

Defamation

Legal information for community organisations

This fact sheet covers:

- ▶ defamation laws in Australia
- ▶ 2021 defamation law reforms
- ▶ what is defamation?
- ▶ who can be defamed?
- ▶ who can be sued for defamation?
- ▶ defences
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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 aim to balance freedom of expression with the protection of reputations.

It's important for not-for-profit organisations to understand the potential risks of publishing defamatory material, including on social media or online. Defending a defamation claim can be stressful, costly and time-consuming – but 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 technical area of law which has several differences between states and territories. The information below is a summary of the key concepts.



Note

This fact sheet provides information on defamation and includes the changes to defamation law in Australia, following the amendments that came into effect in **July 2021**.

This information is intended as a guide only, and is not legal advice. For more detailed information, please see the resources listed at the end of this fact sheet.

If you or your organisation has a specific legal issue, you should seek legal advice before making a decision about what to do.



Note – defamation law reform

On 1 July 2021 significant changes to defamation laws in New South Wales, Victoria, Queensland and South Australia.

This follows a 2019-2020 review of defamation law in Australia led by NSW. These reforms are intended to be phase one of a two-phase set of amendments (**Model Defamation Amendment Provisions**). Submissions regarding stage two in NSW closed in May 2021.

The reforms:

- introduce a ‘serious harm’ threshold element, a ‘single publication’ rule, and the new public interest defence, and
- amend the damages cap and required mandatory concerns notices

The goal of the phase one reforms is to reduce the number of minor matters going to court and promote more effective ways to resolve defamation disputes quickly and cheaply.

The intention is that all states and territories will pass the Model Defamation Amendment Provisions, to provide uniform legislation across Australia. Western Australia has indicated its enactment is not imminent, however Tasmania, the ACT and Northern Territory appear to be willing to enact the reform.

Defamation laws in Australia

The recent changes to defamation laws in NSW, Victoria, Queensland and South Australia in 2021 are the result of the consultation process by the Council of Attorneys General to reach the Model Defamation Amendment Provisions.

The previous uniform defamation laws were last enacted by Australian states and territories in 2005 (**Uniform Defamation Laws**). Since that time, the act of publication has become easier, more accessible and widespread with the increased use of social media and websites. This has resulted in an increase in smaller defamation claims.

Despite the Model Defamation Amendment Provisions, some differences in the various state and territory laws remain.

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 legislation.

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.

Defamation claim elements

A successful defamation claim must prove the following elements:

1. the material has been **published** to a third party
2. 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
3. the material **defames the plaintiff**

Following the 2021 changes to the law, in NSW, Victoria, Queensland and SA, a plaintiff must also prove a **‘serious harm’** element. 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.

This award of damages must be paid to the plaintiff by the defendant ('defendant' is the term used to describe the person or organisation against which the plaintiff's claim for defamation has been brought).



Note – limitation period

Each state and territory has legislation that imposes a limitation period (the timeframe within which you can start legal action) of up to one year from the date of publication of the defamatory material.

Under the Uniform Defamation Laws, the court may extend the period in which to start an action to a maximum of three years. This extension will only be granted in limited circumstances – for example, where the publisher can't be identified, or the plaintiff was not aware of the publication within one year.

The 2021 changes to the law (which apply in NSW, Victoria, Queensland and SA) introduced the '**single publication rule**' for electronic publications. This rule means the date of the first online publication will be treated as the date when the limitation period is calculated from, unless the manner of any subsequent publication is materially different from the original publication. Any defamation claim must be brought within one year of the first time the defamatory material was published on the internet.

Elements of defamation

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 can't be defamed by a letter which only they receive and which 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. A statement targeting a group may be capable of identifying an individual if that group is small enough.

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. Imputations can arise from the literal meaning of words, 'reading between the lines', or a combination of what is published and what the readers already know. It's important to establish the context in which a defamatory communication is made.

The key consideration is whether the plaintiff's reputation would be injured in the mind of an 'ordinary reasonable person'.

The ordinary and natural meaning of the words are established by asking:

- what is the meaning of the words used? and
- is the meaning of the words defamatory?



Note – serious harm threshold

The 2021 changes to the law (which apply in NSW, Victoria, Queensland and SA) introduced a fourth element that must be proved by the plaintiff:

The plaintiff must prove the publication of the defamatory material has or is likely to cause serious harm to the reputation of the plaintiff. For a corporation, it must establish it suffered serious financial loss.

The amendment creates a threshold to reduce the number of defamation claims that are brought to court and ensure the claims are sufficiently substantive to justify the use of the court's resources.

Who can be defamed?

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

However, 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.

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 individual people, such as employees or board members of organisations, those people could also attempt to make a claim for defamation in their individual capacity. It's therefore important to be aware of the risks of making controversial or potentially damaging statements about corporations, as well as individuals.



Caution

A 'class of people' can't be defamed. However – a statement targeting a group may be still be defamatory of a person in that group if the group is small enough that its individual members can be reasonably identified.



