



YOUR GUIDE TO

# DEFAMATION

# WELCOME



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**The laws of defamation, contempt and copyright apply equally to the media as they do to any other sector of the community.**

It is imperative that before publishing anything either in the print or electronic media or elsewhere that writers, journalists, broadcasters and bloggers have at least some basic knowledge of the laws of defamation, contempt and copyright in order to avoid or reduce the risks of legal action.

# TABLE OF CONTENTS

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<b>CHAPTER 1</b> <b>WHAT IS DEFAMATION?</b> . . . . .	<b>04</b>
<b>CHAPTER 2</b> <b>DEFAMATION DEFENCES</b> . . . . .	<b>06</b>
<b>CHAPTER 3</b> <b>REMEDIES</b> . . . . .	<b>09</b>
<b>CHAPTER 4</b> <b>COMMON MISCONCEPTIONS</b> . . . . .	<b>10</b>
<b>CHAPTER 5</b> <b>OFFERS TO MAKE AMENDS</b> . . . . .	<b>11</b>
<b>CHAPTER 6</b> <b>CORPORATIONS</b> . . . . .	<b>12</b>
<b>CHAPTER 7</b> <b>DEFAMATION AND THE INTERNET</b> . . . . .	<b>13</b>
<b>CHAPTER 8</b> <b>TWELVE TIPS ON HOW TO AVOID A DEFAMATION CLAIM</b> . . . . .	<b>15</b>
<b>CHAPTER 9</b> <b>CONTEMPT</b> . . . . .	<b>17</b>
<b>CHAPTER 10</b> <b>COURT REPORTS</b> . . . . .	<b>19</b>
<b>CHAPTER 11</b> <b>PRIVACY</b> . . . . .	<b>21</b>

# WHAT IS DEFAMATION?



The essence of a claim for damages for defamation is the publication of either written or spoken words or gestures which cause or are likely to cause harm to the reputation of another. The law in this area has evolved as a means of compensating an individual for the hurt, embarrassment and other losses suffered in circumstances where their reputation has been damaged as a consequence of the utterance or publication of written words or images.

**Anyone who suffers loss or harm as a consequence of a civil wrong, other than for breach of contract, is said to have a potential right of action under the law of tort. Defamation is a tort. Other examples of claims in tort include actions for negligence or nuisance or civil assault.**

Defamation is the right of action in respect of damage to reputation. It is a collective term encompassing claims for damages in respect of written words or images, once referred to as libel and claims based on spoken words or gestures formerly referred to as slander.

In extenuating circumstances it can constitute a criminal offence and there are specific provisions in this regard

under the Queensland Criminal Code. The law of defamation is otherwise based on the provisions of the Defamation Act 2005 and the common law, that is the law derived from judicial precedent. With some relatively minor exceptions, the laws of defamation are now uniform throughout each of the States and Territories of Australia.

A cause of action does not arise unless the defamatory material is published or communicated to at least one other person. For example, before “A” can bring a claim for damages for defamation against “B”, it must be able to be proven that the defamatory words of “B” were heard or read, as the case may be, by “C”.

Through the years the courts have developed a number of tests in order to determine whether words are defamatory. In essence, however, a publication is said to be defamatory if it is likely to cause ordinary reasonable persons to think less of the plaintiff or shun, ridicule or avoid him. Another test applied by the courts is whether the words have the tendency to lower the person in the estimation of reasonable members of the community.

A defamatory imputation need have no actual effect upon a person’s reputation. The law looks only to its tendency and damage is presumed. In other words, unlike with other causes of action, for an individual to sustain an action in defamation there is no need to show actual or direct financial loss.

However, as a consequence of the amendment of the Defamation Act, as from 1 July 2021, in order to sustain a claim for defamation, a plaintiff must be able to establish that the publication of the defamatory matter has caused or is likely to cause serious harm to the individual’s reputation.

Prior to 1 January 2006 corporations were able to sue for defamation provided that they were able prove that they had suffered direct financial loss. With the introduction of the Defamation Act 2005, companies formed with a view to profit and employing ten or more employees are no longer able to sue for defamation. It should be noted, however, that companies still have other rights of action and the rights of company directors and officers remain unaffected.

An action in defamation does not arise unless a plaintiff can prove that he or she has been identified either directly or indirectly from the defamatory material complained of.

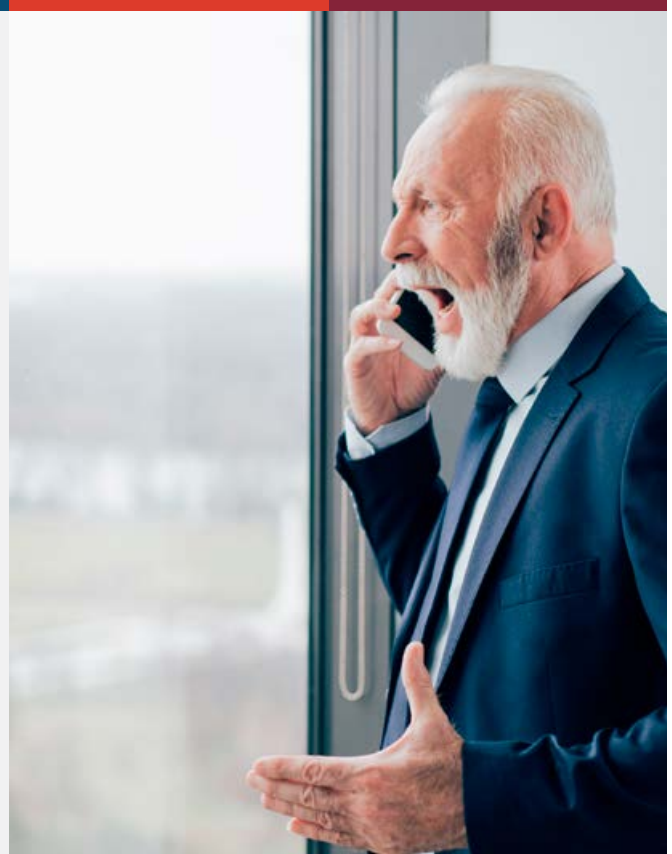
**“A defamatory imputation need have no actual effect upon a person’s reputation.”**

## **ORDINARY MEANING AND INNUENDO**

Actions in defamation are generally based on the ordinary or literal meaning of the defamatory words complained of. For example, if in a publication it is asserted that “A” does not pay his tax, the clear defamatory imputation that arises from such statement is that “A” is guilty of tax avoidance.

