

UNION MEDIA - DEFAMATION CODE OF PRACTICE

INTRODUCTION

1. The publication of defamatory material in any format including Internet notice boards or websites could place the ICU at risk of substantial legal proceedings. The College does not wish to interfere with the freedom of expression enjoyed by ICU and its publications. However, it does require some safeguards to be in place to enable a speedy response to an allegation that defamatory material has been published. In setting out this procedure the College looks to balance freedom of expression within the law against the substantial liability which can be occasioned by suits for defamation.
2. This Code of Practice is intended as broad guidance which attempts to summarise briefly the law of defamation. However, clearly individual cases are uniquely specific. The law is complex and subject to change by statute or the courts. Accordingly, this Code of Practice should not preclude the seeking of specific legal advice on particular cases, as appropriate.
3. This procedure shall only be used in relation to potentially defamatory statements in the Union Media and for no other purpose.

WHAT IS DEFAMATION?

4. Defamation can be defined as "the publication of a statement which tends to lower a person in the estimation of right-thinking members of society generally." The "statement" can be words, visual images or some other method of signifying meaning. Defamation may take two forms, libel and slander. Libel involves (amongst other things) writing or printing a defamatory statement. Slander is speech or gestures of a defamatory nature.

WHAT ARE THE DEFENCES TO A CLAIM OF DEFAMATION?

5. **Truth.** This will only apply if there is evidence that will stand up in a court of law that can prove that the imputation conveyed by the statement complained of is substantially true. In other words, the defendant does not need to prove that every word published was true, but that the essential substance of the statement (often referred to as the defamatory "sting") is true. If a statement conveys two or more distinct imputations and a defendant is not able to prove that all of those imputations are true, the defence of truth can still succeed if "having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously harm the claimant's reputation". The burden in law is upon the publication to prove truth. Simply putting 'allegedly' at the start of a statement does not necessarily stop it from being defamatory. It must also be noted that simply repeating a defamatory statement that has already been published elsewhere is considered to be a separate act of defamation in itself and is further actionable in the courts.

6. **Honest Opinion (previously known as fair comment).** This defence is potentially available if three conditions are met:

- the statement complained of was a statement of opinion (as opposed to a statement of fact for which other defences should be looked at);
- the statement indicated the basis of the opinion (whether in general or specific terms);
- an honest person could have held the opinion on the basis of: (i) any fact that existed at the time the statement complained of was published; or (ii) anything asserted to be a fact in a privileged statement published before the statement complained of.

Even if these three conditions are met, the defence will be defeated if the claimant shows that the defendant did not actually hold the opinion. This is the statutory incarnation of the common law rule that a defence of fair comment is defeated by malice (explained in paragraph 13 below), the rationale being that opinions will not be protected if not truly held.

7. **Publication on a Matter of Public Interest.** It is a defence to an action for defamation where the defendant can show both of the following:

- that the statement complained of was, or formed part of, a statement on a matter of public interest;
- that the defendant reasonably believed that publishing the statement complained of was in the public interest.

The application of the defence will in some cases be likely to depend on a balancing of right to freedom of expression against the claimant's right of reputation.

The defence has two components: public interest and reasonable belief.

In deciding what may be in the public interest, the courts have rejected the concepts of "newsworthiness" as too wide and "what the public need to know" as too restrictive. Matters that are of a purely personal or private nature are unlikely to be considered matters of public interest. The authorities make allowance for editorial judgment in deciding whether a story contains material that is in the public interest. If the publication as a whole concerns a matter of public interest, it will not usually be necessary to consider whether a separate public interest justification exists for each item of information it contains. The more serious an allegation is, the more compelling the need will be to satisfy the public interest test.

In determining whether the defendant reasonably believed that publishing the statement was in the public interest, the court must have regard to all the circumstances of the case and must make such allowance for editorial judgment as it considers appropriate. The assessment of reasonable belief will involve not just an assessment of the publisher's state of mind. It will also involve an objective assessment of the reasonableness of the publisher's belief. When deciding whether a statement was "responsibly published" - relevant factors include the following:

- attempts taken to verify the truth of what is being published
- the nature and status of the sources of the information
- the extent to which the claimant was given an opportunity to respond to or comment on the allegations.

