

# FACT SHEET

## Defamation AN OVERVIEW



Defamation is, in essence, publishing a false and derogatory statement regarding a person without lawful justification. The 'publisher' of the statement and at least one recipient of the statement must not be the subject of the statement. The 'publication' can be made in any way, including in writing, orally, electronic dissemination, by gesture or by images. As a result of these multiple forms of publication, each separate publication of a defamatory statement may give rise to a separate cause of action. A person will have a cause of action for defamation in relation to a publication if that publication contains, either directly or by implication, a defamatory meaning and, in the minds of ordinary reasonable people, that publication would injure that person's reputation by:

- disparaging that person;
- causing others to 'shun or avoid' that person;
- subjecting that person to hatred, ridicule or contempt.

### Publications that may not give rise to a defamation action

Defamatory statements in respect of a 'class' or group of people (ie. individuals are not defined); the dead; local government authorities; corporations (except for corporations with less than 10 employees and certain not-for-profit corporations), would not give rise to a defamation action in Victoria. However, if a defamatory statement in a publication can reasonably be regarded as referring to a specific individual or eligible corporation, that party may be entitled to issue proceedings.

### Defences

Even if a party has the right to issue proceedings, there are several defences to defamation, namely:

- justification (ie. The imputation is true in substance);
- contextual truth (ie. the imputation does not damage the complainant when read in context with truthful imputations that are in the publication);
- absolute privilege (ie. the imputation was made as part of Parliamentary or judicial proceedings or in documents of proceedings of similar public concern, as specified in the *Defamation Act 2005* (Cth));
- fair reporting (ie. fair and accurate reporting of imputations that are the subject of absolute privilege, unless that report was not published honestly for the information of the public or for the advancement of education); qualified privilege (ie. the imputation was made where: (1) the recipient of that publication has an interest in having information on the subject; and (2) the publisher acted reasonably in publishing that defamatory matter to the recipient in the course of giving information on that subject, but also having regard to various issues such as: (a) the extent to which that matter is in the public interest; (b) the sources of information; and (c) the business environment in which the publisher operates; honest opinion (ie. the imputation was made in the expression of an honestly held opinion (rather than the expression of fact), in respect of a matter of public interest where that opinion is based on proper material);
- innocent dissemination (ie. the publication was made by a third person on a service that is
- provided by the publisher, unless the publisher knew or ought reasonably to have known that the material was defamatory, or the publisher's lack of knowledge was due to negligence on its behalf);
- triviality (ie. the circumstances of publication are such that the complainant was unlikely to sustain any harm).

# LIJ Defamation Fact Sheet

## Defamation and the Internet

With the expansion in dissemination of information on the internet in recent years, and its global form of distribution, the question arises to what extent internet intermediaries should be held liable for hosting or carrying defamatory material without their knowledge.

To this end, the *Broadcasting Services Act 1992* (Cth) is worth noting. Clause 91(1) of this Act provides that a law of a State or Territory, or a rule of common law or equity, has no effect to the extent to which it subjects an internet content host or internet service provider to liability in relation to hosting or providing content to where the host or provider was not aware of the nature of the content. Whilst the law has various limitations (such as not applying to ordinary email communications), it does provide a further avenue of defence for internet hosts or providers who may be the subject of a defamation claim, provided certain conditions can be met.

## Other matters to note

Proceedings for defamation must be initiated no later than one year after the alleged defamatory publication unless the court believes there is special reason to allow an action after this time, in which case the time limit may be extended to 3 years.

From 2005, a cap of \$250,000 (indexed with inflation) was imposed for civil action damages able to be awarded for non-economic loss (eg. pain and suffering). However, this threshold may be extended where a court believes there is special reason to make an award beyond this cap. Claims in respect of pure economic loss must show a sufficient relationship between any defamatory publication and the loss claimed.

Exemplary and punitive damages have been abolished in civil actions.

If a civil proceeding for defamation is heard by a jury, the jury only decides whether defamation has occurred, not the amount of damages to be awarded.

Criminal proceedings may be initiated against a publisher if the publisher knew the defamatory statement was false at the time of publication, or had no regard at the time of publication for whether the statement was true or false.

## An alternative form of resolution

Within 28 days of receiving a notice of complaint, a publisher, without admitting or affecting its liability, can voluntarily make an offer of amends, which includes an offer to make a reasonable correction and an offer to pay the complainant's expenses.

If the complainant rejects a reasonable offer, a publisher will have a defence to the defamation claim.

An apology does not constitute an admission of fault or liability.