Defamation can however also arise in the circumstances of an innuendo meaning.

Generally speaking intention is irrelevant in so far as relates to the law of defamation. It is, for instance, not relevant that it was not intended for the matter complained of to be defamatory.



# DEFAMATION DEFENCES

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A basic understanding of the law of defamation requires some knowledge of the potential defences that apply. In certain circumstances, the law provides protection in respect of otherwise defamatory publications and accordingly some knowledge of those defences is vitally important.

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A number of defences to claims for defamation are contained in the Defamation Act 2005. However, it is expressly provided in the legislation that the Act does not limit or restrict other defences or exclusions of liability.

## STATUTORY DEFENCES

The defences prescribed under the Act are as follows:

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|--|--|
| 1. Justification – (s 25)                                | interest (s29A)  |
| 2. Contextual truth – (s 26)                             | 7. Qualified privilege for provision of certain information –(s 30)  |
| 3. Absolute privilege – (s 27)                           | 8. Publication of scientific or academic peer reviewed matter (s30A) |
| 4. Publication of public documents – (s 28)              | 9. Honest opinion – (s 31)   |
| 5. Fair report of proceedings of public concern – (s 29) | 10. Innocent dissemination – (s 32)                                  |
| 6. Publication of matter concerning issues of public     |  |

The following is a brief description of some of these statutory defences.

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## JUSTIFICATION

Under section 25 of the Defamation Act 2005, it is provided that it is a defence to a claim of defamation for a defendant to prove that the defamatory matter was “substantially true”. Pursuant to the dictionary provisions found in schedule 5 of the Act, the term “substantially true” is defined as “true in substance or not materially different from the truth”.

In seeking to rely upon this defence, however, defendants often encounter difficulties from an evidentiary point of view. In order to rely upon such a defence, there must be appropriate evidence available in admissible form. Neither rumour, gossip nor any other form of hearsay evidence will be accepted by a court in support of such a defence.

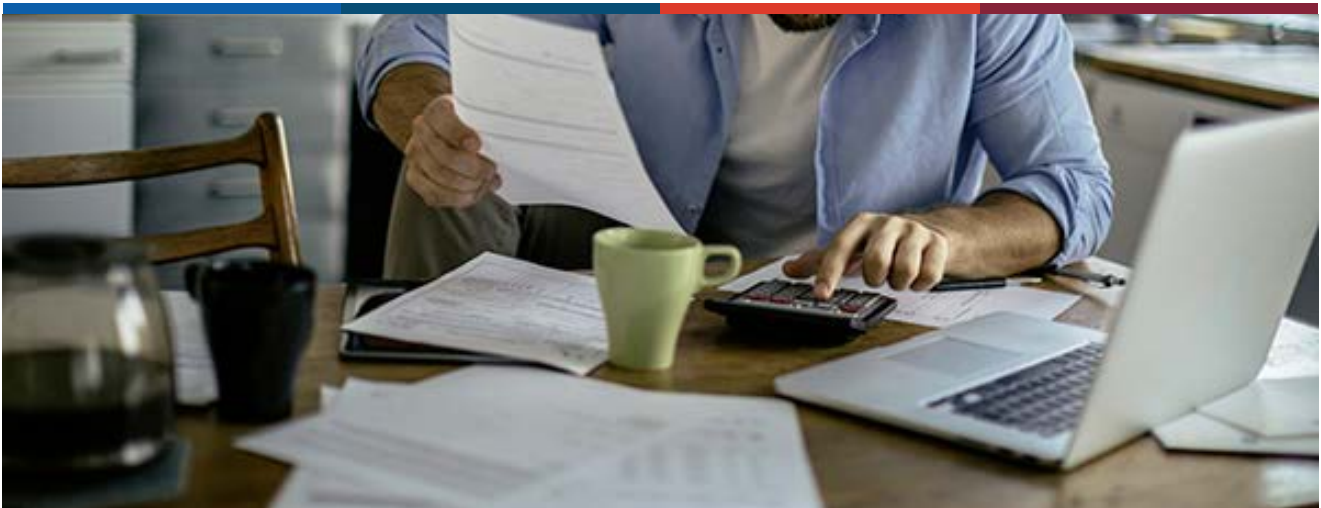
## CONTEXTUAL TRUTH

The defence of contextual truth entitles a defendant, in certain circumstances, to plead that, in addition to the defamatory imputations relied upon by the plaintiff, other contextual imputation/s arise and, by reason of the truth of the contextual imputation/s, no further harm is done to the plaintiff’s reputation.

## ABSOLUTE PRIVILEGE

Defamatory words uttered or otherwise published in Parliament or in any Australian court of law or legal tribunal are said to be published on an occasion of absolute privilege. The objective of such defence is to promote the free and open discussion or debate of matters which arise for consideration before Federal Parliament or any State Parliament or before any Australian court or tribunal.





## PUBLICATION OF PUBLIC DOCUMENTS

Section 28 of the Defamation Act 2005 provides a defence in circumstances where the defendant is able to prove that the defamatory matter was contained in a public document or a fair summary of a public document.



“Public document” is defined in the Act and includes such things as a report or paper published by a parliamentary body, court or tribunal. Examples of public documents include Hansard reports, reports of parliamentary committees, court judgements and transcripts.



