – LIMITATION PERIOD

It is important to note that the Uniform Defamation Laws contain a limitation period (the timeframe within which you can start legal action) of up to **one year** from the date of publication. In limited circumstances, the court may extend the period in which to commence an action to a maximum of three years, for example where the publisher cannot be identified or the plaintiff was not aware of the publication within one year.



1. The material has been published to a third party

The material has to be published to at least one person other than the plaintiff. For example, a person cannot be defamed by a letter which only they receive and is not published to a wider audience.

Publication is defined very broadly. Publication can include, but is not limited to:

- spoken words, for example during a radio broadcast or television program
- written or printed materials, including emails, social media posts, blogs and websites
- online reviews
- drawings and cartoons
- paintings
- poetry, and
- live theatrical performances.

2. The communication is about the plaintiff

For a defamation claim to be successful, the plaintiff has to prove that they were identified in some way by the publication. For example, their name might have been used, or their photo might have been published together with other defamatory remarks. In some cases, describing the characteristics or identifying features of a person may be enough to show that they were identified.

3. The communication defamed the plaintiff

A communication is considered defamatory where it causes others to think less of the plaintiff. It can disparage the plaintiff, cause other people to shun or avoid the plaintiff, or subject them to hatred, public ridicule or contempt.

Some defamatory statements may be overtly untrue and damaging of a person's reputation. Examples could include publishing a social media post containing harmful and disparaging lies about a person, or writing a blog describing a not-for-profit group's treasurer as a criminal and a thief. Making 'imputations' (statements that insinuate or imply certain meanings) may also be defamatory, even if only some readers know the context to understand the implied meaning.

The plaintiff does not need to establish any actual loss as a result of the communication. The key consideration is whether the plaintiff's reputation would be injured in the mind of an 'ordinary reasonable person'.

Who can be defamed?

Any living person can sue for defamation, provided that the three elements discussed above are met.

However, under the Uniform Defamation Laws, there is no cause of action to bring a defamation claim if publications are about:

- deceased persons (note that in Tasmania, the legislation does not specifically exclude deceased persons)
- a class of people (note the caution box below), or
- public bodies, including local government authorities or other government authorities.

The Uniform Defamation Laws limit the ability of corporations to sue for defamation. The only corporations or organisations that can sue for defamation are not-for-profit corporations (not including local government or public authorities) and corporations that employ fewer than ten people.

It is important to note that there are other legal avenues that for-profit corporations can pursue if defamatory material is published, for example the common law cause of action of 'injurious falsehood'. If the material identifies individuals, such as employees or board members of organisations, those people could also attempt to make a claim for defamation in their individual capacity. Therefore, it is important to be aware of the risks of making controversial or potentially damaging statements about corporations, as well as individuals.

CAUTION

Although a 'class of people' cannot be defamed, a statement targeting a group may be still be defamatory of a person in that group if the group is small enough that its members can be reasonably identified.



Who can be sued for defamation?

Anyone involved in the creation, publication or dissemination of the defamatory material can be sued for defamation, including a not-for-profit organisation.

If an employee has published defamatory content in the course of their employment, an organisation may be held 'vicariously liable' for the actions of its employees.

Liability for defamation that arises from the actions of volunteers is a complex area of law with specific state and territory legislation. For further information, refer to Not-for-profit Law's National Volunteer Guide at <https://www.nfplaw.org.au/volunteers>.

Defences

The running of defamation matters is very complex and legal advice should be sought immediately if litigation is threatened.

There are a number of defences that can be raised by those who have been accused of publishing defamatory material. Set out below is an overview of some of the available defences – there are other defences, and legal advice should always be sought in defending a claim for defamation.

Defence of truth

The defence of truth can be used where the defendant (the person being accused of publishing defamatory material) can prove that the defamatory statements are true or are substantially true. The defendant will need to establish truth in court.

Defence of absolute privilege

The defence of absolute privilege is available where matters are published in the course of proceedings of a parliamentary body, or of an Australian court or tribunal.

Defence of qualified privilege

The defence of qualified privilege protects honest communications where the defendant has a moral, legal or social duty to make a communication, and the recipient of the communication has an interest in receiving the information. This defence could apply, for example, where a defendant has provided an employment reference or answered questions asked by the police. The publishing of the material must have been reasonable in the circumstances and cannot have been done maliciously.

