

Legal Update

Defamation in Australia vs Thailand: A Comparative Analysis

False or misleading statements have the potential to impose severe personal, social, financial, and/or professional implications on an individual or a corporation. As such, jurisdictions across the world have enforced defamation laws that aim to balance the right of free speech with the protection of reputation.

Australia and Thailand have adopted fundamentally distinct approaches to their defamation laws, with differing philosophies and objectives underpinning their respective approaches. This article aims to dissect and compare the respective defamation laws in which Australia and Thailand are governed, and the avenues that are available for individuals or corporations who have been defamed.

1. Australia defamation laws

Criminal defamation in Australia

Criminal defamation provisions do exist in Australia as a remote criminal offence, with imprisonment and fines commonly being seen as punishable penalties. However, prosecutions for these offences remain exceedingly rare, due to the significant threshold that the prosecution must meet for a conviction, and the range of defences that are available for a defendant to raise. The primary objective of defamation law is to protect and repair an individual or organisation's personal or professional reputation, which is seen as a private harm rather than a crime against the state. As such, there have been virtually none, or close to no successful criminal prosecutions for defamation in modern Australian history. In practice, criminal defamation remains 'insignificant in contemporary Australian society'.¹

¹ David Rolph, 'A Critique of the National, Uniform Defamation Laws' (2009) 16(3) *Torts Law Journal* 207 – 48.

Therefore, despite the existence of an available criminal offence, defamation is largely treated as a private civil matter in Australia.

Civil defamation in Australia

In Australia, defamation is governed by defamation statutes which have been adopted by all states and territories ('*Uniform Defamation Acts*').² These statutes, although not identical, are substantially uniform across the nation. This synchronised approach means that defamation laws can be identifiable as Australia's laws, rather than eight disparate defamation laws spanning across the country, as it was previously.

Australia's traditional common law distinction between 'libel' and 'slander' has now been abolished following the *Uniform Defamation Acts*, meaning that the publication of defamatory material of any kind, is actionable without proof of special damage. There is also a one (1) year limitation period from the date that the material was published, in which defamation claims must be brought. The court holds discretion as to extending the limitation period to a maximum of three (3) years, contingent on the court finding that it was 'unreasonable' for the plaintiff to have commenced proceedings within the one (1) year limitation period. In *Joukhador v Network Ten Pty Ltd* [2021] FCAFC 37, the Court asserted that an extension of time should only be granted in light of circumstances which are 'relatively unusual, special or compelling'.³

In Australia, individuals are generally eligible to sue for defamation, however corporations can only sue for defamation if they qualify as an 'excluded corporation'. This is typically defined as a corporation employing less than ten (10) people, or is not-for-profit.⁴ The corporation also must not be a public body. Across the *Uniform Defamation Acts*, a public body is defined as 'a local government body or other governmental or public authority constituted by or under a law of any country'.⁵ If a corporation does not meet the definition of being an 'excluded corporation', they are unable to pursue a claim for defamation, and

² *Defamation Act 2005* (NSW); *Defamation Act 2005* (Vic); *Defamation Act 2005* (Qld); *Defamation Act 2005* (WA); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2006* (NT); *Civil Law (Wrongs) Act 2002* (ACT) ch 9 ('*Uniform Defamation Acts*').

³ At [17].

⁴ *Uniform Defamation Acts* s 9(2); *Civil Law (Wrongs) Act 2002* (ACT) s 121(2); *Defamation Act 2006* (NT) s 8(2).

⁵ *Uniform Defamation Acts* s 9(6); *Civil Law (Wrongs) Act 2002* (ACT) s 121(6); *Defamation Act 2006* (NT) s 8(6).

should consider alternative avenues, such as the tort of injurious falsehood, or pursuing action under Australian Consumer Law and ACCC guidelines.

Australia has also introduced a 'serious harm' threshold, that requires a plaintiff to prove that a defamatory publication has caused, or is likely to cause, serious harm to their reputation. The former common law rule that damage is presumed,⁶ is no longer applicable. This means that plaintiffs bear the onus in demonstrating that the defamatory material caused real impact, held significant gravity, and/or reached a substantial audience. Hurt feelings do not suffice. For excluded corporations, this means they must prove that the material caused, or will cause, serious financial loss. However for individuals, the definitive criteria for what constitutes 'serious harm' remains somewhat ambiguous. The case of *Newman v Whittington* [2002] NSWSC 249 was the first time an Australian superior court interpreted the statutory 'serious harm' threshold for individuals, where it heavily relied on the reasoning established by the United Kingdom Supreme Court in *Lachaux v Independent Print Ltd and another* [2019] UKSC 27 ('*Lachaux*'). Applying the reasoning in *Lachaux*, the NSW Supreme Court concluded that 'serious harm' is to be determined by reference to the actual facts about its impact, rather than the meaning of the material's words.⁷ The harm caused by the material must not be 'trivial' and must genuinely place the individual's interests 'at stake'.⁸

Moreover, in *Dow Jones & Company v Gutnick* (2002) 210 CLR 575, the High Court of Australia considered the contention regarding jurisdictional reach for publications that originate from foreign jurisdictions. Particularly, the court considered whether an online article that originated from New Jersey, USA, could be the subject of a defamation suit in Australia. The key question was whether the liability for defamation in cyberspace is determined by the jurisdiction of the original website, or the jurisdiction of where the article is accessed and/or downloaded. The Court ultimately found that the law in defamation cases has been for centuries, that publication takes place when and where the contents of the publication are seen and heard, and comprehended by the reader or hearer.⁹ The Court expressed concerns that if publication was established in the jurisdiction of the material's origination, publishers would be able to freely manipulate the uploading and location of data so as to insulate themselves from liability in Australia.¹⁰ This case established that material on the internet may be subject to proceedings in foreign jurisdictions, even if the material does not contravene the law in the local jurisdiction it was posted within. The Courts have been careful to discourage 'forum shopping' by plaintiffs who seek to bring their claim in a

⁶ *Uren v John Fairfax & Sons Ltd* (1966) 117 CLR 118 at [150].