“Australian court” is defined to mean: “any court established by or under a law of an Australian jurisdiction (including a court conducting committal proceedings for an indictable offence”

## FAIR REPORT OF PROCEEDINGS OF PUBLIC CONCERN

The legislation provides a defence in circumstances where a defendant proves that the defamatory matter complained of was a fair report of “proceedings of public concern”. That term is given a very broad definition. In summary, it includes public proceedings of:-

- a parliamentary body;
- any international organization of the government of any country;
- an international conference;
- the International Court of Justice or any other international judicial or arbitral tribunal;
- a local government body;
- a learned society;
- a sporting or recreation body;
- a trade union;
- corporate shareholders.

*This list is not exhaustive*

## QUALIFIED PRIVILEGE FOR PROVISION OF CERTAIN INFORMATION

Pursuant to the statutory defence found under the Defamation Act, in order for a defendant to rely upon this defence the following three elements must be proven, namely:-

- a. That the recipient of the information which is alleged to contain some defamatory matter had an interest or apparent interest in receiving such information in relation to some subject; and
- b. That the matter was published to the recipient in the course of giving to the recipient information on that subject; and
- c. The conduct of the defendant in publishing that information was reasonable in the circumstances.

In seeking to rely on this defence, a defendant must be able to prove that he/she acted reasonably. Some of the matters that a court is required to take into consideration in determining this question are prescribed in section 30(3) of the Act.

For writers and journalists it is imperative that every effort is made to give any person the subject of a publication an opportunity to put their point of view and that their response is published or broadcast as part of the story.

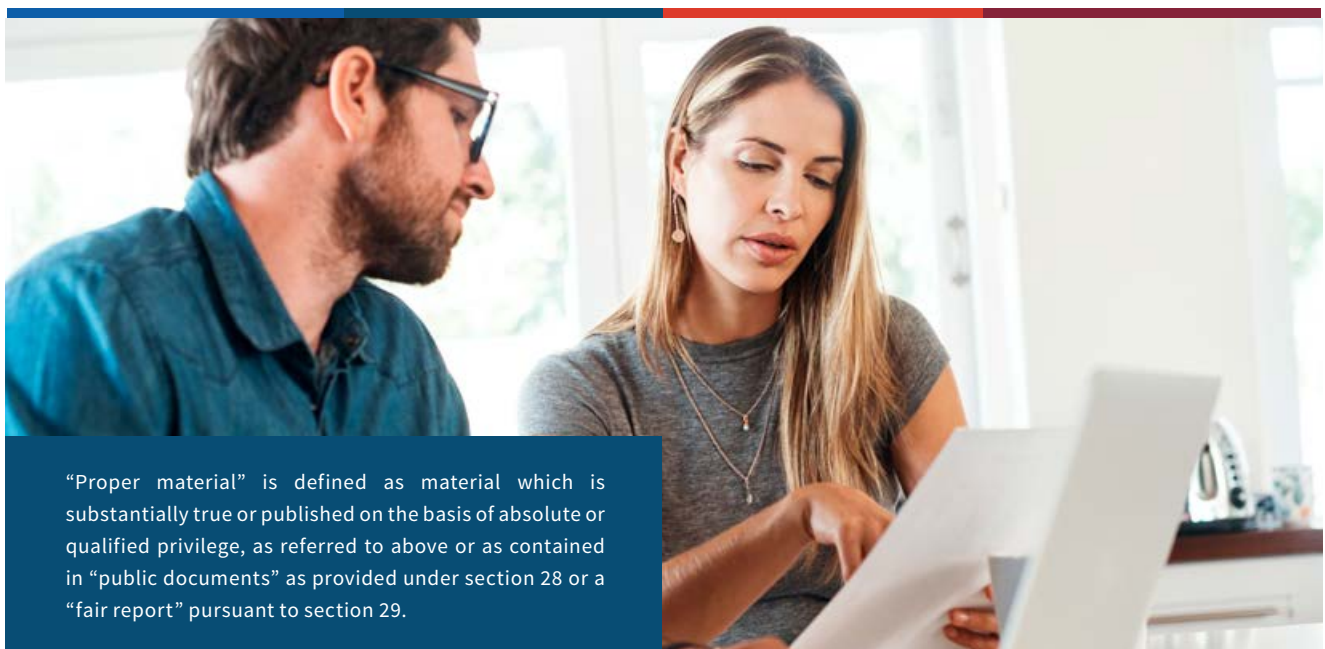
A defence of qualified privilege is lost if a plaintiff is able to establish that the defendant did not act in good faith or was actuated by malice toward the person defamed.

## HONEST OPINION

Honest opinion is a defence which is available where a defendant is able to prove:-

- a. That the publication was an expression of opinion and not a statement of fact; and
- b. The expression of opinion related to a matter of public interest; and
- c. The opinion was based on proper material.

The defence is lost in circumstances where a plaintiff is able to show that the opinion was not honestly held by the defendant at the time of publication.



“Proper material” is defined as material which is substantially true or published on the basis of absolute or qualified privilege, as referred to above or as contained in “public documents” as provided under section 28 or a “fair report” pursuant to section 29.



# REMEDIES

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**The remedies in defamation are compensatory damages, aggravated damages, business or financial loss (if applicable), interest on damages, costs and, in some cases, injunctive relief.**

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## DAMAGES

An award of damages for defamation is essentially dependant on two factors: the seriousness of the defamatory imputation found to arise from the defamation and the extent of publication.

The Defamation Act 2005 now sets the limits that a court is able to award in terms of compensatory damages for non-economic loss. With adjustments as prescribed under the Act for cost of living, as of July 2021, it is

now \$432,500.00. Rarely have courts in defamation actions awarded sums of this magnitude for general compensatory damages.

Notwithstanding the above limitations, courts are, however, also permitted, in some circumstances, to award aggravated damages over and above the award of compensatory damages.

