



# Legal issues bulletin

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## Defamation

The law of defamation is designed to protect people from publication of material that is detrimental to their reputation.

Changes in community standards means with the passage of time, what amounts to defamation may vary. In New South Wales, the law of defamation is largely determined by the Defamation Act 2005 (the Act).

### What is defamatory material?

While historically, defamation has been considered in terms of slanderous (oral) and libelous (written) material, the Act does not differentiate between the two. The essential features of defamatory material can be summarised as follows –

- The material must have been published in some way.
- A person's reputation is impugned to the extent that others will think less of them. This is assessed from the view of ordinary people of average intelligence.
- The intentions of the person publishing the material are immaterial.
- Some person or people must be identified. The identification can arise by use of the person's name, photograph, title, well-known nickname or any other description that will lead to identification. For example, the statement "A PE teacher at ABC school" will identify the teacher if there is only one PE teacher at the school.

Defamation can also apply to a group of people. While the statement "All teachers are bullies" is too wide and general to enable any teacher to take action for defamation, the statement "All the teachers at ABC school are bullies" could be considered sufficiently narrow to identify a specific teacher or teachers and therefore allow individual teachers to commence a defamation action.

### What is publication?

Publication is a communication by one person to at least one other person apart from the person defamed. A person cannot sue for defamation for something said to their face, as long as no one else heard it.

Material can be "published" in a variety of ways including by the spoken word, written material, photographs, transmission by electronic means such as facsimile or email, or inclusion of an item on a website or through an Internet chat room. For example, material can be published during an announcement made by a principal at a school assembly. When defamatory material is published it is said to have one more defamatory "imputations".

Publication will also occur if defamatory material is re-published by someone else. An example of this would be the printing in a school magazine of an article that has been written by a student.

Defamation can occur from a literal meaning of any words used as well as from inferences reasonably drawn from any statements made or what is already known by the reader or person hearing the defamatory material. For example –

- the statement “Mr X, the principal of ABC school, is a child molester” is defamatory;
- the statements “Mr X, a teacher at ABC school, was spoken to by police yesterday” and “Mr X tendered his resignation this morning” are, taken separately, not defamatory statements. When read together however, they could be said to infer Mr X had to resign as a result of being spoken to by the police.

Defamation can occur unintentionally as a result of ambiguous language or misplacement of words and pictures or other images.

## What defences are available to allegations of defamation?

There are a number of defences available under the Act. Those with most relevance to schools are –

### **Justification (or truth)**

It is a complete defence to an action for defamation if the material published is substantially true. Minor inaccuracies will not negate the defence. Any motive for publishing the material is not relevant if the imputations can be proven to be substantially true.

### **Contextual truth**

This defence is available if it can be shown that in addition to any defamatory imputations, there are one or more other imputations that are substantially true (contextual imputations) and that the defamatory imputations do not further harm the reputation of the person because of the substantial truth of the contextual imputations.

It is also necessary to prove any contextual imputations arise from the material published. For example, in relation to the statements “Mr X, a teacher at ABC school, was spoken to by police yesterday” and “Mr X tendered his resignation this morning”, the publisher would need to prove not only that each event occurred, but also that there was a direct connection between the two events, as is implied by the statements.

To establish something is in the “public interest”, it must be shown there was a legitimate public interest as opposed to being simply interesting gossip. Not everything that is of interest to the public is in the public interest.

### **Honest opinion**

This defence permits public debate about matters of public interest. This defence allows public criticism and debate about such areas as the arts, restaurants, governments and organisations that deal with the public.

For this defence to be successful, the statement must be an expression of opinion or comment as opposed to fact. The publication must indicate the facts upon which the opinion is based and the facts must be either proved true or be subject to some form of privilege (see below). The opinion must be the honest opinion of the person who makes the statement. The fact the comment is made for reasons of malice or spite will not of itself negate the availability of the defence.

