



PII Session

CLCQ Leadership Forum

5 November 2024

Responsible Person duties - Defamation

Acknowledgment

- **We acknowledge and pay our respects to the Traditional Owners of the lands and waters across Australia on which we all live and work.**
- **We pay our deep respects to Elders, past and present for their ongoing leadership and advocacy.**
- **We also acknowledge and pay our respects to all Aboriginal and/or Torres Strait Islander people joining us today.**

Introduction



Brief updates from the PII reps

- ▶ Cross check
- ▶ RMG publication

Mandatory Standard 2- Responsible Person

Element 2.3 A Responsible Person must be responsible overall at a Centre for the Mandatory Standards of the RMG *ESSENTIAL REQUIREMENTS for 2.3*

- a. The role/responsibilities of the Responsible Person/s include but are not limited to:
 - 1. Taking overall responsibility for the Centre's legal practice, including ensuring that any non-legal services/projects/programs provided by the Centre comply with the Mandatory Standards contained in the RMG.
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 - 3. Ensuring policies and procedures at the Centre are consistent with the RMG and give effect to the Mandatory Standards contained in the RMG.

Element 2.4 A Responsible Person must ensure that all Centre Staff and Centre Workers comply with the RMG *ESSENTIAL REQUIREMENTS for 2.4*

- a. The responsibility for the day-to-day implementation of the RMG must rest with the Responsible Person/s.
- a. The Responsible Person/s is responsible for ensuring that all Centre Staff and Centre Workers comply with the RMG.
- a. A Responsible Person must ensure that all Centre Staff and Centre Workers receive adequate training on the RMG during induction to the Centre.

Element 2.5 A Centre must provide the Responsible Person with adequate support, training and sufficient resources to ensure compliance with the RMG at the Centre *ESSENTIAL REQUIREMENTS for 2.5*

- a. A Centre must ensure that the Responsible Person has adequate support, training and resources to ensure compliance with the RMG at the Centre. This includes ensuring the Responsible Person has the capacity to undertake the following:
 - 1. to ensure compliance at the Centre with all legal profession laws in the jurisdiction/s in which law is practised.

Mandatory Standard 18 - Community Legal Education & Community Education

Explanatory Note:

Centres should ensure that they are familiar with what amounts to 'publication' legally in terms of defamation claims and other legal contexts.

Element 18.1 The Responsible Person must review Community Legal Education and Community Education materials produced or published by a Centre itself (including Auspiced Services and Specialist Services or Projects) both hard copy and electronic

ESSENTIAL REQUIREMENTS for 18.1

- a. A Responsible Person must review CLE and CE materials published or produced (both hard copy and electronic publications) by the Centre itself (including Auspiced Services and Specialist Services or Projects) and ensure that the materials are:
 1. Dated.
 2. Current.
 3. Legally accurate.
 4. Not defamatory.
 5. Not exposing the Centre to any other legal risks.
 6. Containing a disclaimer with words to the effect that:

The information provided is general information and is not legal advice.
- b. A Centre must have a documented policy and procedure for the review of CLE and CE materials by the Responsible Person.
- c. A Centre must ensure that the documented policy and procedure in relation to the review of CLE and CE by the Responsible Person is accessible by Centre Staff and Centre Workers.
- d. A Centre must ensure that the documented policy and procedure in relation to the review of CLE and CE materials by the Responsible Person is included in the training for the induction to the Centre for relevant Centre Staff and Centre Workers.

Mandatory Standard 18 - Community Legal Education & Community Education (continued)

GUIDANCE ON 18.1

It is also prudent for the Responsible Person to review any CLE and CE materials from another organisation that are distributed by the Centre and ensure that the materials are current, from a reputable source and not defamatory.

Element 18.2 A Centre must ensure those providing Community Legal Education do not provide legal advice during a session or presentation

ESSENTIAL REQUIREMENTS for 18.2

- a. A Responsible Person must ensure that those presenting the CLE have been briefed about not providing legal advice to any participants during a session or presentation.

GUIDANCE ON 18.2

Centres should consider including a disclaimer during any session or presentation noting that legal advice is not being given during the presentation.

Mandatory Standard 19 – Law Reform

Explanatory Note:

Centres should be familiar with what amounts to ‘publication’ legally in terms of defamation claims and other legal contexts.

