



DEFAMATION PRACTICE NOTE (DEF-1)

OTHER FEDERAL JURISDICTION NATIONAL PRACTICE AREA

NPA Sub-area Practice Note

1. INTRODUCTION

- 1.1 This Practice Note sets out the arrangements for the management of defamation cases within the National Court Framework (“NCF”). It:
- (a) is to be read together with the:
 - Central Practice Note (CPN-1), which sets out the fundamental principles concerning the NCF of the Federal Court and key principles of case management procedure. The Central Practice Note is an essential guide to practice in this Court in all proceedings; and
 - the *Federal Court of Australia Act 1976* (Cth) (“**Federal Court Act**”) and the *Federal Court Rules 2011* (Cth) (“**Federal Court Rules**”);
 - (b) takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of issue; and
 - (c) sets out the arrangements for the management of defamation proceedings. It is intended to set out guiding principles for the conduct of these proceedings and is not intended to be applied inflexibly.

2. OVERVIEW, DEFINITION AND OPERATION OF THE DEFAMATION SUB-AREA

- 2.1 The Defamation Sub-area is a Sub-area within the Other Federal Jurisdiction NPA and covers all manner of defamation disputes within federal jurisdiction, including defamation cases that may arise under a law of the Parliament (s 39B(1A)(c) of the *Judiciary Act 1903* (Cth)).
- 2.2 This area of the law involves the balancing of competing rights and interests: the protection of a person’s reputation, on the one hand, and the protection of free speech, on the other.
- 2.3 The Defamation Sub-area is specialised in nature. The judges dealing with the work in the Sub-area are listed on the Court’s website and cases will be allocated to this dedicated group of judges who have expertise in defamation matters.

3. COMMENCING PROCEEDINGS

- 3.1 Subject to the matters set out in the Central Practice Note and clarified below (see for example paragraph 4.5 regarding the timing of service of originating material), the Federal Court Rules and Forms apply to the commencement of proceedings in this NPA.

- 3.2 Due to the nature of defamation proceedings, any defamation proceeding should be commenced by filing an originating application (see r 8.01 of the Federal Court Rules) supported by a statement of claim, rather than by a concise statement.
- 3.3 The statement of claim:
- (a) should, when practical, include as an annexure a legible copy and/or transcript of the impugned publication, with each paragraph numbered for ease of common reference; and
 - (b) must be carefully drafted so as to minimise the likelihood of disputes concerning the capacity of the impugned matter:
 - to convey the pleaded imputations; and
 - to be of and concerning the applicant.
- 3.4 Applicants should, in accordance with paragraph 3.5, deliver to the Court and to the respondent(s), the actual publication(s) in issue. The publications should be provided in such a manner that the Docket Judge can view the impugned matters in the form (or as close to the form as practicable) in which they were published (eg, an online or video publication provided in digital form, an oral statement in audio form, and a printed publication in print form – preferably in context, such as the position of the article in a newspaper). When the impugned matter is in written form, a copy of the publication in actual size and in original colour should be provided, with the paragraphs of the relevant article, chapter or document numbered, for ease of common reference; and when in audio or audio visual form, with a transcript with numbered paragraphs. The paragraph numbers should match those used in the annexure to the statement of claim.
- 3.5 The delivery of the actual publication(s) required by paragraph 3.4 should be made both to the Court and to the respondent(s) as soon as practicable after the commencement of the proceeding and, in any event, at least seven days before the first case management hearing.

4. CASE MANAGEMENT

- 4.1 Parties and their representatives should familiarise themselves with the guiding case management information set out in Part 8 of the Central Practice Note. This Practice Note should always be read with the Central Practice Note.
- 4.2 Case management will have a strong emphasis on the quick, efficient and as inexpensive as practicable disposition of each matter (see Parts 7 and 8 of the Central Practice Note). The key objective of case management is to reduce costs and delay so that:
- the issues in contest are reduced;
 - in relation to those issues, there is no greater factual investigation than the justice of the case requires; and
 - the number of interlocutory applications and attendances is the minimum necessary for the just and efficient disposition of the action.
- 4.3 The Court recognises that proceedings in this Sub-area will vary in complexity and that different approaches to case management and alternative dispute resolution may be appropriate from time to time.

Case Management Hearings and Pleadings

- 4.4 Case management hearings are integral to case management. The aim of case management hearings is the early identification of issues in the proceedings and means for their resolution. The parties should prepare for the first case management hearing and subsequent case management hearings as noted in Part 8 of the Central Practice Note and below.
- 4.5 Ordinarily, the first case management hearing will take place approximately 5-6 weeks after the filing of the originating application and statement of claim, so as to allow for a defence to be filed before the hearing (which must be within 28 days of service of the statement of claim – see rr 16.32 and 16.45(3) of the Federal Court Rules). Accordingly, it is important that the application and statement of claim are served on the respondent(s) expeditiously (for example, within 3 business days).
- 4.6 The respondent(s) should, to the extent possible, make clear in the defence, in addition to any affirmative defence upon which the respondent(s) relies:
- (a) whether the element of publication is admitted;
 - (b) if so, the admitted scope of the publication;
 - (c) if publication is not admitted, the reason why it is not;
 - (d) whether the element of identification (that the impugned matter is of and concerning, or about the applicant) is admitted;
 - (e) whether the pleaded imputations or any of them are admitted to have been carried by the impugned matter; and
 - (f) whether it is admitted that the pleaded imputations (whether or not it is admitted that they were carried) are defamatory.
- 4.7 With respect to publication which is admitted, the respondent(s) should, in the defence or, if that is not possible, within 4 weeks after filing the defence (and preferably before the first case management hearing), file and serve on the applicant a statement indicating the extent of its publication; for example:
- (a) in the case of a print newspaper, the number of editions of the newspaper sold and the estimated readership for that newspaper at the relevant time;
 - (b) in the case of a digital newspaper, the number of visits to the page or pages hosting the impugned matter;
 - (c) in the case of a website, the number of visits to the impugned item on the website;
 - (d) in the case of publications by social media, the number of persons who follow the relevant social media account, the number of persons who interacted with the post via likes, shares, comments or views, and the number of persons who accessed the article via a hyperlink;
 - (e) in the case of newspaper posters, the number and location of the posters;
 - (f) in the case of radio publications, data concerning the estimated listening audience for the publication; and
 - (g) in the case of publication by TV, data indicating the estimated viewing audience for the program, etc.

