



REUTERS/ Mike Hutchings

# UNDERSTANDING DEFAMATION LAWS IN SOUTH AFRICA

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## INTRODUCTION

When applied legitimately, defamation laws are intended to protect individuals and businesses against false statements that are harmful to their reputation. Yet both civil and criminal defamation laws have the potential to be misused to prevent open public debate.

This Guide provides journalists with a practical understanding of defamation laws and the steps they can take to mitigate defamation liability in South Africa. This awareness will empower journalists to understand their legal rights and obligations and continue to report on issues of vital public interest. The Guide covers the scope of defamation law, the criminal and civil process of cases in courts, the defences against defamation, sanctions against defamation, and practical steps to mitigate defamation liability.

## 1. SCOPE OF DEFAMATION

- **What is defamation?**

Defamation is broadly defined as a false statement that tarnishes, harms or damages a person's reputation. Defamation falls under [tort law](#) and includes both libel (written statements) and slander (oral or spoken statements). In South Africa, defamation refers to unlawful publication, with the intention to defame, of a defamatory statement concerning a person/entity. According to common law (decisions from previous cases) a statement is defamatory if it damages a person's reputation, i.e., if the statement tends to lower the individual in the estimation of reasonable members of society.

Publication can include words, photographs and cartoons in a newspaper or online as well as when a person repeats, confirms or draws attention to a defamatory statement. Accordingly, not only the journalist, but also the editor, printer, publisher and owner of the newspaper may be held liable.

- **What constitutes criminal and civil defamation?**

Both civil and criminal defamation refer to unlawful publication of a defamatory statement concerning a person/entity with the intention to damage someone's good reputation.

The key distinctions between a criminal and civil defamation case are:

- a. the identity of the party bringing the claim;
- b. the applicable standard of proof required to prove the claim; and
- c. whether the intention to defame is presumed if publication of a defamatory statement is established.

In civil proceedings, the individual or entity who alleges that they were defamed will bring the claim which must be proven on a balance of probabilities. In the case of criminal defamation, the National Prosecuting Authority (NPA) or a private prosecutor institutes the case, and they must establish the elements of criminal defamation beyond reasonable doubt. This means that there is a higher evidence threshold in criminal defamation as opposed to civil defamation.

Criminal defamation convictions are extremely rare. Notably, there is currently a Bill to repeal the common law offence of criminal defamation pending before the [South African Parliament](#).

Criminal defamation is punishable by a fine or imprisonment or both. On the other hand, civil defamation is usually punished through damages.

- ***In what instances can I be sued for civil defamation?***

You may be sued for civil defamation by any person or an entity (through their representatives such as company directors) who believe their reputation has been disparaged by your alleged defamatory statement.

However, for the person suing you to successfully establish a claim against you for civil defamation, they need to prove that:

- a. the publication was made by the defendant;
- b. the statement complained of was defamatory; and
- c. the statement was referring to the plaintiff.

If the court finds that the statement complained of was defamatory, you will be found liable, unless you can defend the claim. Defences to defamation are highlighted at pages 11 and 12 of this Guide.

- ***In what instances can I be prosecuted for criminal defamation?***

You may be charged/prosecuted for criminal defamation if you unlawfully and intentionally publish a matter concerning another person which tends to harm their reputation. In other words, the elements of criminal defamation include:

- a. the unlawful;
- b. intentional;
- c. publication;
- d. of content concerning another;
- e. which tends to injure their reputation.

Unlike in the case of civil defamation where intention to defame is presumed if a publication is proved, the intention to defame needs to be proved in criminal defamation. The State will need to prove that the accused/journalist intended to harm the complainant's reputation by the publication. Intentional publication also requires proof that the accused knew that they were acting unlawfully or that they might possibly be acting unlawfully. The standard of proof is beyond reasonable doubt.

The accused/journalist can establish that their conduct was not unlawful by raising one of the defences to defamation.

- **Hate Speech**

It is an offence to publish or communicate words against any person based on the protected categories (such as, gender, race or sexual orientation), if the words demonstrate a clear intention to:

- a. be hurtful;
- b. be harmful or to incite harm; or
- c. promote or propagate hatred ([Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000](#) (PEPUDA)).