## INJUNCTIVE RELIEF

In some limited circumstances, courts will grant injunctive relief in order to restrain or prevent further publication of defamatory material. Such relief is sometimes granted on an interim basis, pending a trial of the matter or, at the conclusion of a defamation matter, to prevent further publication. However, courts will generally only grant such relief in extenuating circumstances where it can be shown that the right of freedom of speech has been or will be abused. Awards of damages are generally deemed to be an adequate remedy.



# COMMON MISCONCEPTIONS

## SATIRE

One of the common misconceptions that frequently arise in defamation matters is the mistaken belief that if words are humorous then no liability arises. This is not always the case. Comedy, satire, cartoons and other forms of such entertainment are all capable of bearing a defamatory meaning. As highlighted earlier, intention is irrelevant when determining whether words are capable of bearing a defamatory meaning.

In the South Australian Supreme Court case of *Cornes v The Ten Group Pty Ltd & others*, the court awarded the plaintiff \$85,000.00 damages in respect of comments made by comedian Mick Molloy in the course of a television broadcast.

## ALLEGEDLY / ALLEGED

The use of the words 'allegedly' or 'alleged' will not of itself excuse the publication of a defamation. The republication of the defamatory words of another is no defence to a claim. Despite this, there is, however, one important exception, and that is pending trial in criminal matters. In such circumstances the use of these terms is imperative.

## CRIMINAL DEFAMATION

Whilst defamation is no longer a criminal offence in many States, it is still a criminal offence in some, including Queensland. Whilst instances of criminal convictions for defamation are extremely rare, it remains an offence under the criminal law in certain parts of Australia as, for example, under section 365 of the Queensland Criminal Code.

## DECEASED PERSONS

The personal representatives of a deceased person are not permitted to commence or maintain an action on behalf of the estate of the deceased. Similarly, pursuant to the provisions of the Defamation Act 2005, it is not possible to commence or maintain an action for defamation against the estate of a deceased person.



In many instances, words which are clearly ironic will not be capable of bearing a defamatory meaning, however, satire of itself is no defence to a defamation claim.

# OFFERS TO MAKE AMENDS

One of the innovations with the introduction of the Defamation Act 2005 has been the offer to make amends regime. It enables the publisher of defamatory material to make a formal offer of amends at an early stage and thereby limit or, in some instances, eliminate a claim of defamation.

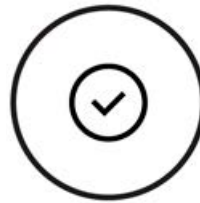
Pursuant to the provisions of Part 3 of the Act, where an individual is aggrieved by a publication, the publisher may at an early stage make an offer of amends. The Act prescribes that such offer must be made either within 28 days of receipt of a formal complaint from an aggrieved party (known as a “concerns notice”) or alternatively before filing a defence to legal proceedings issued by the aggrieved party. The Act specifies that an offer to make amends must contain a number of essential prerequisites, namely:-



it must be in writing and readily identifiable as an offer to make amends;



if it is limited to particular defamatory imputations then those imputations must be specified;



it must include an offer to publish a reasonable correction; and



it must contain an offer to pay reasonable expenses incurred by the aggrieved party.

An offer of amends may also include an offer to pay compensation.

## APOLOGY

The early publication of an apology can be taken into consideration in mitigation of any award of damages contemplated by a court. However, in order for an apology to be effective, it must be expressed in clear and unequivocal terms.

It is provided in the Defamation Act 2005 that evidence of the publication of an apology is not able to be admitted in evidence in a defamation action as admission of fault or liability.



# CORPORATIONS



By virtue of section 9(1) of the Defamation Act 2005, Corporations formed with a view to making profit and employing 10 or more persons, and public bodies constituted under the law of any country, no longer have a right of action in defamation.

Corporations formed for a purpose other than financial gain, or which employ less than 10 persons, still, however, retain the right to sue for defamation, although, unlike in the case of an individual, such corporations must be able to establish or show direct financial loss, or damage to the goodwill of the business arising from the defamation.

With the introduction of the amendments to the Defamation Act on 1 July 2021, companies which still retain the right to bring claims for damages for defamation, must as part of any claim be able to prove that as the consequence of the publication of defamatory matter, it has sustained or is likely to sustain serious financial loss.

Whilst many companies might no longer have a right of action in defamation, other rights of action such as claims for injurious falsehood and claims for misleading and deceptive conduct prevail. Similarly, the rights of directors and other senior company staff remain unaffected.

Frequently, a defamatory reference to a company can implicate directors and other staff whose rights remain unfettered.

## INJURIOUS FALSEHOOD

Companies which no longer have a right of action for damages for defamation can still pursue a common law claim for injurious falsehood or, as it is sometimes referred to, malicious falsehood. The tort of injurious falsehood bears some similarity to a claim for defamation. With such a claim, however, a plaintiff must be able to establish that a false written or oral statement has been published to others with a view to producing actual loss, whether it is a loss of profits or damage to business goodwill.

Unlike with a claim of defamation, in claims of injurious falsehood, evidence must be adduced in order to prove actual malice and actual financial loss.