Defence of honest opinion

The defence of honest opinion in the Uniform Defamation Laws (which is similar to the defence of 'fair comment' at common law) requires the defendant to prove that the matter was an expression of opinion, not a statement of fact. The defendant also needs to prove that the opinion is related to a matter of public interest and is based on material that is substantially true.

Triviality

Under the Uniform Defamation Laws, triviality is a defence if the defendant can prove that the circumstances of the publication were such that the plaintiff was unlikely to sustain any harm.

Innocent dissemination

The defence of innocent dissemination is intended to protect those who publish material created by someone else. This defence requires you to prove that you did not know, and would not have known with the exercise of reasonable care, that the publication was defamatory. This defence may be used by people and organisations such as television broadcasters, copying services and book sellers.

NOTE

If you innocently publish defamatory material, you must take reasonable steps to remove the defamatory material as soon as you become aware that it is or may be defamatory. Otherwise you will be deemed to have published the material.

The above list is not a complete list of defences – for further information on defences, see the resources at the end of this fact sheet.

CASE EXAMPLE

In *Harbour Radio Pty Ltd v Keysar Trad* (2012) 247 CLR 31, the defence of qualified privilege was accepted by the High Court with respect to a number of defamatory imputations made by 2GB (a radio station), the day after it was attacked and called "racist rednecks" by Trad at a peace rally held after the Cronulla Riots.



In response to the comments made at the peace rally, 2GB made comments about Trad during a broadcast, including naming Trad as a "*disgraceful individual*". Trad sued 2GB for defamation.

The High Court held that the defence of qualified privilege was available for a response to an attack when the response is proportionate with the attack and is made for the bona fide purpose of vindicating one's reputation. Therefore, the Court found that 2GB had not defamed Trad.

CASE EXAMPLE

Wilson v Bauer Media Pty Ltd [2017] VSC 521 is a recent high profile Australian defamation case.

Wilson claimed that Bauer Media published a series of defamatory articles that depicted her as a serial liar. Wilson claimed that she had suffered injury to her feelings, credit and reputation and had suffered loss and damage. The jury found that the articles were defamatory and rejected Bauer Media's defences that the imputations were substantially true, or that their publication was in circumstances of triviality. The judge rejected the defences that the publication was on an occasion protected by qualified privilege.

The Supreme Court awarded Wilson \$650,000 in general damages, including aggravated damages and \$3,917,472 in special damages for Ms Wilson's opportunity for new screen roles lost by reason of the defendant's publication. The cap on general damages (currently \$389,500) imposed by the *Defamation Act 2005* (Vic) did not apply because Ms Wilson was awarded aggravated damages.

Bauer media appealed the award of damages to Ms Wilson. The award of damages to Ms Wilson was subsequently reduced on appeal to \$600,000. The Court found that the award of \$3,917,472 for economic damages arising from lost opportunities could not be upheld based on the evidence.

On 16 November 2018, Ms Wilson was refused special leave to appeal to the High Court of Australia.

The judgment and the award of aggravated damages acts as a warning to publishers to diligently investigate and fact-check stories.

Apologies and offers to make amends

As noted above, the Uniform Defamations Laws have a focus on speedy and non-litigious resolution of defamation matters. There are steps that can be taken to avoid the matter proceeding to court.

Apologies

When faced with a claim for defamation, it is important to consider apologising or recanting the defamatory statement. An apology does not constitute an admission of guilt and is not relevant in determining the fault or liability for a defamatory publication.

Offer to make amends

Where a defamatory publication has been made, the publisher may make an offer to make amends to the aggrieved person.

An offer to make amends must be made **within 28 days** of being served or presented with a 'concerns notice.' An offer to make amends cannot be made if a defence has already been served in a legal action brought by the aggrieved person against the publisher.

The offer must be made in writing and the wording must make it clear that it is intended to be an offer to make amends. The offer must include:

- a reasonable correction of the defamatory material
- details of the reasonable steps you will take to tell other people who have been given the publication that the publication may be defamatory, and
- an offer to pay expenses incurred by the aggrieved person before the offer was made and the expenses reasonably incurred in considering the offer.