- 4.8 At the first case management hearing, the parties should be in a position to:
- (a) address the Case Management Imperatives as set out in paragraph 8.5 of the Central Practice Note;
 - (b) provide to the Court appropriately tailored case management orders, by consent or otherwise;
 - (c) inform the Court of any objections to a pleading which may require determination, together with the basis for those objections; and
 - (d) indicate any issues relevant to the timing of the trial (including any need for an expedited or truncated hearing process), the parties' estimates of trial length and their available dates for trial.

4.9 Parties should expect that, at the first case management hearing, the Court will wish to have identified and timetabled the interlocutory steps in the proceeding for its efficient conduct so that, if appropriate, a final hearing date may be set.

4.10 Usually, it will be a judge sitting without a jury who will determine all issues in the case¹. Accordingly, issues concerning:

- the *capacity* of the impugned matter to convey the pleaded meaning;
- whether a pleaded meaning is capable of being defamatory; and
- whether the impugned matter is capable of identifying the applicant;

should not ordinarily be litigated as separate questions at the interlocutory stage as they will be subsumed in the issues to be determined at trial. When issues of this kind do need to be dealt with at the interlocutory stage, then, subject at all times to the discretion of the judge, they will ordinarily be dealt with under the Court's Rules relating to the adequacy of pleadings (see r 16.21), rather than by way of a separate trial under r 30.01.

5. ALTERNATIVE DISPUTE RESOLUTION

5.1 Parties and their representatives should familiarise themselves with the guiding ADR information set out in Part 9 of the Central Practice Note.

5.2 Given the nature of defamation matters, the parties should expect that, save in exceptional circumstances, the Court will refer any defamation matter to mediation (including to a Registrar with specialist skills) at an appropriate, and preferably early, stage in the proceeding. The Court expects the parties to be prepared to address the referral of the proceeding to mediation, and the manner of the mediation at the first case management hearing. The parties should also consider what is necessary to facilitate the mediation.

¹ See: *Wing v Fairfax Media Publications Pty Ltd* [2017] FCAFC 191; (2017) 255 FCR 61 at [37]-[45].

6. DISCOVERY AND INTERROGATORIES

- 6.1 To the extent that discovery may be necessary within the Defamation Sub-area, parties should consider the information concerning discovery set out in Part 10 of the Central Practice Note before making any request for discovery. They should also consider whether requests for discovery should be deferred until after witness affidavits or outlines of evidence, if ordered, are filed and served.
- 6.2 Parties should expect that, ordinarily, the Court will not order a party to answer interrogatories pursuant to Part 21 of the Federal Court Rules unless satisfied that it is necessary for the resolution of the real issues in dispute in the proceedings.

7. INTERLOCUTORY STEPS, EVIDENCE, PRE-TRIAL CASE MANAGEMENT HEARINGS

- 7.1 Parties and their representatives should familiarise themselves with the information in the Central Practice Note on these matters (see Parts 11 to 13).
- 7.2 Ordinarily evidence-in-chief is led orally. The parties should not assume that the Court will accept an agreement to the contrary reached by the parties under s 47(5) of the Federal Court Act. The parties should raise with the Court any agreement for the giving of evidence by affidavit in a timely way before the trial (and prior to the parties incurring the time and expense of preparing affidavit evidence).
- 7.3 When evidence-in-chief is to be led orally and outlines of evidence are to be exchanged, the outlines are to provide notice of the evidence to be given by the witness and, without the leave of the Court, are not to be the subject of cross-examination or be tendered as a prior statement of the witness.
- 7.4 As part of the preparation for trial, the parties should discuss between themselves, and suggest to the Court well before trial, any particular resources required to support the trial. This may include, for example, appropriate digital or other resources so as to be able to see and hear the publication in its original form (or as close to its original form as practicable).

8. COSTS

- 8.1 In addition to the matters regarding costs set out in the Central Practice Note and the Costs Practice Note, the parties are reminded of r 40.08 of the Federal Court Rules, which provides:

40.08 Reduction in costs otherwise payable

A party other than in a proceeding under the Admiralty Act 1988 may apply to the Court for an order that any costs and disbursements payable to another party in the proceeding be reduced by an amount to be specified by the Court if:

- (a) the applicant has claimed a money sum or damages and has been awarded a sum of less than \$100 000; or*
- (b) the proceeding (including a cross-claim) could more suitably have been brought in another court or tribunal.*

9. FURTHER PRACTICE INFORMATION AND RESOURCES

- 9.1 This Practice Note relates to all defamation matters. In addition, further practice and procedure information and resources for this NPA can be found on the Court's Other Federal Jurisdiction "homepage".
- 9.2 General queries concerning the practice arrangements in defamation matters should be raised, at first instance, with your local registry. If a registry officer is unable to answer your query, please ask to speak to the NCF Coordinator in your local registry. Contact details for your local registry are available on the Court's website.

J L B ALLSOP
Chief Justice
12 November 2019