## MISLEADING AND DECEPTIVE CONDUCT

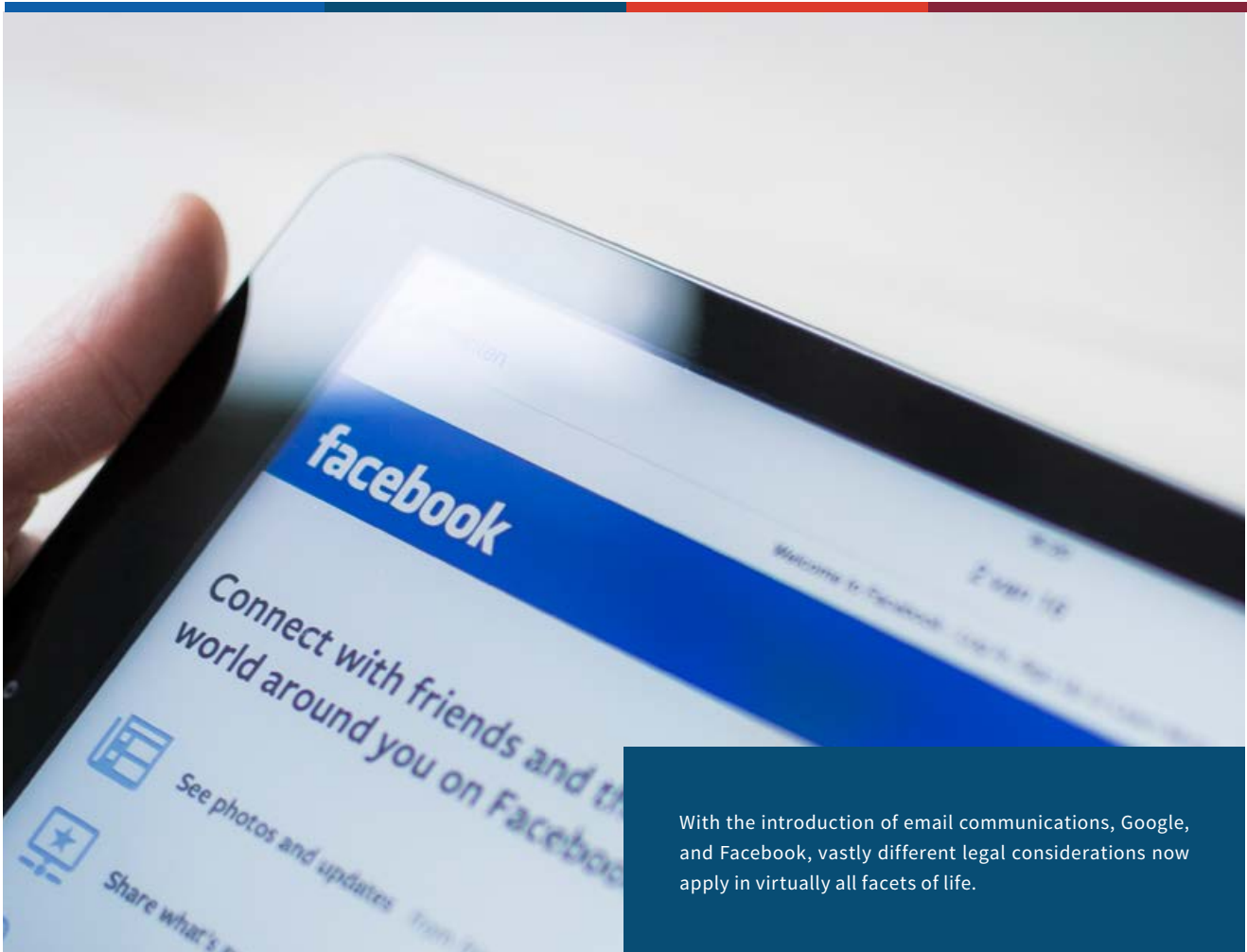
Notwithstanding the fact that many companies no longer have a right of action in defamation, their rights to bring claims under the Competition and Consumer Act 2010 for misleading and deceptive conduct in trade and commerce remain unaffected. For example, disparaging statements in respect of a competitor's goods or services can potentially give rise to a claim for damages if it contains significant inaccuracies.



# DEFAMATION AND THE INTERNET

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The laws of defamation as they apply to the internet are, to a large extent, still in the formative stage as both legislators and the justice system scramble to keep pace with wholesale changes in the way individuals now communicate with one another and the world conducts business.



The legal system has had to adapt to the changes brought about as a consequence of the digital information age and advances in technology. With the introduction of email communications, Google, and Facebook, vastly different legal considerations now apply in virtually all facets of life. The virtually instantaneous nature of mass communications afforded as a consequence of the World Wide Web has, for example, now meant that defined legal boundaries are no longer as rigid as they perhaps once were. This is best illustrated by reference to the decision of the High Court of Australia in *Dow Jones & Company –v- Gutnick* in 2002

The decision has helped to address some of the issues arising in respect of multiple jurisdictions. In that matter, the plaintiff, Mr Gutnick, sued the publishers of the financial magazine, *Barron's*, which was an online subscription service circulated largely in the United States of America. However, a limited number of subscribers were based in Australia where Mr Gutnick instituted his defamation proceedings. He alleged that he was defamed in a *Barron's* article entitled “Unholy Gains”.

For certain strategic reasons the defendant sought to have the action heard and determined in the United States of America and, consequently, it made application to have the proceedings in Australia permanently stayed on the basis that the plaintiff ought to have instituted proceedings in the United States where its web server was located.

On the hearing of the appeal by the High Court, however, the majority of the Court held that damage to reputation occurs in the place where the defamation occurs. They rejected the notion that the place where the cause of action arises is principally determined by reference to the publisher's conduct. They preferred the view that, ordinarily, the defamation occurs where the material can be downloaded and, as a consequence, damage is thereby done to the plaintiff's reputation. Further, it was determined that due weight must be given to the question

as whether or not damage to reputation will result in a substantial award of damages. Unlike in Australia, Mr Gutnick was relatively unknown in the United States.

By reason of these findings the Court also rejected the argument advanced by Dow Jones that those publishing on the web would be forced to have regard to the defamation laws of every country where their material could be downloaded.

The courts both in Australia and in other parts of the world continue to grapple with the culpability of internet search engines and internet service providers (ISP's). What seems apparent as a consequence of recent decisions emanating from the United Kingdom is that the question of whether an ISP is or is not a publisher and, therefore, liable for defamatory content is "fact sensitive".