However, *bona fide*/good faith engagement in fair and accurate reporting in the public interest or publication of any information in accordance with the right to freedom of expression under the Constitution does not constitute hate speech.

Claims based on [PEPUDA](#) must be brought to the Equality Court, which can refer any case dealing with the publication of hate speech for the institution of criminal proceedings.

- **What are possible consequences for being convicted/found liable for defamation?**

### Civil defamation

- a. **An interdict:** When publication of a defamatory statement is threatened, the person about to be defamed is not obliged to wait for the act to occur. The person/entity can apply to Court for an interdict to prevent the publication.
- b. **Damages:** If the defamatory statement has already been published and someone/an entity is successful in proving a defamation claim against a journalist, they are entitled to an award of damages as compensation for the harm to their dignity and reputation. There is no formula for the determination of damages by the Court. However, South African Courts have taken into account the following factors in the past to determine damages payable by journalists/media outlets:
  - the nature of the defamatory statement;
  - the nature and extent of the publication (i.e. the circulation or viewership);
  - the reputation, character and conduct of the defamed person; and
  - the motives and conduct of the journalist, which would include whether the journalist has apologised or was acting out of malice.

Damages ordered by the Courts for defamatory statements published in newspapers (whether in print or online) have ranged from R12,000 to R150,000 (approximately USD 642 to 8,022) per defamatory statement over the past 20 years.

- c. **Retraction and/or apology:** Courts may grant an order for retraction and apology when requested by the claimant and after assessing the facts of the case.

## Hate speech

In the context of hate speech, [PEPUDA](#) empowers the Equality Court to make an appropriate order if someone is found to have broken the PEPUDA. This can include an order for the payment of any damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering.

## Criminal Defamation

Convictions for the crime of defamation are extremely rare. Since 1994, the only time that a journalist was convicted of criminal defamation was in [S v Motsepe](#) as discussed below. When determining the appropriate sentence for an accused found guilty of criminal defamation, the general principle is that the Courts have wide-ranging powers to impose an appropriate sentence. Courts will consider the unique facts of the case as well as previous sentences imposed by the Courts for similar offences.

## CASE EXAMPLES

### **Criminal Defamation**

In post-apartheid South Africa, the only example of a criminal conviction of a journalist for defamation is [S v Motsepe](#). In 2009, the Sowetan journalist Cecil Motsepe wrote a series of articles about a Gauteng Magistrate, Marius Serfontein. Motsepe claimed that Serfontein was meting out different punishments to black and white defendants in his capacity as a Magistrate. Serfontein specifically objected to one article in which Motsepe alleged Serfontein had given a white woman convicted of drunk driving a lighter sentence than the sentence given to a black man convicted of the same crime. This turned out to be incorrect.

The two cases that were the subject of the incorrect article were in Afrikaans. Motsepe relied on a lawyer and a Court official to interpret the cases for him (he was not conversant in Afrikaans) as well as explain the legal principles involved. They told him that the sentences were heavier. Motsepe did not verify the accuracy of the lawyer's and the Court official's interpretation of the cases. He approached the Magistrate for comment, who looked at the two records in Afrikaans and said: *"You have the facts. Just publish the facts correctly."*

The Magistrates' Court convicted Motsepe and sentenced him to a fine of R10,000 (approximately USD 535) or 10 months' imprisonment wholly suspended on certain conditions for a period of five years.

However, this conviction was set aside on appeal to the High Court. The Court held that the State had failed to establish an intention to defame, as Motsepe did not realise at the time of publishing the article that the information that he had received from the lawyer and the Court official was incorrect. While the High Court found that Motsepe acted hastily and recklessly, the High Court stated that *"recklessness does not however equate to intention"*. The High Court found that the evidence showed that Motsepe relied on his belief that the statement was true and deemed it in the public interest to publish the facts.