### **Absolute privilege**

This applies to publication of material in a range of specified circumstances, including court proceedings (e.g. material filed in court which has been obtained by subpoena), the Parliament (e.g. debates, tabled documents) and by a variety of statutory bodies and officers including the Ombudsman, the Privacy Commissioner, the Anti-Discrimination Board, Administrative Decisions Tribunal and the Independent Commission Against Corruption. This defence is also available to any public official or public authority for disclosures made concerning corrupt conduct, maladministration or serious and substantial waste of public money provided the publication is made for the purpose of investigating the allegation.

### **Qualified Privilege**

This defence applies to the publication of material which, though defamatory, the law recognises as being necessary to ensure the common good of society. Qualified privilege will arise if the following can be established –

- the recipient of the information has an interest or apparent interest in having information on some subject
- the matter is published to the recipient in the course of giving information on that subject, and
- the publishing of the material is reasonable in the circumstances
- What is “reasonable” is wide and can include consideration of issues such as -
- action has been taken to ensure the accuracy of the information;
- the degree of public interest in the publication of the information

- the seriousness of any defamatory imputations which arise
- the nature of the business environment in which the person making the publication operates
- the extent to which the information published relates to the performance of the public functions or activities of the person

The defence will apply to such things as –

- publications to boards and tribunals not otherwise protected by absolute privilege;
- publications by a superior about a person's ability to perform work;
- school reports and job references;
- reports of court proceedings, the Parliament and local council meetings;
- volunteered information, such as the reporting of a crime.

A complaint made in good faith about a member of staff by a parent to a principal or other senior officer will generally be considered to attract qualified privilege even if the complaint is not found to be warranted. The defence will not be available if the publication of the material was for an improper purpose or was purely on the grounds of malice.

### **Specific statutory defences**

There are a range of statutory provisions which protect departmental staff who may be called upon to provide information in a variety of circumstances where the information may otherwise be considered defamatory. Examples include –

- information provided under section 22A (relating to the establishing the identity, age and whereabouts of children not attending school) and 26F (relating to the assessment of risk to students and other people arising from an application for the enrolment in a school) of the Education Act 1990.
- risk of significant harm reports made in good faith to Family and Community Services under the Children and Young Persons (Care and Protection) Act 1998.
- provision of information in good faith made under the Government Information (Public Access) Act 2009. This protection applies not only to the person who releases the information but also the author of the document released if the publication only occurs via its release under the GIPA process.

### **Consent**

If a person consents to material being published, the publisher will be able to rely on the defence of consent.

### **What is the practical effect of the law of defamation in the school setting?**

This question is best addressed by providing examples of common scenarios which have the potential to be considered as defamatory.

#### **Scenario 1**

A high school seeks articles from its students for publication in the annual school magazine. A student submits an article that makes certain negative allegations in respect of his or her parents. Staff responsible for vetting the material for inclusion in the magazine assume the article was fictional and allow it to be published.

#### **Scenario 2**

As part of Year 12 end of year activities, a high school permits the Year 12 students to put on a performance for students and staff in the school. During the course of the performance, two students engage in an impromptu skit that relates negatively to a teacher at the school. Staff at the school do not examine the contents of any of the planned skits prior to their performance.

#### **Scenario 3**

A high school seeks contributions from year 12 students to be included in the annual school magazine. The material provided by the students is light hearted in nature and includes one line comments on the students' reflections of their time at the school. A student makes a defamatory comment about a fellow student that is not detected during the editorial process established by the school staff.

## Scenario 4

A public school principal attends the annual general meeting of the school P&C at which a new P&C executive is elected. In welcoming the members of the new committee, the principal indicates his pleasure at the outcome of the election in light of the alleged attempt at vote-rigging prior to the meeting by a member of the old committee.