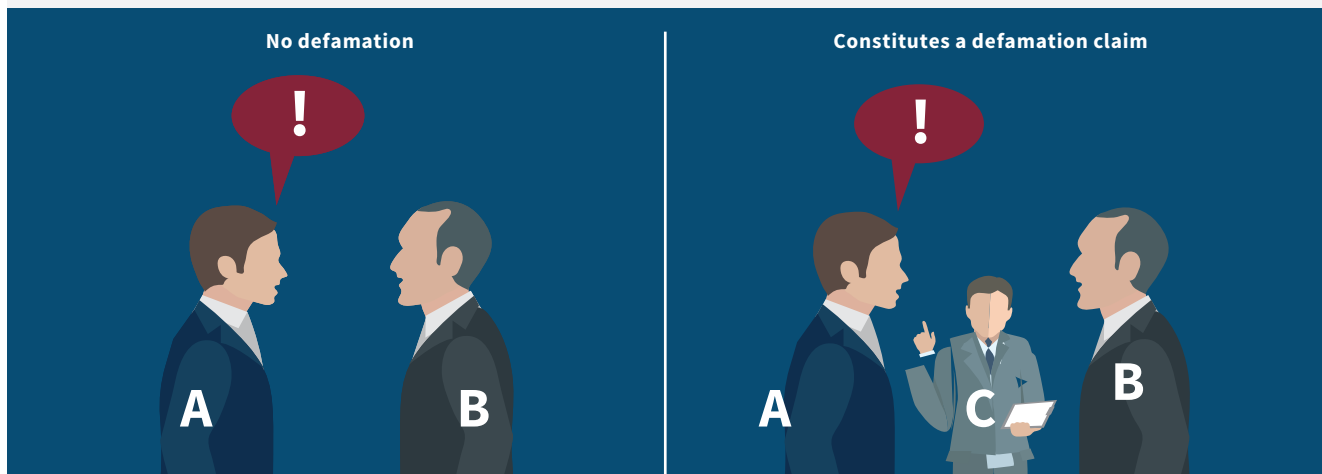
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# TWELVE TIPS ON HOW TO AVOID A DEFAMATION CLAIM

1. Generally speaking, written or spoken words will not be found to be defamatory if ordinary and reasonable members of the community would not interpret them to injure or have a tendency to injure another's personal, business, trade or professional reputation.
2. If words do not identify anyone, either directly or indirectly, then no cause of action is capable of arising as identification is an essential element of defamation.
3. Publication is the third essential element of defamation. If words are not published or communicated to a third party (i.e., one or more other persons), then no cause of action in defamation arises.

For example, if A utters disparaging words to B, then there is no defamation. However, if A utters those words to B in the presence of C, then that will constitute publication for the purposes of a claim for defamation.



4. Care must be taken to ensure that words which are intended to be either written or spoken do not contain any unintended, secondary meaning or innuendo that is defamatory.
5. Truth is a defence to an action for defamation but it should always be remembered that strict proof can often be difficult and sometimes costly. In this regard, it can be dangerous to rely on the hearsay evidence of someone else.
6. When publishing an honestly held opinion it is imperative that all of the facts upon which the opinion is based are also published, that there is a clear distinction made as between the expression of opinion and a statement of fact and, finally, that the opinion relates to a matter of public interest.
7. Never repeat or re-publish the defamatory words of another. It is no defence to an action for defamation to assert that the words were merely a repetition of statements or words uttered by someone else.
8. It is permitted by law to publish a fair and balanced report of defamatory words spoken or published in Parliament or in an Australian court or tribunal.
9. A company formed with a view to profit and employing 10 persons or more, no longer has a right of action in defamation, although, be aware that the rights of company directors and officers remain unchanged.
10. No cause of action lies in respect of defamatory statements made in respect of deceased persons.
11. In certain limited circumstances, the law excuses the publication of defamatory statements provided that it pertains to a matter of interest or apparent interest to the recipient, the conduct in publishing the matter is reasonable, and the publisher is not motivated by malice or other improper motive.
12. Finally if defamatory words are published inadvertently, or otherwise, the publication of a fulsome apology and correction at the earliest opportunity will generally help avoid the possibility of legal action.

# CONTEMPT

Contempt of court can essentially be divided into three separate categories, namely criminal contempt or as it is sometimes referred to, sub judge, civil contempt, and scandalising the court.

## WHAT IS SUB JUDICE CONTEMPT?

Essentially, sub judge contempt is the publication, during or pending a trial, of any material which interferes with, or has the tendency to interfere with, the administration of justice. The laws in this area have evolved in order to ensure, so far as possible, that individuals are afforded proper justice and, ultimately, a fair trial.

It is an offence to publish material which has or is likely to have an adverse effect upon proceedings before a court. It has application in all proceedings before the courts but it is mainly relevant in criminal proceedings particularly those more serious matters where the accused is tried before a jury.

The principles of sub judge contempt also apply in civil matters, however, the vast bulk of civil matters are heard by a judge alone and, accordingly, the rules in this regard are not applied as rigorously. In most civil litigation the

judge alone is the sole determiner of both fact and law. Unlike jurors, judges are by virtue of their legal knowledge and experience presumed not to be influenced by outside factors such as media reports. That is not to say that such material does not have the potential to affect those called or intended to be called as witnesses and it is for that reason that sub judge still has relevance in civil cases albeit to a lesser extent.

Sub judge considerations apply in relation to criminal proceedings from the moment that a warrant is issued for a person's arrest, or a person is charged with a criminal offence and, strictly speaking, continue until those charges are either dismissed or, in the case of a conviction, all rights of appeal have been exhausted or, in the absence of an appeal, the relevant appeal period has expired.