## **Civil Defamation**

### [National Media v Bogoshi \(1998\)](#)

The owner and publisher of the City Press was sued for defamation alongside its editor, distributor and printer. The City Press had published a series of articles between November 1991 and May 1994 alleging that Nthedi Bogoshi had defrauded his clients and was under investigation. This case introduced a new defence of “reasonable publication” to defamation available to journalists.

### [Independent Newspapers Holdings Ltd v Suliman \(2004\)](#)

The Cape Times newspaper published two articles following a bombing at Planet Hollywood. These articles named Walleed Suliman as a suspect, including his photograph in the write-up, and stated that he had been arrested and detained overnight by the police in connection with the bombing. The Court found that these acts were defamatory. It was argued that, even though press attention was warranted because of public interest in the development of police investigation in the matter, the naming of a suspect prior to a Court appearance was a violation of Suliman’s constitutional right to privacy and dignity.

### [Mogale and Others v Siema \(2005\)](#)

In this case, the editor, publisher, and distributor of Sowetan Sunday World Newspapers appealed the damages awarded by the High Court in a defamation suit against them. A gossip column in the *Sowetan Sunday World* published an article about an advocate at the Pretoria Bar, who was dating Ms Michelle Molatlou, a television presenter, and said that he had, at a wedding reception, given Ms Molatlou a “hot klap” (a hard slap) in the face, because he was annoyed by the fact that Ms Molatlou had taken notice of other men. The advocate in question was Siema.

The editor, publisher, and the distributor of the paper relied on the defence of truth and public benefit, which they later abandoned because they could not locate all of the original sources/informants, and those they could locate refused to testify. The editor, publisher and distributor of the paper also tendered the publication of an apology, which Siema did not accept.

The High Court initially awarded R70,000 (approximately USD 3,744) in damages but the Supreme Court of Appeal reduced this to R12,000 (approximately USD 642). The Supreme Court of Appeal’s reasoning in this regard was based on, amongst other factors:

- a. the fact that Siema had unreasonably refused to accept the defendant’s tender of a public apology;
- b. previous awards of damages by South African courts (which tended to “not have been generous”);
- c. the fact that the publication appeared in a gossip column, which an ordinary reader would know to take with a “pinch of salt,” notwithstanding the publication’s wide distribution.

### [Media 24 Limited v Du Plessis \(2017\)](#)

Mr Bekker du Plessis took action against Media 24 Limited, trading as the Daily Sun, and Mr Themba Khumalo (the editor of the Daily Sun at the date of publication) for defamation and claimed damages in the sum of R500,000 (approximately USD 26,740). Mr Du Plessis was the director and sales agent of D W Fresh Produce (Pty) Ltd. An article was published about Mr Du Plessis in the Daily Sun claiming that he had instructed one of his employees to lock another employee in the cold storage room for hours because he was found with two onions in his pocket, and he suffered medical injury as a result. The Daily Sun relied on two defences: (i) it contended that the article complained of was substantially true, and thus of public interest; alternatively (ii) its publication was reasonable in the circumstances.

The Supreme Court of Appeal concluded that the allegations against Mr Du Plessis made in the article were false. The Court also found that the Daily Sun had not taken reasonable steps to verify the accuracy of the information provided by the alleged victim to them and that the publication was therefore unreasonable. The High Court awarded damages of R80,000 (approximately USD 4,278) which were reduced to R40,000 (approximately USD 2,139) by the Supreme Court of Appeal.

## 2. PROCEDURE FOR LAUNCHING CRIMINAL CASES

It is extremely rare to be convicted of criminal defamation in South Africa. Also, as discussed at page 3, there is currently a Bill in Parliament to repeal the common law offence.

- ***Who can complain to law enforcement about defamation?***

Any person, including individuals and corporations, may complain to law enforcement about criminal defamation. The case may be reported to a police station so that a docket (a file containing information about a criminal case including statements and evidence gathered) can be opened. Opening a docket requires that the complainant provides a statement to a police officer who will interview and assist the complainant at the police station with preparing the statement. The docket will be registered in the Crime Administration System (CAS). A CAS number will be issued to the complainant to be used as a reference when following up on the case.

