

Human Rights Defenders' Fact Sheet

Dealing with Defamation Allegations

Disclaimer

This document is solely the property of Peace Brigades International. It does not necessarily reflect the views of Peace Brigades International but has been published in order to inform debate and discussion of this important issue. It is the culmination of work by Peace Brigades International and Simmons & Simmons LLP. Lawyers at Simmons & Simmons LLP undertook the legal research covered in the report on a pro bono basis which includes the analysis of the law in England and Wales.

This document does not constitute legal advice nor does the report represent the views of Simmons & Simmons LLP. For a definitive view as to the laws and application of those laws in other jurisdictions, advice must be sought from counsel in that jurisdiction. This Fact Sheet was produced in January 2021 and reflects the law at that point.

1. **Introduction**

- 1.1 It is important to be aware that some things said or written – even unintentionally – can result in you being sued for defamation.
- 1.2 Whilst Article 17 of the UN International Covenant on Civil and Political Rights grants everyone the ‘*right to the protection of the law against... interferences or attacks*’ amounting to ‘*unlawful attacks on his honour or reputation*’, the relevant legal framework that governs allegations of defamation against human rights defenders (“HRDs”) is determined by local law in the relevant jurisdiction.
- 1.3 This fact sheet provides a brief overview of the law in England and assumes that the contentious statement has been made or published in England.
- 1.4 To the extent that the English courts do not have jurisdiction over the contentious statement, a different legal framework will apply.¹ However, the practical guidance on limiting the risks and dealing with a threatened claim (see paragraphs 3 and 4 below) are likely to be generally applicable.

2. **Defamation: An Overview**

2.1 **Nature and sources of law**

- 2.2 Defamation is concerned with damage to a person's reputation. It covers both libel and slander – the former being the publication of material in lasting form (such as print), and the latter concerned with transient statements (such as words or gestures).
- 2.3 The law in England is based on both common law and statute (principally the Defamation Acts 1996 and 2013, although the Human Rights Act 1998 is also relevant).

2.4 **Jurisdiction**

- 2.5 Only the person who has allegedly been defamed can bring a claim against the defendant HRD; a claim cannot be assigned or brought on someone else's behalf.
- 2.6 The English court will accept jurisdiction to hear a claim in a number of instances. However, if the defendant HRD is not domiciled (i.e. lives/ is based) in an EU member state, Switzerland, Norway or Iceland the court will not accept jurisdiction unless it is satisfied that, of all the places in which the statement complained of has been published, England and

¹ We understand that the bulk of HRDs are based in South America. We are not able to advise on the local law position in any of the relevant South America jurisdictions. However an initial high level primer on criminal defamation law in each South American jurisdiction has been published by the Committee to Protect Journalists and is available at <https://cpj.org/reports/2016/03/south-america.php>.

Wales is clearly the most appropriate place to bring an action in respect of the statement. Where a statement has been published in the UK and also abroad, the court is required to consider the overall global picture in determining where it would be most appropriate for a claim to be heard. Where the claimant is domiciled is likely to be a relevant factor for the purposes of this assessment.

2.7 The cause of action

While there is no single, agreed definition of what constitutes a “defamatory” statement, a common description is that the statement “*tends to lower the claimant in the estimation of right-thinking members of society generally*”.

However, for a statement actually to be defamatory, a number of important elements must be present (and proved by the claimant):

- (A) The claimant must establish that the words complained of were published to a third party by the defendant.
- (B) The claimant must be identified in the publication (or objectively identifiable if not explicitly named).
- (C) In the case of a company, it must be shown that the words complained of have caused, or are likely to cause, serious financial loss (the so-called “serious harm” threshold).

In circumstances where the meaning and context of a publication are not of a nature that serious harm might be inferred, it will be necessary for the claimant to establish that serious harm has been, or is likely to be, caused. The meaning of the words in question are of critical importance in determining whether the claimant’s reputation has been damaged. Generally, words have their natural and ordinary meaning – being the meaning that the words would convey to the ordinary reasonable reader who reads the entire article or publication once.

2.8 Defences

Assuming the court determines that the statement in question is defamatory (with reference to all the elements considered above), the burden of proof then switches to the defendant to prove a defence which exonerates their making the statement in question.

Key defences include (but are not limited to):

- (A) **Truth** – the defendant must prove that the defamatory statement is substantially true. The defendant does not need to prove that *every* word published was true, only that the *essential substance* of the statement is true. This is closely linked to the meaning of the words in question.

If a statement contains several different allegations, the defence of truth will still succeed even if a number of those allegations are proven to be false – providing that those false allegations do not seriously harm the claimant's reputation. Equally, the defence will fail if the defendant cannot prove the truth of all its statements and the unproven accusations do cause harm over and above the true statements.

- (B) **Honest opinion** – the defendant must establish that the defamatory statement was a statement of opinion that an honest person could hold, knowing the facts as they existed at the time. The defence can be defeated if the statement was made maliciously (but note: the fact that the allegations may be false is not necessarily an indication of malice).