Case example – Capilano Honey Ltd v Dowling (No 4) [2021] NSWSC 264

The plaintiffs, Capilano Honey Ltd (**Capilano Honey**), and Dr Ben McKee (the CEO of Capilano Honey) brought a claim against the defendant, Shane Dowling.

It was alleged Mr Dowling posted material on a website, as well as on Facebook and Twitter, that harshly and untruthfully criticised Capilano Honey and Dr McKee.

Capilano Honey, one of Australia's largest commercial honey manufacturers, sued for injurious falsehood, whereas Dr McKee sued for defamation. Capilano Honey could not sue for defamation as it is not a not-for-profit organisation, nor a natural living person, and has more than 10 employees. Dr McKee was able to sue for defamation as he is a natural living person, despite being CEO of Capilano Honey.

Capilano Honey and Dr McKee were ultimately successful in their claims against the defendant.

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. This means the organisation assumes the responsibility of the employee if the employee was acting within the scope of their employment in publishing the defamatory material.

Liability for defamation that arises from the actions of volunteers is a complex area of law that differs between each state and territory.



Related Not-for-profit Law resource

For further information about the liability of organisations and their volunteers, refer to our [National Volunteer Guide](#).

Defences

If the defamatory statements or imputations are proven by the plaintiff, there are a number of defences that can be raised by the defendant. An overview of some of the available defences is set out below.

This is not a complete list of defences – for further information on defences, see the resources at the end of this fact sheet. Legal advice should always be sought when defending a claim for defamation.

Defence of truth

This is a defence if the defendant (the person being accused of publishing defamatory material) can prove that the defamatory statements or imputations are true or are substantially true.

Defence of absolute privilege

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

Defence of qualified privilege

This defence exists at common law and in the Uniform Defamation Laws. The defence of qualified privilege operates when someone has a moral, legal or social duty to communicate defamatory information they



honestly believe to be true to a recipient with an interest in receiving the defamatory information. The Uniform Defamation Laws add the extra requirement that the conduct of the defendant in publishing the matter must be reasonable in the circumstances.

If the plaintiff can establish that the defendant had a malicious intent to cause the plaintiff harm, then this will defeat the qualified privilege defence.

Typical instances of defamatory communications protected by qualified privilege are, for example, where a defendant has provided an employment reference or answered questions asked by the police.



Case example – Leyonhjelm v Hanson-Young [2021] FCAFC 22

In this high-profile case, Senator Sarah Hanson-Young brought defamation proceedings against a former senator, David Leyonhjelm.

Senator Hanson-Young claimed Mr Leyonhjelm had defamed her in four separate publications. The primary judge (the judge in the first hearing) held that the publications conveyed three imputations: (1) Senator Hanson-Young was a hypocrite for claiming all men are rapists despite having sexual relations with men, (2) Senator Hanson-Young had, during the course of parliamentary debate, made the claim that all men are rapists, and (3) Senator Hanson-Young is a misandrist, because she claimed all men are rapists. The primary judge found Senator Hanson-Young had been defamed by Mr Leyonhjelm and rejected Mr Leyonhjelm's defence of qualified privilege, awarding Senator Hanson-Young damages of \$120,000.

On appeal by Mr Leyonhjelm, the Full Federal Court held the primary judge was correct to reject Mr Leyonhjelm's defence of qualified privilege. The Full Court found that Mr Leyonhjelm had not proved that it was open on the evidence that his conduct in publishing the defamatory matter was reasonable. The Full Court also agreed with the primary judge's reasoning that Mr Leyonhjelm acted with malice, which would have defeated the defence of qualified privilege, had it been successfully made out.

The Full Court also held it was not a breach of parliamentary privilege for a party to prove, as a fact, that certain things were said in parliament when proof of that fact is relevant to an issue in the proceeding, provided that proof does not contravene laws regarding parliamentary privilege.

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.

It's a requirement that the comment be 'fair' – meaning a fair-minded person would be able to honestly express such an opinion on the same factual material.

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.

The defence will be unsuccessful if the defendant was notified the material was defamatory and ignores it. The defendant must take all reasonable steps to remove the defamatory material as soon as they become aware it is defamatory.



Public interest

The public interest defence was introduced as part of the 2021 changes to the law (which apply in NSW, Victoria, Queensland and SA). Similar to the defence of qualified privilege, it is designed to help protect media organisations and journalists who have published material they believe to be of public interest.

A defendant can rely on this defence if they can prove the matter concerns an issue of public interest, and the defendant reasonably believed that the publication of the matter was in the public interest. The legislation provides a number of factors the court may take into account when considering this defence



Case example – Wilson v Bauer Media (Ruling No 3) [2017] VSC 311 (31 May 2017)

In this 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) didn't 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

The Uniform Defamations Laws and the 2021 changes to the law (which apply in NSW, Victoria, Queensland and SA) have a focus on quick 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's important to consider apologising or recanting the defamatory statement. An apology doesn't necessarily constitute an admission of guilt and is not necessarily relevant in determining the fault or liability for a defamatory publication. It can be the quickest and cheapest form of resolving the matter.