The completed case docket will be allocated to a police detective, who will carry out the investigation, as the investigating officer. Once the investigation is complete, the docket will be presented to the relevant Court for prosecution.

- ***Who decides whether to prosecute a journalist on defamation? How do they decide on whether they can charge a journalist?***

The National Prosecuting Authority (NPA) decides whether to prosecute. The NPA cannot proceed with a prosecution if there is insufficient evidence to convict. If the NPA does decide to go ahead with the prosecution, the case is then sent to Court to charge/indict the accused.

Prosecutorial discretion is often exercised fairly, intelligently, and in accordance with what is required at each stage of the criminal justice process. According to the NPA's [Code of Professional Conduct](#), prosecutors must always act with integrity and impartiality, protect the public interest and exercise discretion independently (i.e. free from political, public and judicial interference).

- ***What should I do if I am arrested and/or charged with defamation?***

The [Constitution](#) outlines the rights of an arrested person under Article 35 (1) as below:

- a. to remain silent;
- b. to be informed promptly of the right to remain silent and the consequences of not remaining silent;
- c. not to be compelled to make a confession or admission that could be used as evidence against them;
- d. to be brought to court as soon as reasonably possible, within 48 hours after arrest. If the 48 hours fall outside court hours or on a day which is not an ordinary court day, the arrested person should be brought to court on the next court day;
- e. at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
- f. to be released from detention if the interests of justice permit, subject to reasonable conditions.

A journalist will be informed that they will be charged with the crime of defamation by receiving a summons informing them to appear in court on a specific day and time. A summons is a document that informs an accused of the charge against them and will order the accused to appear in Court. The charges against the accused appear on the charge sheet (in the Magistrates' Court) or indictment (in the High Court).

An accused can also be arrested and kept in custody until their Court appearance. A summons will usually be given in cases where the accused is not going to be arrested and if the prosecutor believes that the accused will appear in Court as ordered by the summons and will not interfere with the police officer's investigations or try to influence any state witnesses that might be used in the criminal trial.

After the accused has received the summons, they should obtain legal representation. The law and legal procedures can be confusing, so it is a good idea to have a lawyer who can offer expert legal advice and assistance. After that, the accused must appear in Court on the day the summons stipulates. If an accused fails to appear in Court on the specified date and time, a warrant of arrest (a document that authorises the arrest of the accused) will be issued by the Court. Failure to appear in Court without a reasonable excuse is an offence.

The first step taken by the accused is to enter their plea. The prosecutor states the charges against the accused, who will then plead to the charge. If the accused pleads not guilty, the case must proceed to trial. The case may be postponed to obtain further evidence or to get legal assistance for the accused, if they have been unable to secure legal representation. If the accused pleads guilty, the matter will proceed straight to sentencing.

The [Criminal Procedure Act 51 of 1977](#) (the Criminal Procedure Act) requires that a person charged with the unlawful publication of defamatory matter, who raises as a defence that the defamatory matter is true and that it was for the public benefit that the matter should be published, shall plead such defence specifically.

At the plea stage, if an accused pleads "not guilty", he or she can provide a statement to the Court indicating the basis for their defence, although this is not required.

The next step is to prepare for the trial and determine which witnesses to call in order to establish the accused's defence(s). These defences are set out in more detail at pages 11 and 12 of this Guide. The accused does not need to call any witnesses or testify themselves as the onus of proving the accused's guilt rests on the State. However, if appropriate, certain inferences can be drawn by the presiding officer if the accused does not put up any witnesses or testify in their defence.

Once the trial begins, the prosecution will call witnesses to testify and support the case against the accused. Once the prosecution has closed its case, the accused or their attorney will also have the opportunity to call witnesses to testify or produce evidence. After both sides have been heard, the presiding officer must decide whether the accused is guilty or not (render a verdict). If the accused is found guilty, they will be sentenced by the presiding officer.





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### 3. PROCEDURE FOR LAUNCHING CIVIL DEFAMATION CASES

- ***How does an aggrieved party sue a journalist/media outlet for defamation?***

Any individual can sue for defamation. Generally, juristic persons (such as companies) also have standing to sue. The state and its departments or agencies, including municipalities, cannot sue for defamation (although state officers such as Ministers may sue in their personal capacities).