⁷ At [64].

⁸ At [59].

⁹ At [178], [198] – [199].

¹⁰ At [199].

jurisdiction which provides a greater chance of success.¹¹ The claim must have a substantial connection with the location the proceedings are commenced.

2. Thai defamation laws

Criminal defamation in Thailand

Defamation is a criminal offence under section 326 of the Thai Criminal Code. A person commits the offence by imputing a matter concerning another person to a third party in a manner likely to damage that person's reputation or expose them to hatred or contempt. The offence is punishable by imprisonment for up to one (1) year, a fine of up to THB 20,000, or both. Where the matter is disseminated through a document, image, recording, broadcast, or other means of publication, section 328 imposes a maximum sentence of two (2) years imprisonment and a fine of up to THB 200,000.

Not every electronic communication constitutes publication under section 328. In Supreme Court Judgment No. 1612/2564 (2021), the Court held that a message sent to a limited Line group was not a publication to the public at large and therefore fell under section 326 rather than section 328.

The statement must be communicated to at least one third party, although the person concerned need not be expressly named if they can be identified from the words and surrounding circumstances. Thai courts consider the publication as a whole and the meaning that an ordinary recipient would reasonably understand. Mere abusive language will not necessarily constitute defamation unless it conveys a damaging allegation or imputation. This distinction was affirmed in Supreme Court Judgment No. 3073/2565 (2022) and No.3877/2565 (2022).

Unlike Australia, Thailand has no criminal 'serious harm' threshold. Actual reputational or financial loss need not be proved; it is sufficient that the imputation was objectively likely to damage the person's reputation or expose them to hatred or contempt.

As to the principal statutory exceptions and defences to criminal defamation, sections 329 and 330 of the Thai Criminal Code provide important protections. Section 329 protects certain statements or opinions made in good faith, including fair comment and statements made to protect a legitimate interest. Section 330 allows the accused to prove the truth of the

¹¹ At [135].

imputation, except where the imputation concerns a private matter and proving its truth would not benefit the public.

Both individuals and juristic persons may be injured persons in criminal defamation proceedings. In Supreme Court Judgment No. 1068/2537 (1994), the Court recognised that companies may suffer reputational harm. Thai law therefore imposes no equivalent to Australia's 'excluded corporation' restriction.

Defamation is generally a compoundable offence under section 333. Under section 96, an injured person must generally file a complaint with the investigating officer or institute criminal proceedings before the court within three (3) months from the date on which the injured person becomes aware of both the offence and the identity of the offender.

Civil defamation in Thailand

Civil liability for reputational harm principally arises under sections 420 and 423 of the Thai Civil and Commercial Code ('CCC'). Section 420 is the general tort provision and applies where a person intentionally or negligently and unlawfully infringes another person's rights, causing damage. Section 423 specifically applies to the dissemination of a false statement that damages another person's reputation, credit, earnings, or prospects.

The two provisions have distinct roles. False and damaging statements generally fall within section 423, whereas conduct that does not satisfy section 423 may still constitute a wrongful act under section 420 if it infringes another legally protected right. In Supreme Court Judgment No. 4893/2558 (2015), the publication of true information concerning the claimant's private life did not fall within section 423 because the information was not false, but nevertheless constituted an infringement of privacy under section 420.

Although section 423 does not expressly require communication to a third party, the Supreme Court confirmed in Judgment No. 6681/2562 (2019) that the statement must reach a third party to constitute dissemination. A publisher may be liable without actual knowledge of the falsity if they ought reasonably to have known that the statement was false. However, a person who forwards information without such knowledge may not be liable where the sender or recipient has a legitimate interest in the communication.

Unlike criminal defamation, falsity is an element of liability under section 423 and must be proved by the claimant. Thailand has no civil 'serious harm' threshold equivalent to Australia's, although the claimant must still establish legally recognisable harm. Reputational damage may justify compensation even without proof of a separate loss of income or business.

The court may award compensation under section 438 and order measures to restore the claimant's reputation under section 447, including publication of the judgment. Both individuals and juristic persons may bring claims, without restrictions based on corporate size, employee numbers, or not-for-profit status.

Under section 448, a claim in tort is generally subject to a limitation period of one (1) year from the date on which the injured person became aware of the wrongful act and the identity of the person liable, and an ultimate limitation period of ten (10) years from the date of the wrongful act.

3. Key differences between Thailand and Australia

Defamation in Australia is predominantly treated as a civil matter, whereas Thailand imposes both criminal and civil liability, which may arise from the same publication.

Australia requires claimants to satisfy a statutory serious-harm threshold and restricts corporate claims to 'excluded corporations'. Thailand has no equivalent serious-harm threshold or restriction based on a corporation's size, number of employees, or not-for-profit status. However, a Thai civil claimant must prove that the statement was false and caused legally recognisable harm, while truth generally operates as a defence in criminal proceedings.

4. Conclusion

Although both jurisdictions seek to balance freedom of expression with the protection of reputation, their differing legal frameworks result in materially different remedies, evidentiary requirements, and legal consequences in defamation cases.

Further information

Should you have any questions on defamation laws in Australia and/or Thailand, or how this development may affect you or your business, please get in touch with the team at PDLegal.

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