Element 19.1 A Centre must ensure that the Responsible Person reviews Law Reform materials submitted, published or produced by a Centre (including Auspiced Services or Specialist Services or Projects) and any material from another organisation endorsed by the Centre

ESSENTIAL REQUIREMENTS for 19.1

- a. A Responsible Person must review Law Reform materials submitted, produced and published by a Centre or any material from another organisation endorsed by the Centre and ensure that the materials are:
 - a. Legally accurate.
 - b. Current.
 - c. Not defamatory.
 - d. Not exposing the Centre to any other legal risks.
- b. A Centre must ensure that there is a documented policy which sets out the process for review of Law Reform materials by the Responsible Person.
- c. A Centre must ensure the documented policy which sets out the process for review of Law Reform materials by the Responsible Person is accessible to all Centre Staff and Centre Workers.
- d. A Centre must ensure that the documented policy which sets out the process for review of Law Reform materials by the Responsible Person is part of the training included in the induction for all relevant Centre Staff and Centre Workers.
- e. A Centre must ensure adherence to the documented policy which sets out the process for review of Law Reform materials by the Responsible Person.

Mandatory Standard 20- Media, Social Media & Communications

Explanatory Note:

Centres should be familiar with and understand what legally constitutes 'Publication' in terms of defamation claims and in other legal contexts.

Centres should be mindful of all Social Media accounts that they operate or maintain and how the elements of this Mandatory Standard apply to them.

Element 20.1 A Centre must ensure that the Responsible Person reviews media and communications materials published and/or produced by a Centre (including Auspiced Services or Specialist Services or Projects) and any other media and communications materials from another organisation endorsed by the Centre that include legal information or content

ESSENTIAL REQUIREMENTS for 20.1

- A Responsible Person must review media and communications materials published and/or produced by a Centre (including Auspiced Services or Specialist Services or Projects) and any other media and communications materials from another organisation distributed by the Centre, to ensure that the materials are:
 - a. Legally accurate.
 - b. Current.
 - c. Not defamatory.
 - d. Not in breach of any of laws or legal duties owed.
 - e. Not exposing the Centre to any other legal risks.
- A Centre must ensure that there is a documented policy which sets out the process for review of media and communications materials by the Responsible Person.
- A Centre must ensure the documented policy which sets out the process for review of media and communications materials by the Responsible Person is accessible to all Centre Staff and Centre Workers.
- A Centre must ensure that the documented policy which sets out the process for review of media and communications materials by the Responsible Person is part of the training included in the induction for all Centre Staff and Centre Workers.
- A Centre must ensure adherence to the documented policy which sets out the process for review of media and communications materials by the Responsible Person.

GUIDANCE on 20.1

In some instances, it will be obvious that a social media post contains legal content and so will require the approval of the Responsible Person. In other circumstances it may not be so clear and Centres should exercise caution where there is uncertainty.

Mandatory Standard 20- Media, Social Media & Communications

Element 20.2 A Centre must ensure that the Responsible Person is satisfied that any Centre Staff or Centre Workers who speak/interact with the media by making comments or speaking in public possess the requisite qualifications, skills and experience to do so and are aware of the risks of defamation, breaches of client confidentiality and contempt

ESSENTIAL REQUIREMENTS for 20.2

- a. A Responsible Person must be satisfied that Centre Staff or Centre Workers who speak/interact with the media possess:
 - 1. The requisite qualifications, skills and experience.
 - 2. Are aware of the risks of defamation.
 - 3. Are aware of risks to breaches of Client confidentiality.
 - 4. Are aware of any risk of contempt of court.
 - 5. Will not breach any duties owed by the Centre and not expose the Centre to any other legal risks.

Element 20.3 A Centre must ensure that the Responsible Person is satisfied that any Centre Staff or Centre Workers who manage, maintain or update any social media accounts possess the requisite training, skills and experience to do so and are aware of the risks of defamation, breaches of client confidentiality and contempt

ESSENTIAL REQUIREMENTS for 20.3

- a. A Responsible Person must be satisfied that Centre Staff or Centre Workers who manage, maintain or update any social media accounts possess:
 - 1. The requisite training, skills and experience.
 - 2. Are aware of the risks of defamation.
 - 3. Are aware of risks to breaches of Client confidentiality.
 - 4. Are aware of any risk of contempt of court.

Will not breach any duties owed by the Centre and not expose the Centre to any other legal risks.

Overview

Responsible Persons must ensure that*:

- any published Community Legal Education (CLE) materials are not defamatory;
- any third party CLE materials distributed are not defamatory;
- when presenting CLE, the presenters do not say anything that is defamatory;
- law reform materials submitted, produced and published by a centre, or from another organisation that are endorsed by the centre are not defamatory;
- they are familiar with and understand what constitutes “publication” in terms of defamation and other legal concepts;
- media and communication materials produced or published by the centre, including materials from another organisation that are distributed by the centre are not defamatory;
- staff or workers that interact with the media are aware of the risks of defamation; and
- staff or workers that manage, maintain or update any social media are aware of the risks of defamation.

*Note: The information in this powerpoint is based on the draft Risk Management Guide and is subject to change.

