

Defamation

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This fact sheet will explain the basics of defamation including where defamation occurs, what defamatory material is, what is meant by 'publishing' defamatory material and what defences to defamation are available. This fact sheet is not exhaustive and defamation law is complex. For further information, we recommend visiting the Arts Law Australia [web site](#).

What is defamation?

Defamation occurs where:

Something is **published** (Note: under defamation law, **publication** occurs where the statement/material is communicated **to a third person**).

- The publication contains **defamatory material**.
- The material **identifies a third person, a not for profit organisation or a company with fewer than 10 employees** (Note: an individual within a company of more than 10 employees can sue if they have been personally identified).
- There is **no legal defence** available to all those involved in publication.

The person claiming defamation (**the plaintiff**) must prove that **the first three elements** exist. Those involved in publishing the material (**the defendant**) must establish any available **legal defence**.

Previously, individual States and Territories had their own defamation laws, but all States and Territories now have uniform legislation that applies to anything published **on or after 1 January 2006**. Under the uniform legislation, any legal action must begin **within 12 months of publication**.

Publication

A publication can be a:

- Radio or television broadcast or internet transmission
- Newspaper article or book
- Letter or email
- Cartoon, poster or advertisement
- Gesture

Remember that the publication need only be communicated to **one other person** besides the plaintiff. Under the law, defamation applies equally whether the publication is an email or a national broadcast, as long as it is communicated to at least **one other person**.

Anyone involved in the publication of the material may be liable under defamation law. For example, if a journalist publishes an article that contains defamatory material, the newspaper and the journalist's editor may also be liable.

Defamatory material

Material is defamatory if it:

- Injures the reputation of a person, a not for profit organisation or a company with fewer than 10 employees (**the plaintiff**) in the eyes of **ordinary reasonable people**.
- Exposes the plaintiff to hatred, contempt or ridicule, and/or
- Causes the plaintiff to be shunned or avoided.

The plaintiff does not need to prove effects on their reputation. The court assesses this based on what **ordinary reasonable people** would think. If an allegation will damage a person's reputation in the eyes of a section of society considered to be **substantial, intelligent and reasonable**, it may be enough for the allegation to be defamatory.

No fault defamation

No fault defamation can occur where the material mentions something that is beyond the plaintiff's control, if doing so will:

- Cause them to be shunned or avoided, or
- Expose them to ridicule.

An example is saying that someone is insane.

Defamatory imputation

Remember that in defamation law, intention does not matter. Material can still be defamatory if it is published accidentally. What matters is the **defamatory imputation**: that is, what ordinary reasonable people think the material said or implied.

Before publishing, think about what is being published. Look at the story from a number of angles. Consider the context and consider how different people might receive it.

Defamatory imputations can arise in two ways:

Natural and ordinary meaning

- A literal meaning on the face of the words
- A meaning reasonably inferred by reading between the lines, whether a colloquialism, double meaning or inference.

Special knowledge

- Words may carry additional meanings where people have 'special knowledge' and the words imply something specific.

Remember that defamation can occur by implying something unintentionally. Always keep defamation in mind, especially when:

- Reporting **allegations or rumours** – just because you say 'allegedly' does not mean that you have not defamed someone
- Using **humour or satire**
- Putting information in a certain **context**
- Using **jargon** (legal or technical terms) – understand the definition and effect of the words you are using

When publishing something, check for unintended imputations in the publication and remove them.

Identification

The material must identify a person, a not for profit organisation or a company with less than 10 employees to be defamatory. Identification can occur by:

- Naming a person directly
- Identifying a person through other information
- Naming someone with the same name
- Defaming members of a group

Defamation defences

Defamation defences balance a person's right not to have their reputation damaged against the interests of wider society in knowing matters of public concern.

Offer to make amends

In 2006, the Defamation Act was amended to include the offer to make amends. An offer to make amends is not a defence against defamation, but if a reasonable offer to make amends is made – for instance, printing a retraction of the defamatory material – and the plaintiff does not accept this offer, the court will take this into account when considering potential damages.

There are three broad categories of defence to defamation:

- Truth/justification
- Honest opinion (previously 'fair comment')
- Privilege

There are **other defamation defences** including **consent**, **innocent defamation** and **triviality**.

Truth

Truth (or justification) is a defence based on the **truth** of the material which has been published. Under uniform defamation legislation, proving that the material the plaintiff has complained about is **substantially true** is a complete defence.

It is up to the defendant to prove that the defamatory imputations are true through hard evidence.

Honest opinion

The honest opinion or 'comment' defence can apply to commentary, analysis, reviews, satire and cartoons. This defence recognises the importance of public opinion.

Elements of the 'honest opinion' defence

The defamatory statements must be clearly identifiable as **opinions** and not factual statements.

- The opinions must be **based on facts** which are provable or privileged.
- The facts must be set out **in the story** or be **well known**.
- The opinion must be **honestly held**.
- The comment must be on a matter of **public interest**.

It can be difficult to distinguish between fact and opinion, especially in court. The facts (on which the opinion is based) must be proven by **evidence**, a **witness**, a **document** or a **physical object**.

Privilege

In certain circumstances, the law recognises that people need to speak out, even if what they say is defamatory and they cannot prove it is true. This is called **privilege**. There are different types of privilege:

- *Absolute privilege* applies to people who speak in Federal, State and Territory parliaments, courts, inquiries and certain tribunals. These people have immunity from defamation laws for what they say **in those places** and **on certain occasions**. For example, a politician is protected by absolute privilege when they speak in a sitting Parliament, but not when they are standing on the steps of Parliament House.
- *Qualified privilege* is often relied upon by the media when reporting on public documents (e.g. parliamentary or court reports) and on 'proceedings of public concern' (e.g. proceedings of international organisations). It can also apply to reporting on political and governmental matters generally, but the defence is subject to certain requirements. It does not apply if the publisher acted in malice.

Remember to:

- Always check facts – many cases of defamation occur because a person has not gotten their facts right or has not cross-checked information.
- Look at who you are identifying - remember that you do not necessarily need to name someone to identify them.
- Keep detailed records of all research, including documentation.
- Be wary of relying too heavily on any one source for information. People often have vested interests.
- Get a response from the person/organisation that is the subject of the material.
- Always consider multiple angles before publishing information. Think about how the information might be perceived by others.
- If in doubt about something, leave it out. If it is vital to the publication, seek legal advice BEFORE it is published.

Community broadcasting

There is information about the legal issues and requirements of community broadcasting in the [Community Broadcasting Codes of Practice](#).

For more information about defamation:

Defamation law is complex. If you need more information about defamation, refer to the Arts Law Centre of Australia's defamation fact sheets:

- [The law of defamation – for material published after 1 January 2006](#)
- [The law of defamation – for material published before 1 January 2006](#)

About the writer

Mary Kozlovski, 22, joined SYN Media in 2006. She has since worked at SYN as a reporter, presenter, executive producer, project manager and is currently a SYN radio trainer. Mary has a Bachelor of Arts (Media and Communications) from The University of Melbourne and her writing has been published in Farrago and Voiceworks. Mary has been a radio presenter at community stations 3CR and 3RRR.