### What strategies can departmental staff implement to minimise the risk of defamation claims being made?

- Principals must take reasonable steps to ensure as far as possible that any material proposed to be published does not have the potential to be defamatory.
- Procedures should be established to ensure that a designated staff member or members scrutinise any documentation submitted for publication to ensure inappropriate comments are removed.
- Where performances are conducted on school sites by staff or students, relevant scripts should be submitted to and approved by the principal, or other designated staff member prior to the performance.
- If during a performance it becomes apparent that there is a departure from the approved script and that such departure may be defamatory, the performance should be stopped immediately and the principal, or designated staff member should take action they deem appropriate.
- If information is to be provided to parents, students or other people, caution should be exercised to ensure that defamatory material or comment is not included;
- Staff should at all times be circumspect in relation to any comments, written or oral, that may be made about members of the school community, including other staff, students and parents.

### Will staff be personally liable for defamatory comments made during the course of their employment?

The department, as an employer, is vicariously liable for the actions of its employees. Unless acting with serious and wilful misconduct, staff are not personally liable in respect of any claim made by any person alleging to have been defamed. The Employees Liability Act 1991 requires employers to indemnify staff in relation to their negligent acts or omissions. An employee's right to an indemnity does not apply if the negligent act or omission arises from the serious and wilful misconduct of the employee.

### Is the department liable if students make defamatory comments during the course of school activities?

In most instances the department does not accept any liability for defamatory comments that may be made by students during the course of school activities. It may however be liable if the defamatory comments arise in circumstances as outlined in scenarios 1, 2 & 4 previously referred to. It would be prudent for principals to remind students from time to time of the need to avoid making any comments that are defamatory in nature.

### What happens if departmental staff claim they have been defamed by other people?

Sometimes school staff will be subject to comments by other people which may be defamatory. Where comments are made by another staff member the situation is best dealt with by reference to the department's dispute resolution procedures as outlined in the [Complaints Handling Policy](#). In some cases disciplinary action may need to be considered.

Where the comment is made by a student or member of the public, generally the simplest way to deal with it is to approach the person directly and ask him or her to make a clarification or apology. In relation to students, depending on the circumstances, action under the relevant school student discipline procedures may also be appropriate.

In relation to school discipline codes, principals should consider whether it is appropriate to include provisions for the making of suitable apologies by students in circumstances where they have been found to have made defamatory comments about other students, staff or members of the school community.

### What about defamatory websites and social media sites?

Sometimes defamatory material is published on non-departmental websites or on social media sites such as Facebook. The department is unable to take any action to shut down such websites – any decision regarding the shutting down of a non-departmental website is at the discretion of the site host. If principals believe a non-departmental website contains defamatory material relating to a school, they should contact the relevant site host to discuss what action can be taken to shut the site down.

If principals are unable to identify the host site, the following procedure should be followed –

- Determine the site address of the offending site – e.g. [www.xyz.org.au](http://www.xyz.org.au)
- Go to the “whois server” address at <https://www.whois.com.au/whois/whois-resources.html>
- Enter the details of the offending site to determine who owns the site and how to contact them.

If after following this procedure, principals are unable to determine the host site, assistance can be sought from the department’s IT directorate HelpServices at <https://education.nsw.gov.au/technology/getting-help>

Principals can also contact HelpServices to have school access to any website suspended.

If the material is on a social media site and the identity of the author is known, that person should be contacted and asked to remove the posting. If the person refuses to remove the defamatory posting, contact should be made with the site host to discuss what further action can be taken.

### Can I obtain legal assistance to pursue legal proceedings if I am defamed?

It should be noted that in accordance with long standing government policy, the department is unable to provide any legal assistance, beyond preliminary advice, in respect of any defamation proceedings that may be commenced by staff. Staff have the legal right to take legal action individually in relation to defamatory material or comments. However sometimes non-legal solutions, such as a direct discussion with the publisher, can be more effective in addressing an issue than litigation. The degree of damage to reputation can sometimes be enlarged by the public nature of an action for defamation. Principals should contact Legal Services if assistance is needed in circumstances where allegations of defamation arise

## About Legal Services

Legal Services is here to support our government schools. **Staff can contact Legal Services by email or phone.**

Legal Services can only provide legal advice to departmental staff. It is not able to provide legal advice or assistance to parents, students or members of the public due to the potential for a conflict of interest.