DEFAMATION

- Elements of defamation - focus on publication
- Brief overview of defences

ELEMENTS OF DEFAMTION - COMMON LAW

Three elements of the common law cause of action:

1. Publication
2. Identification
3. Defamatory meaning

ELEMENTS OF DEFAMATION – DEFAMATION ACT 2005

Section 6(2):

This Act does not affect the operation of the general law in relation to the tort of defamation except to the extent that this Act provides otherwise (whether expressly or by necessary implication).

Section 10A:

10A Serious harm element of cause of action for defamation

- (1) It is an element (the serious harm element) of a cause of action for defamation that the publication of defamatory matter about a person has caused, or is likely to cause, serious harm to the reputation of the person.*
- (2) For the purposes of subsection (1), harm to the reputation of an excluded corporation is not serious harm unless it has caused, or is likely to cause, the corporation serious financial loss.*

ELEMENTS OF DEFAMATION - PUBLICATION

Communication of matter defamatory of the plaintiff to some person other than the plaintiff.

Any means of communication:

- Orally
- In writing
- In picture
- By conduct

Recipient must comprehend the communication – by reading, hearing or seeing.

REPUBLICATION: Both the person who republishes and the original publisher can be liable in certain circumstances for the republication.

ELEMENTS OF DEFAMATION – PUBLICATION

What is “defamatory matter”?

Defamation Act, Schedule 5 definition:

matter includes—

- (a) an article, report, advertisement or other thing communicated by means of a newspaper, magazine or other periodical; and*
- (b) a program, report, advertisement or other thing communicated by means of television, radio, the Internet or any other form of electronic communication; and*
- (c) a letter, note or other writing; and*
- (d) a picture, gesture or oral utterance; and*
- (e) any other thing by means of which something may be communicated to a person*

ELEMENTS OF DEFAMATION – PUBLICATION

The date of the publication is the date it is comprehended by the audience (*Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 at [44]).

Internet publications continue to be published every time a new reader comprehends the material, subject to the operation of the single publication rule in section 10AB of the *Limitation of Actions Act 1974*.

Search engine and social media publications:

- *Google LLC v George Defteros* (2022) HCA 27 (Google held not to be a publisher)
- *Fairfax Media Publications v Voller* (2021) HCA 27 (the acts of the Facebook page administrators “in facilitating, encouraging and thereby assisting the posting of comments by the third-party Facebook users rendered them publishers of those comments”)

Publication by employee gives rise to issues of vicarious liability of employer (where the publication is in the course of employment and subject matter is work-related).

ELEMENTS OF DEFAMATION - IDENTIFICATION OF THE PLAINTIFF

1. Defamatory matter must be “of and concerning” the plaintiff.
2. The law applies the understanding or comprehension of an *ordinary reasonable person* or *ordinary reasonable recipient* of the publication:
 - a. Prone to a certain amount of loose thinking;
 - b. Ordinary reasonable readers are fair minded and would not read the matter with a morbid or suspicious mind;
 - c. General knowledge or experience of worldly affairs.
3. **Ask: what is the general impression given by the publication?**
4. The intention of the publisher is irrelevant.

ELEMENTS OF DEFAMATION – DEFAMATORY MEANING

1. **Ask: Does the publication convey a meaning which would tend to cause ordinary reasonable people to think less of the person identified?**
2. This is an objective question, which references the natural and ordinary meaning of the publication and a fair-minded, ordinary reasonable person in the community.
3. Ordinary reasonable persons:
 - a. May vary widely in temperament, life experiences, character, education;
 - b. Are persons of average intelligence;
 - c. Approach the interpretation in a fair and objective manner;
 - d. Are not unduly suspicious nor avid for scandal;
 - e. Form a general impression from the meaning of the words used.

ELEMENTS OF DEFAMATION – SERIOUS HARM

Serious harm to reputation must be established by the plaintiff.

Defamation Act 2005, section 10A:

- (1) It is an element (the serious harm element) of a cause of action for defamation that the publication of defamatory matter about a person has caused, or is likely to cause, serious harm to the reputation of the person.*
- (2) For the purposes of subsection (1), harm to the reputation of an excluded corporation is not serious harm unless it has caused, or is likely to cause, the corporation serious financial loss.*

Case law:

- *Lachaux v Independent Print* [2019] UKSC 27
- *Rader v Haines* [2022] NSWCA 198
- *Zimmerman v Perkiss* [2022] NSWDC 448
- *Martin v Najem* [2022] NSWDC 479
- *Peros v Nationwide News Pty Ltd & Ors (No 3)* [2024] QSC 192

DEFENCES

1. Truth / justification (section 25)
2. Qualified privilege (section 30)
3. Absolute privilege (section 27)
4. Innocent dissemination (section 32)