Within this defence category there is also the defence of what was formerly commonly referred to as a reportage defence, that is, a neutral account of a dispute to which the claimant is a party. In such a case, the defendant is relieved of their normal obligation to take reasonable steps to verify the truth of the allegations being reported, the rationale being that a person who is doing no more than providing an impartial account of a dispute should not have to investigate the merits of the dispute before reporting neutrally on it. It is of course essential to preserve impartiality in such cases and not to adopt one or other party's side in the dispute.

8. Privilege.

There are times when complete freedom of speech, without any risk of defamation action, is in the public interest. Privilege can be "absolute" or "qualified".

- a. Absolutely privileged statements include statements in Parliament, Parliamentary reports, statements made in UK judicial proceedings, fair and accurate contemporaneous reports of judicial proceedings in the United Kingdom and UN tribunals and communications by ministers of other officers of state in the court or official duty.
- b. Qualified privilege may be one of two types – statutory qualified privilege and common law qualified privilege.

Statutory qualified privilege covers the publication of any report or other statement mentioned in Schedule 1 to the Defamation Act 1996 unless the publication is shown to be made with malice (explained in paragraph 13 below). Schedule 1 to the Defamation Act 1996 includes: reports of proceedings in public of a legislature or court anywhere in the world, reports of a government-appointed public inquiry anywhere in the world, reports of the proceedings of any international organisation, a copy, extract or summary of a notice issued by a government or authority performing "governmental functions", which includes the police, local authorities and councils, reports of proceedings of certain public meetings, reports of proceedings at a general meeting of a listed company.

For statutory qualified privilege to apply the published report must be: fair and accurate (but not contemporaneous, as opposed to reports of judicial proceedings that are protected by absolute privilege), published without malice, a matter of public interest, the publication of which is for the public benefit.

Furthermore, in the case of those statements which fall under Part II of Schedule 1 of the Defamation Act 1996, a defendant must publish a reasonable letter or statement by way of explanation or contradiction if required to do so by anyone defamed in the report if it is to retain the protection of the defence.

Common law qualified privilege covers numerous occasions of defamatory publication. As a general rule, the defence of common law qualified privilege requires a reciprocal relationship of duty and interest between publisher and publishee. For

example, if an employer writes an employment reference about an employee, the employer has a duty to provide the reference and the party receiving the reference has a corresponding interest in receiving it. Equally, it is well established that a complaint to the police made by a member of the public about the commission of a crime is similarly protected.

Communications made where there are common and reciprocal interests at play (without any identifiable "duty") can also give rise to common law qualified privilege. For example, where a person has been criticised or had their character attacked or has received some sort of communication making demands of them, that person is entitled to defend themselves by responding and their reply will be privileged provided that any statements are made in good faith and are relevant to the matter in hand.

The principal features of the defence are both of the following:

- that the communication has been made in circumstances where the person who makes a communication has an interest or duty (legal, social or moral) to make it to the person to whom it is made, and that person has a corresponding interest or duty to receive it;
- that there is no evidence of actual malice. A defendant will be held to be malicious if they do not use the occasion said to be privileged in order to fulfil the relevant duty or serve the relevant interest;
- in relation to malice, the fact that false claims are made will not necessarily be evidence of malice.

9. **Peer-reviewed statements in scientific or academic journals.** The Defamation Act 2013 provides qualified privilege for peer-reviewed statements published in scientific or academic journals (both in print and online). The term "scientific" includes medical and engineering journals. To rely on this defence, a defendant must show that the statement complained of relates to a scientific or academic matter and that, before the statement was published, an independent review of the statement's scientific or academic merit was carried out by the editor of the journal and one or more persons with expertise in the scientific or academic matter concerned (the peer review). Privilege can also attach to the publication of such assessments. Newspaper or other reports summarising or containing extracts from the statement complained of would also consequently be privileged. However, if a claimant establishes that the defendant acted with malice (explained in paragraph 13 below), the defence will be defeated.