Contempt of court is a serious matter and a conviction can result in very substantial fines and, in serious cases, gaol. Clear instances of sub judge contempt include the following circumstances:

1. Reports in criminal proceedings incorporating reference as to a persons guilt or innocence;
2. Prior convictions of either the accused person or any witness;
3. An alleged confession prior to it be put into evidence in open court;
4. The motive of the accused;
5. The evidence intended to be given by either party upon the hearing of the matter;
6. The results of any independent investigations;
7. The identity of the accused;
8. Any legal argument which takes place in the absence of the jury;
9. Jury deliberations;
10. The identity of jurors;
11. Any information detrimental to the interests of the accused.

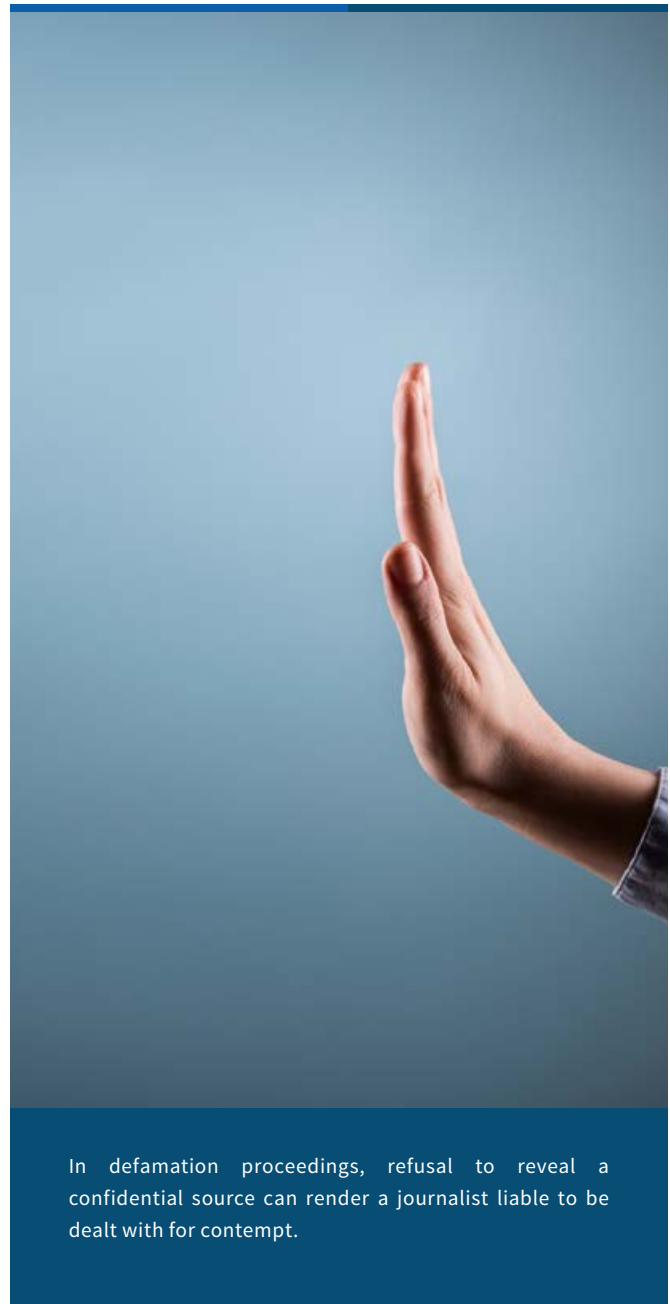
## CIVIL CONTEMPT

Disobedience of a court order or direction by a litigant in civil proceedings can render that party liable to court sanction. Failure to obey or comply with a court order, or failure to honour an express or implied undertaking, can amount to a civil contempt. Anything which undermines the court's authority is capable of constituting a contempt. In the case of civil contempt, however, the sanctions are generally of a remedial nature, albeit that wilful or repeated breaches can invoke the courts criminal powers in order to deal with the offending party.

## SCANDALISING THE COURT

The publication of anything which undermines or has the potential to undermine public confidence in the judicial system is also capable of amounting to a contempt of court. Whilst not all material which is critical of the judicial system is capable of amounting to a contempt, great care needs to be taken in publishing the same. The boundary between what is and what is not permissible can often be difficult to determine. For example, a publication containing material which is insulting of a particular judicial officer in the exercise of his/her particular role might amount to scurrilous abuse and potentially render the author of the same liable to prosecution.

Prosecutions of this nature are not uncommon. The Queensland decision of Attorney-General -v- Lovitt QC [2003] QSC 279 is one such example. During the course of proceedings before the Magistrates Court, barrister, Colin Lovitt QC, referred to the presiding Magistrate as "a cretin". Subsequently, the Attorney General brought Supreme Court contempt proceedings against Mr Lovitt and he was ultimately found guilty and fined \$10,000.00.



In defamation proceedings, refusal to reveal a confidential source can render a journalist liable to be dealt with for contempt.

**“ Failure to obey or comply with a court order, or failure to honour an express or implied undertaking, can amount to a civil contempt.”**

# COURT REPORTS

## CHILDREN

Special considerations apply in respect of reports in respect of children. The main areas of relevance are:-



Children's Court or any criminal proceedings involving children;



Adoption proceedings;



Wards of the State;



Family Court proceedings.

The laws in respect of children vary from State to State, however, essentially all jurisdictions adhere to the general philosophy or principle that, during their minority, children ought to be able to put the mistakes of their youth behind them. Accordingly, except with the express order of the court, it is an offence to name or otherwise identify, in any publication, a child who appears in any criminal proceedings or before a Children's Court either as a party to such proceedings or as a witness.

Whilst reports must not name a child in such circumstances, they similarly must not contain anything which identifies them such as reference to the names of relatives or guardians, residential addresses, schools and certainly not by the use of any photos.

In all States and Territories of Australia, it is an offence to publish the identity of a child, an applicant for adoption, or parent or guardian of a child that is the subject of an adoption.

In most States, the identity of a child who is in care or subject to a child protection order similarly must not be published. However, the same can be published in circumstances where a court or relevant child protection authority has been given express leave or authority to do so. In addition, such information can be published with the relevant individuals consent upon their reaching the age of majority.