The offer may also include other measures to compensate harm suffered including publishing an apology, paying compensation, or details of any corrections or apologies made before the date of the offer.

If the offer to make amends is accepted by the aggrieved person, then the aggrieved person cannot continue with an action for defamation even if the offer to make amends was limited to a particular defamatory imputation.

Under the Uniform Defamation Laws, if a reasonable offer to make amends is not accepted, the failure to accept the offer can be used by the publisher as a defence for an action for defamation, if the defendant can show that:

- the offer was made as soon as practicably possible after they became aware of the defamatory material
- they were ready and willing to carry out the terms of the offer, and
- the offer was reasonable.

NOTE – CONCERNS NOTICE

A **concerns notice** is made by the aggrieved person. It must be made in writing and must inform the publisher of the alleged defamatory imputations that the aggrieved person believes have been published.

Practical guidance

Organisations should have a proactive risk management policy in place, to minimise their risk of publishing defamatory material.

How to avoid publishing defamatory content

As part of a risk management strategy, organisations should have appropriate policies in place and, depending on the nature of the organisation, consider training employees and volunteers.

Organisations which post blogs, use social media and publish information to the public need to be particularly mindful about imputations conveyed in these publications.

It is a common misconception that defamation claims can be avoided by simply not mentioning a person's name. Employees and volunteers should be trained to consider the communication as a whole, including titles, headlines and accompanying images.

Staff should be reminded that, where appropriate, statements should be expressed using the language of opinion rather than the language of fact.

Your organisation may wish to implement a 'peer review' process for material that is published through an organisation's social media account, blog, newsletter or other channels

If a controversial statement is made that your organisation knows is true, it is still important to ensure that your organisation has evidence to substantiate the claim. If your organisation's mission involves publishing material that puts you at risk of a defamation claim, then you may wish to consult a lawyer for review of the material pre-publication, in order to manage the risks of a potential claim.

What if someone claims you have defamed them?

Being served with a concerns notice or having a defamation claim made against you or your organisation can be daunting and very stressful. If you have been served with a concerns notice you should immediately seek legal advice, particularly noting the timeframes for an offer to make amends.

What if you believe someone has defamed your not-for-profit organisation?

It is important to take note of the relevant timeframes for claims of defamation discussed above. You should save copies of the defamatory material (for example, by taking screenshots of Facebook posts) and consider whether the publication satisfies the elements for defamation and whether the publisher may be able to rely on one of the defences outlined above. Obtaining specific legal advice is recommended.

Remember that strict timeframes apply for making a claim for defamation (see the 'caution' box on page 2 of this fact sheet).

Resources

Related Not-for-profit Law Resources

The Not-for-profit Law website at <http://www.nfplaw.org.au/> has further information on the following topics:

✔ **Advertising** - <http://www.nfplaw.org.au/advertising>

The advertising page provides a comprehensive guide on how organisations can comply with advertising law and marketing in Australia.

✔ **Campaigns or protests** - <http://www.nfplaw.org.au/campaignsprotest>

The campaigns or protests page provides information for organisations thinking about organising a campaign or protest in each of Australia's States and Territories.

✔ **Social media** - <http://www.nfplaw.org.au/socialmedia>

The social media page provides information regarding the risks associated with the use of social media by organisations and employees.

✔ **Setting up and managing a website** - <http://www.nfplaw.org.au/website>

The setting up a website page provides a legal guide for Victorian and NSW community organisations when they are setting up a website.

Related Resources

✔ [Law Handbook Defamation](#)

This website provides an outline of what defamation is and what defences are available.

✔ [Arts Law Defamation Information Sheet](#)

This information sheet describes defamation and explains how to minimise risk.

Legislation

✔ [Civil Law \(Wrongs\) Act 2002 \(ACT\)](#)

✔ [Defamation Act 2006 \(NT\)](#)

✔ [Defamation Act 2005 \(NSW\)](#)

✔ [Defamation Act 2005 \(Qld\)](#)

✔ [Defamation Act 2005 \(SA\)](#)

✔ [Defamation Act 2005 \(Vic\)](#)

✔ [Defamation Act 2005 \(WA\)](#)

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