Save for anticipatory relief (i.e., relief sought to prevent the publication of a defamatory statement), a claim for defamation will generally be brought by way of action proceedings. This means that the matter will involve a trial and the hearing of oral evidence, as opposed to an application in which the evidence is put forward in writing by way of affidavit (a sworn statement witnessed by lawyers).

The claimant will need to issue a summons and get the sheriff with jurisdiction over the journalist's home or work address to serve the summons on the journalist. The summons will attach a "particular of claim", which will need to set out the material facts that give rise to a claim for defamation. The summons will set out the relief that the claimant is seeking from the Court, which will most likely be in the form of financial damages.

- ***Where does an aggrieved party file a case of defamation?***

A civil defamation suit may be pursued in a High Court or the Magistrates' Court. The court to sue in is determined by the amount of damages sought as set out in the table below.

Court	Damages claimed (in South African Rand)
District Magistrates' Court	Below 200,000 (approximately USD 10,696)
Regional Magistrates' Court	200,000 - 400,000 (approximately USD 10,696 – 21,392)
High Court	Above 400,000 (approximately USD 21,392)

Jurisdiction is also determined by the geographical area. The claim must be instituted in the court with the geographical jurisdiction over the area where the journalist is resident or works or in the area where the claim arose (i.e., where the defamatory statement was published).

- **What should I do if I am served with a defamation suit?**

Once the summons (with the details of the claim) has been served on the journalist by the sheriff, the journalist will then need to deliver a “notice of intention to defend” and then a “plea”, which sets out the defence(s) that the journalist intends to rely on at trial. How the journalist will go about lodging these documents with the court will depend on whether they are in a Magistrates' Court or a High Court and where the court is located. For example, in the Johannesburg and Pretoria High Courts, documents can be filed with the court online whereas in other High Courts and in the Magistrates' Courts, documents must be filed physically at the court.

While it is possible for an individual to defend themselves in a trial and sign the necessary pleadings, it is not advisable to do so. Defamation is a relatively complex area of law, and it can be difficult to navigate the legal defences as well as the practical steps necessary to defend a claim. Therefore, it is important to approach an attorney as soon as the journalist receives a summons so that the attorney can deliver the notice of intention to defend and start preparing the plea. In most cases, the attorney will brief an advocate to prepare the plea or exception, as they are experts in drafting court documents and can appear in court. However, some attorneys have the right to appear in court and will not need to brief an advocate.

Once a plea has been filed, the claimant will have a right to reply to any new allegations raised by the journalist in the plea by filing a “replication”. Once the replication has been filed or the time period for doing so has expired and no replication has been filed, the pleadings will close.

After the pleadings close, the matter enters the preparation for trial phase.

- a. all relevant documents in the journalist's possession will need to be provided to the claimant and *vice versa*;
- b. the parties can deliver expert witness reports; and
- c. the parties can subpoena third parties (who are not the claimant(s) or defendant(s) in the matter) to provide documents and/or give oral evidence at the trial.

Once all of this is done, the matter may be enrolled and set down for trial. Once the date is obtained, a written notice of set down, which informs the journalist of the trial date, must be served on the journalist. The trial will then proceed.



## 4. DEFENCES TO DEFAMATION

- ***How can I defend myself if I am charged with defamation or a civil defamation case is brought against me? What are the available defences and when do I raise them?***

Where it is found that a journalist has published a statement that is defamatory, the onus falls on the journalist to raise a defence that establishes a lawful justification or excuse to the defamation charge. There is no distinction between the defences that can be raised to a charge of criminal defamation and a claim for civil defamation. Each of the defences discussed below can be raised to either a criminal or civil claim of defamation.

### **Truth and public benefit**

If the journalist can establish that the “gist” of the defamatory statement is true (i.e., it is true in substance) and was published for the public benefit, then the claim for defamation will not succeed. The party sued for defamation can rely on facts that they were not aware of at the time of publication or facts that occurred after publication to establish that the defamatory statement is true.