**“In all States and Territories of Australia, it is an offence to publish the identity of a child, an applicant for adoption, or parent or guardian of a child that is the subject of an adoption.”**

## **FAMILY COURT PROCEEDINGS**

The Family Law Act 1975 prohibits the publication of any account of proceedings that identifies parties involved in, or associated with, proceedings before the Family Court. It is therefore not permissible to publish, without the courts leave the names, pseudonym or alias of, and person involved in, such proceedings, nor their residential or business address or occupation.

Similar provisions apply in respect of reports pertaining to proceedings involving de facto relationships. In Queensland for example, section 344 of the Property Law Act contains a similar restriction in respect of reports pertaining to such matters.

Contravention of the above legislative provisions can render the publisher liable to significant fines and/or imprisonment.

## **COMMUNICATIONS WITH PRISONERS**

Most States have legislation that governs communications with adult prison inmates and which make it an offence to publish those communications without appropriate authorisation from prison authorities. It is therefore imperative that appropriate written approval always be obtained before publication in such circumstances as criminal penalties apply for breaches of the relevant legislation.

## **JURORS**

It is an offence to publish the identity of jurors without the consent of a court and, after the conclusion of a trial, the juror's personal consent. Also it is illegal publish a jury's deliberations.

## **SEXUAL OFFENCES**

In Queensland, as in most jurisdictions, it is not permissible to publish either the name nor any other information which identifies the victim of a sexual offence. The provisions of the Queensland Criminal Law (Sexual Offences) Act 1978 prescribe that it is illegal to publish details of the name of a victim of an alleged sexual offence nor details of that person's address, occupation, school, or other information which might identify that person.

Similarly, it is prohibited to name a person accused of a sexual offence until that person has been committed to stand trial and then only if it does not identify or have the tendency to identify the victim of the alleged sexual offence.





The three major considerations in respect of privacy in so far as relates to publishing and broadcasting are:-



The Privacy Act 1988 (Cth);



The tort of invasion of privacy; and



The use of listening/visual recording devices

### PRIVACY ACT 1988 (CTH)

This Commonwealth legislation was introduced in 1988. It is a code for the protection of private information setting standards with respect to the collection, storage and use of such information. Pursuant to the legislation, governments and large sectors of the business community are compelled to comply with what are known as the 10 national privacy principles or 'NPP's'.

These NPP's regulate the use of personal information very broadly defined as information or an opinion of, or concerning, an individual whose identity is apparent

or can reasonably be ascertained. For example, information pertaining to an individual's health, religious or philosophical beliefs, sexual preference, criminal record, etc.

In reporting in respect of news and current affairs, the media is essentially able to claim exemption from the provisions of the Act. The media exemption applies for acts and practices of media organisations if carried out "in the course of journalism".



A “media organisation” is an organisation whose activities consist of or include collecting, preparing or disseminating to the public:-

1. “news, current affairs, information or documentaries; or
2. commentary or opinion or analysis of such material.



However, in order to take advantage of this exemption, it must be able to be shown by the media organisation concerned that there is an established policy to observe privacy policy standards. A media organisation may, for example, satisfy this requirement by being able to demonstrate that it belongs to an industry body that requires its members to observe a code of ethics which deals at least in part with privacy.

For instance, the guiding principles espoused by the Australian Press Council is that news readers are entitled to have news and comments presented to them honestly and fairly, and with respect for the privacy and sensibilities of individuals. A news print organisation would be able to satisfy the requirements of the

legislation by being able to establish that it adopted the above Press Council statement of principle.

Another example can be found under the Commercial Television Industry Code of Practice Australia which provides that “in broadcasting news and current affairs (television) licensees must not use material relating to a person’s personal or private affairs, or which invades an individual’s privacy, other than where there is identifiable public interest reasons for the material to be broadcast”. Although it is not beyond question adoption of these guiding principles arguably entitles broadcasters to claim exemption under the Act in reporting on news and current affairs.

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## THE TORT OF INVASION OF PRIVACY

Invasion of privacy was first recognized as a common law right of action in Australia as a consequence of the 2001 High Court decision of *Australian Broadcasting Corporation –v- Lenah Game Meats Pty Ltd* (2001) 208 CLR 199. Subsequently there have been surprisingly few decisions in relation to this area of law. However in the decision of *Grosse –v- Purvis*, District Court Judge Skoien found that in order to establish such a cause the plaintiff must be able to establish four essential elements namely:

1. a willed act by the defendant;
2. which intrudes upon the privacy or seclusion of the plaintiff;
3. in a manner that could be considered highly offensive to a reasonable person of ordinary sensibilities; and
4. which causes the plaintiff emotional or physical harm or distress or which prevents or hinders the plaintiff from doing an act which he or she is lawfully entitled to do.

# ABOUT BENNETT & PHILP

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Bennett & Philp is a leading provider of solutions-focused legal services to large corporates, small and medium enterprises and individuals.

Since our origins in 1984, Bennett & Philp has grown to meet the changing needs of both Australian and international clients. Our success has been largely achieved by our ability to develop and maintain close business relationships with our clients and deliver tailored solutions specific to their business needs.

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## MEET OUR DEFAMATION EXPERT



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Having acted for print and electronic media organisations for over 30 years, Mark Jones heads the firm's Defamation and Media Services practice.

Mark has particular skills in defamation, pre-publication/broadcast advice, injunction proceedings and general media law and has successfully represented clients in major litigation before the Supreme Court, Court of Appeal and High Court of Australia.

His experience also includes injunction proceedings, contempt actions and judicial review proceedings. He represents private individuals in prosecuting and defending defamation claims. From time to time he has been involved in some landmark decisions and in addition, has successfully resolved numerous defamation matters through mediation and other alternative dispute resolution processes. Mark's clients include various media outlets.

**Contact us today and talk to us about how we can assist you in your situation.**