The defence is not available if the defamatory statement makes allegations of fact, which have to be defended by the defences of truth or privilege. Whether words are fact or opinion is typically difficult to establish.

- (C) **Publication on a matter of public interest** – having regard to all circumstances, the defendant must establish that the statement complained of was, or formed part of, a statement on a matter of public interest, and that it reasonably believed that publishing the statement complained of was in the public interest.
- (D) **Qualified privilege** – very broadly, the defendant must establish that it had an interest in publishing the statement, and that the third party had a corresponding interest in receiving it. Again, the defence can be defeated if the statement is made maliciously.

2.9 Remedies

Monetary damages are the primary remedy for a defamation action in jurisdictions where defamation is a civil wrong. A successful claimant may also seek a statement in open court that summarises the dispute and explains why the defamatory statements were inappropriate.

If the defendant recognises that it has made a mistake, under English law, it is able to make an offer of amends (per sections 2-4 of the Defamation Act 1996). This can include a written apology, the publication of a correction or retraction, and the payment of compensation and legal costs, if appropriate. Such an offer must be made before a defence is served.

3. Limiting the risk of being accused of defamation

HRDs can limit their risk of being accused of defamation by being careful with the statements they are making and by controlling the meaning of their statements.

3.1 Only say or publish what you can prove

Truth is usually the most important defence against any defamation claim. Therefore, ensuring statements can be proven true is the best way of limiting the risk of a defamation claim. Statements should only be made if HRDs can prove them directly, or through a credible and independently corroborated, or authenticated source. Where the sources are people, HRDs should verify whether they have first-hand knowledge and are willing to give evidence if necessary.

It is also safer to make statements about a person's objectively verifiable conduct rather than a subjective and assumed state of mind. Ambiguity should be avoided, as this can be interpreted unfavourably. Only statements which can be proved or are backed by sources should be made and any gaps in information should be pointed out.

3.2 Be aware of the implication of statements made or published

In a defamation case, you are likely to be liable not just for what you say expressly, but also for what an ordinary person may read between the lines. Put another way, innuendo is capable of being defamatory. Attention should therefore be paid to how people will interpret a statement, not just what is expressly said.

3.3 Use the language of opinion

The risk of defamation liability can be reduced by phrasing any allegation as a suggestion or inference and without any assertions of fact. Framing your statements as opinion can be helpful. The statement of opinion should be based on verified facts unless the facts are in

the public domain, in which case they should be referred to. However, if the opinion itself implies facts which are incorrect, this may give rise to liability.

3.4 **Avoid repeating potentially defamatory statements made by others**

In defamation cases, you are also liable for publishing a defamatory statement made by someone else, even if you quote them accurately. HRDs must therefore consider the veracity and any implications of statements made by others before repeating them.²

3.5 **Consider seeking input from the claimant prior to publication**

In some instances, it may be sensible to seek the potential claimant's input into any publication. This gives them the opportunity to present their side of the story, and potentially provides some balance.

This is important as defamatory statements will be assessed in their context, not in isolation. If the potential claimant has been given the opportunity to comment, they may find it harder to establish that the statements are damaging to their reputation, when matters are viewed in the round. It is appreciated, however, that seeking the potential claimant's input may not be suitable in all circumstances.

4. **Practical advice in dealing with a threatened claim**

4.1 **Seek legal advice**

HRDs should immediately seek independent local legal advice on how to proceed. HRDs should also consider whether any of the defences to a defamation claim in the relevant jurisdiction may apply in the circumstances.

4.2 **Consider editing or removing the offending article**

If the allegedly defamatory statement has been made online, and HRDs feel it is appropriate to do so, steps can be taken to limit the damage by toning down, or even taking down, the article. This will limit the number of people to whom the statements are published and may prevent the claimant from escalating its claim (but will not guarantee this).

4.3 **Consider an apology or retraction**

The risk of threatened claims can be reduced by making an offer of amends to the claimant. This can be an important negotiating tool when defamation has actually occurred, whether through an honest mistake, or if the defendant is unable or unwilling to defend a defamation claim. However, an offer to make amends usually includes payment of damages and costs to the claimant, and the claimant may refuse to accept any offer made. The English law position is that if an offer is not accepted, the claimant may only recover damages in court if it is able to prove that the defendant acted maliciously.

It is important to seek legal advice prior to issuing such an offer of amends. Publishing a retraction or apology can be damaging to any defence you might have to bring if not handled properly.

4.4 **Ensure that you document your statements and any sources used to support those statements**

Truth is often the most important defence to any potentially defamation liability. Meticulous record keeping, particularly regarding the content of any public statements you make and

² This can include linking, on your own website, to defamatory statements in third party publications.

the sources which you have used to support any such statements, is key to founding a defence if one is required.