There is a difference between what is interesting to the public, and what is in the public interest or for the public benefit to be known. A news outlet that publishes a defamatory statement will therefore not successfully rely on this defence if they published information which was merely interesting to the public.

### **Fair comment**

If the journalist can establish that the defamatory statement was merely comment or opinion (as opposed to a statement of fact) and that the comment was fair, related to a matter of public interest and was based on true facts, then the claim for defamation will not succeed.

The facts on which the journalist bases the comment must be expressly stated or clearly indicated in the publication. In other words, the reader must be able to distinguish between the parts of the publication that are fact and the parts that are comment. The journalist is not required to prove that the defamatory comment itself is true or correct (only the facts on which the comment is based must be true).

The comment must be fair and relate to a matter of public interest. Matters of public interest include the conduct of public figures and matters open to public criticism, such as speeches made in public, public performances, works of art and literary works.

## Privilege

There is presently no specific privilege that applies to members of the media when making public statements.

There are various general categories of privilege, but the only one that may be applicable to journalists is the publication of a defamatory statement that constitutes a fair and accurate report of the proceedings of parliament, a Court, or other public bodies that exercise public functions (not ordinary public meetings). If it is found that the journalist acted with an improper motive, such as malice, when publishing the defamatory statement, then the journalist can be found guilty of defamation.

## The Bogoshi defence

In *National Media Ltd v Bogoshi*, the Supreme Court of Appeal found that the publication of a defamatory statement by the press may, in the absence of another recognised defence, be lawful if the publication was reasonable. This case established the defence of reasonable publication popularly referred to as the Bogoshi defence. What constitutes a “reasonable” publication would depend on numerous factors, including the tone of the defamatory allegations, the severity of the consequences of the publication, the reliability of the journalist’s sources and the steps taken by the journalist to verify the information received from sources.

## Consent

It is lawful to publish a defamatory statement if the journalist can show that the publication was made with the consent of the defamed person.

- ***What options do I have if I am found guilty? Can I appeal?***

An order from a Magistrates’ Court or High Court can be appealed to a higher court. South African courts are structured as a hierarchy, namely (in order from the highest court to the lowest) the Constitutional Court, the Supreme Court of Appeal, the various High Courts and the Regional and District Magistrate’s Courts. The Regional and District Magistrate’s Courts are also known as lower courts and matters of appeal from these courts will be heard by the High Court.





REUTERS/ Alex Gallardo

## 5. PRACTICAL STEPS TO MITIGATE DEFAMATION LIABILITY

### PRACTICAL STEPS JOURNALISTS CAN TAKE TO MITIGATE THE RISK OF DEFAMATION LIABILITY IN THEIR WORK

In general, journalists in South Africa should be guided by the [Independent Communications Authority of South Africa \(ICASA\) Code of Ethical Conduct, 2016](#) and the Press Council's [Press Code of Ethics and Conduct for South African Print and Online Media](#).

#### **Summary**

It is worth remembering that truth is a complete defence to a defamation action. There may be other limitations on publishing information, but to the extent that the information is and can be proved to be true, a defamation action will not be successful. A good rule of thumb is to only report what you are confident you can prove.

A rigorous focus on fair and accurate reporting at each stage and verifying the truth of the matters reported will put you in the best possible position if faced with legal threats or claims. The suggestions below are intended to help you to think about practical means of achieving this. There are also other defences to a defamation claim which may be available to you depending on the jurisdiction, some of which are mentioned below.

### ***Newsgathering***

- Gather information early - as time passes and memories fade, information and sources can become less reliable.
- Use confidential sources with caution – if you rely solely on information from a confidential source in respect of certain allegations or statements in your reporting, be aware proving the truth may be more difficult.
- Non-disclosure agreements are permissible and effective to protect journalists from disclosing their source. If you do not conclude such an agreement – expressly or impliedly – you are not contractually (although you may be ethically) obligated to protect sources and maintain confidentiality.
- Use public records to your advantage. You can use them to verify information you received from other sources.
- If you choose to use audio or visual recording, always pause to consider whether you can record without permission, or whether permission is required. When in doubt, ask for consent.
- Keep a good record of your notes, meetings, etc.
- Research carefully. Verify sources and double-check your facts to ensure accuracy. Generally, you may only adopt communications from authorities and recognized agencies without further verification where you clearly attribute the source of the information.