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 can't 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 can't 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

Concerns notice

A concerns notice is made by the aggrieved person and sent to the publisher.

A concerns notice must:

- be in writing
- specify the location where the matter in question can be accessed (such as a website or Facebook page), and
- inform the publisher of the defamatory imputations

A publisher may seek further details from the aggrieved person after the concerns notice is given, which must be provided within 14 days by the aggrieved person.



Note – under the 2021 changes to the law

Under the 2021 changes to the law (which apply in NSW, Victoria, Queensland and SA), a potential plaintiff can't start defamation proceedings unless the potential plaintiff has given a concerns notice to the publisher.

If the potential plaintiff has given the potential defendant a concerns notice that details the defamatory imputations and the 28-day period to make an offer to make amends has passed, the potential plaintiff may start defamation proceedings against the publisher. This is a compulsory step for a potential plaintiff, before lodging the claim.

The court may grant leave for proceedings to start before the end of the 28-day period, but only if starting the proceedings after that period would contravene the limitation period, or it is just and reasonable for the court to grant leave.

Damages

Damages are awarded by the court to the successful plaintiff for damage to their reputation, hurt feelings and economic loss. As a very general rule, the more widely the defamatory material was circulated and the more serious the defamation, the higher the award of damages will be.

The defendant can provide evidence to attempt to mitigate the damages for the publication of the defamatory material. Such evidence may be that the defendant has apologised, published a correction, or the plaintiff has already recovered damages for defamation in other proceedings concerning the same imputations made by the defendant.



As of 1 July 2021, the maximum damages that can be awarded for non-economic loss (loss for hurt feelings and damages reputation) is \$432,500 in NSW, which is adjusted annually to keep pace with inflation. The maximum is only to be awarded in a most serious case. There is no cap on an award of damages for economic loss (for example, damages for loss of income).

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, podcast, broadcast and publish information to the public need to be mindful about imputations conveyed in these publications.

It's a common misconception that defamation claims can be avoided by simply not mentioning a person's name. As noted above, if the imputation the defamatory material conveys concerns an aggrieved person regardless of whether their name is mentioned, and the ordinary, reasonable person could identify that, the material can be defamatory. 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's 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, 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 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. As noted above, there are non-litigious options available to a publisher accused of publishing defamatory material, but the timeframe for accessing those options is short.

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

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 downloading copies, with publication dates clearly marked). You may 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 highly recommended.

Remember that strict timeframes apply for making a claim for defamation. The 2021 changes to the law (which apply in NSW, Victoria, Queensland and SA) require a concerns notice to be given to the publisher before any proceedings can start as a first step.

Increased risks for organisations with social media accounts.

The increasing influence of and ease of access to social media means anyone can publish defamatory material. As a result, there are increased risks for organisations with social media accounts.

It's important for an organisation to be aware of what is being said about it on social media, and whether anything posted to social media platforms is defamatory.

Postings to a social media site are subject to the same defamation, anti-discrimination and intellectual property laws as other publications, such as newspapers. There is also the added complexity that, often, other people may post comments on your social media sites.



A recent High Court case considered whether an organisation is responsible for comments posted by other parties on its Facebook page.



Case example – Fairfax Media Publications Pty Ltd v Voller [2021] HCA 27

Dylan Voller brought a defamation claim against Fairfax Media and two other newspaper publishers. The publishers covered Mr Voller's story of abuse and mistreatment in the Northern Territory's Don Dale Juvenile Detention Centre and posted news articles on their Facebook pages. Users of the Facebook pages left insulting comments against the articles.

The articles themselves were not defamatory and the publishers didn't write the comments, approve them or read them before they were posted.

Mr Voller took legal action against the publishers arguing he was defamed by comments made by third-party Facebook users who posted comments. It was argued that the publishers had facilitated, encouraged and thereby assisted the posting of comments by Facebook users. It was argued that this rendered the publishers the publishers of those defamatory comments.

The High Court agreed and held that the publishers were responsible for 'publishing' the comments made on its Facebook page by Facebook users.

This case highlights that defamatory material does not necessarily have to be posted by the publisher, but if it encourages and facilitates the publication of defamatory statements on its social media pages by other users, it is just as liable.

This case shows how carefully organisations that post material to their social media pages must navigate social media and why comments should be monitored and moderated.



Related Not-for-profit Law resource

For more information about social media and your organisation, see [our webpage on social media](#).



Resources

Not-for-profit Law resources

▶ [Advertising](#)

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

▶ [Campaigns or protests](#)

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](#)

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](#)

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.

▶ [Model Defamation Amendment Provisions](#)

This webpage contains the NSW Government Review of Model Defamation Provisions

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 \(WA\)*](#)