Note that the scope of this defence is restricted and is not a general protection for academic speech.

10. **Accepted offer of Amends.** The person or body defamed has accepted an apology or offer of amends. An offer of amends must be in writing and may be made in relation to the statement generally, or may be a qualified offer relating to a specific defamatory meaning

which the defendant accepts.

11. **Consent**. The person defamed consented clearly and unequivocally to the publication of the defamatory statement.

12. **“Intermediary” defences**. There are a number of potential defences for intermediaries including for example:

- an “innocent disseminator” defence under section 1 of the Defamation Act 1996 – a person has a defence to an action for defamation if he shows that (i) they were not the author, editor or publisher of the statement complained of, (ii) they took reasonable care in relation to its publication and (iii) they did not know, and had no reason to believe, that what they were doing caused or contributed to the publication of a defamatory statement;
- a further defence for secondary publishers (i.e. those who are not the author, editor or publisher of the statement complained of) under section 10 of the Defamation Act 2013 - section 10 provides that the court does not have jurisdiction to hear and determine an action for defamation brought against such a person "unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher";
- defences under the E-Commerce Regulations 2002 - they provide certain defences to a range of actions against "information society services" (ISS) which can be used to defend defamation proceedings;
- operators of websites - a new defence for operators of websites in defamation proceedings where the operator itself has not posted the statement complained of is contained in section 5 of the Defamation Act 2013.

13. **Malice**. For the defences of honest opinion, qualified privilege and peer-reviewed statements in scientific or academic journals to succeed, it is essential that the statement be made without malice. Malice means any dishonest or improper motive. If a person has made a comment based on facts they knew to be untrue, or commented upon facts recklessly without caring whether they were true or not, or made a comment about someone simply to discredit them, then this would constitute malice, and they would not be able to claim “honest opinion”, “qualified privilege” or “peer-reviewed statements in scientific or academic journals” as their defence.

PROCEDURE

14. If, in the opinion of the College Secretary or, in his absence, another member of the College’s President Executive Group, defamatory material has been published in any form in the ICU managed student media, the ICU President shall be contacted and will authorise and arrange for the removal of the offending material immediately pending further investigation. In the event of the ICU President being unavailable, any Deputy President may arrange for the removal of the offending material from distribution.

15. Where a complaint is directed in the first instance to the ICU President, they will notify the College Secretary, or in the College Secretary’s absence, another member of the College’s President Executive Group immediately for further advice.

16. Where there is a dispute over the existence of defamatory material (for example, where the author or editor of the publication in question believes that the material is not defamatory due to the existence of a defence), the material in question shall be removed for the protection of the College and ICU while the College Secretary consults an arbitrator for guidance.

17. The arbitrator will normally be the College's Vice-Provost (Education) or their nominee, and shall act independently. If the arbitrator is under a conflict of interest the Provost shall appoint another independent arbitrator. The arbitrator must provide the College Secretary, the editor and ICU President with an opportunity for comment prior to making any decision.

18. The arbitrator shall come to a decision within 7 days of the complaint, or within 14 days with the approval of the Provost. Should the arbitrator feel that legal advice is necessary, the opinion of the College's Solicitors shall be sought. The arbitrator's decision shall be final and shall be divulged in full with reasons to all relevant parties.

19. If the arbitrator finds defamatory material to have been published, the publication shall be withdrawn and may only be re-issued with the defamatory material withdrawn or redacted. If the arbitrator finds there to have been no published defamatory material, then the ICU may request that the College consider what measures, if any, are appropriate to remedy any financial loss suffered by the ICU publication affected.

20. Any members of the College who are found to have deliberately published defamatory material will be dealt with under the relevant College or Union disciplinary procedures.

21. The Governance Committee is responsible under the Constitution as an independent part of the Union responsible among other things for dealing with complaints about Union publications, in a role equivalent to that of the Independent Press Standards Organisation, such complaints possibly including defamatory material (though material need not be defamatory to breach the IPSO Code). However, given the potentially swift dissemination of Union publications and potential liability of the College, this procedure shall be established in addition to any rights and remedies available in Governance Committee.

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