### ***Drafting and vetting the article***

- Familiarise yourself with defamation law in the countries where you're working (see above). Be aware there may be more restrictive laws in some countries – for example in some countries it is easier for a company to bring a defamation challenge than others.
- Familiarise yourself and comply with your news organisation's ethics guidelines and policies.
- Use credible sources to verify the accuracy of any potentially defamatory statements.
- Ask yourself whether there are any statements directed to identifiable individual(s) or companies that could be reputationally damaging. Confirm accuracy, and if doubt remains, weigh the benefits of keeping the statement in versus taking it out.
- Make your reliance on trustworthy and non-confidential sources transparent (for example, by hyperlinking to or otherwise disclosing the relevant reports or public records).
- A cornerstone of responsible journalism is seeking comment from the subject(s) of the reporting you intend to publish, in particular where you intend to make allegations about them or their conduct – you should clearly put the substance of allegations to the subject, in advance and invite their response.
- Ensure, especially where you are engaging in investigative reporting, the subjects of your reporting have sufficient time to respond and have enough information to respond adequately. You should not show them a draft of your intended reporting but you should be prepared to share the substance of the intended publication.
- Reflect the comment /response in the article (you may use your editorial discretion in doing so).



Even noting “no comment” or source “did not respond to requests for information” will go a long way in showcasing the steps you took to report factual information.

- Be precise with your language and the meaning you intend to convey. Avoid any ambiguity, over-exaggerations or speculations. To the extent that you’ve made any assumptions, disclose them clearly as such.
- Always reproduce quotations correctly and attribute them clearly.
- Consider exculpatory circumstances and avoid one-sided reporting. Reporting should be balanced and not create a distorted picture of reality.
- Do not spread mere rumours, whether about public or private matters. Report only when a minimum body of evidence is available and say what you don’t know, where applicable.
- Consider how litigious and risky the subjects of your reporting are, and plan accordingly. If it is someone with a history of litigious activity toward the press, engage your news organisation’s legal/compliance team early.
- Consider whether you are making an assertion of fact or a potentially protected opinion. There must be sufficient evidence for a statement of fact. If there is any uncertainty or doubt, consider formulating it as an expression of opinion (based on true facts) or presenting it as an assumption.
- Beware of republication liability. If you take information from another medium for your reporting, you assume responsibility for its content. Always research yourself.
- Consider whether any available defences to defamation – for example truth, public interest reporting, qualified or absolute privilege, fair and accurate reports of certain proceedings – apply.
- There are several defences to a defamation action other than truth/justification, some of which may be particularly applicable to journalists – for example in some countries there is defence for reporting in the public interest. There may also be defences available where an article expresses an opinion and is written in the public interest. However, these defences are not fool proof and will usually involve satisfying a number of requirements. If you intend to rely on a defence, consult your legal team or research precedent to ensure that the defence is likely to be available.

### **After publication**

- Stay informed of any developments in the subject matter that might change, call into question, or shed new light on the published information. Originally permissible reporting may generally be kept in the online archive. You typically have no active duty to investigate or update the reporting. Only if an affected party raises a qualified complaint about the reporting, you may be required to add supplementary information or take reasonable precautions to prevent the reports from being found in search engines in name-related search queries (“right to be forgotten”).
- Consider whether to keep your notes and relevant communications and, if so, for how long – knowing the limitation period for defamation claims in the relevant jurisdiction may assist.
- Be willing to correct or retract your mistakes and issue an apology to the extent necessary for the justification/truth defence. You may be required to correct factual allegations that have subsequently proven to be incorrect and have a lasting effect on the personal rights of the person concerned. This is usually done via a supplement/correction in the next issue or on the website.

*Please note that journalists must also remain cognisant of emerging trends in other areas of the law that place their wellbeing at risk, or which could create legal risk – such as applicable privacy laws.*



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