



EDO-NQ FACTSHEET SERIES

DEFAMATION

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HOW TO DUCK DEFAMATION AND SLIP 'SLAPP' SUITS

This factsheet is intended as a plain English guide to a particular area of law. It is not legal advice and is not intended as a comprehensive examination of the legislation. Whilst all care has been taken in its preparation, it is not a substitute for legal advice as legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your particular circumstances you should contact the EDO or your solicitor.

Introduction

Defamation law has generally presented a problem often reflected or perceived in the broader legal system; those with money and resources are better able to protect their reputation or freeze criticism but economically-disadvantaged people are less able to seek and obtain true redress.

New defamation laws applied in Queensland from 1 January 2006¹, with the introduction of the new *Defamation Act 2005* (Qld). Similar legislation was introduced by each State in Australia around the same time. Uniform defamation laws now apply across the country – there are no longer large differences in the tort (or civil wrong) or the defences available to it around Australia.

Active community members must be able to effectively use the media through press releases, comments on television and radio, and by writing and disseminating newsletters and campaign material to convey their views and opinions.

Activists must be familiar with defamation law to be able to protect themselves and their organisations and to save time, energy and money.

What is defamation?

The new Act does not define the tort of defamation. Definitions vary from jurisdiction to jurisdiction, as do community expectations and notions such as free speech. At its simplest, defamation is the publication of a statement that may tend to cause an individual to be subject to hatred, ridicule or contempt, or to be shunned or avoided. The statement published is called “defamatory matter”.

Not all criticism of, or disagreement with, people is defamatory. You only defame somebody when:

¹ *Defamation Act 2005* (Qld), section 2
(further section references in this Factsheet are to the *Defamation Act 2005* (Qld) unless stated otherwise)

1. you publish defamatory matter about that person to another person; and
2. the defamatory matter identifies the person allegedly being defamed.

If you publish a “*defamatory matter*” about someone then they will have a *cause of action* against you (and be able to sue you) for damages. In suing you they will not have to show that any special damage has been caused to them or their reputation², *but* it is a defence to show that the person suing you is unlikely to suffer any harm because of the publication³. Of course, there are other defences available to a *publisher* of *defamatory matter(s)*, and they will be dealt with below.

What is ‘Publication’?

“*Publication*” includes spoken words, signs or gestures (e.g. speeches and statements), and delivering or exhibiting written words (e.g. newspapers, magazines etc.) to any person other than the person allegedly defamed.

Who can sue for defamation?

The law of defamation protects individual reputation. The law assumes that all people are of good character until the opposite is proven. However, it should be noted that deceased people cannot be defamed, or sued for defaming anyone else⁴.

An individual can only sue for defamation if:

1. defamatory matter is published; and
2. the defamatory matter identifies that individual so that people reading or hearing the defamatory matter know who is allegedly being defamed.

Generally, corporations and public organisations such as councils and government departments *cannot* sue for defamation⁵.

However, not-for-profit corporations and those with less than 10 full-time employees *can* sue⁶ – as can individuals within organisations.

People should still be careful when criticising corporations. Employees of companies may still be able to sue in defamation if they are sufficiently identified in any defamatory criticism of the company.

² Section 7(1)

³ Section 33

⁴ Section 10

⁵ Section 9, and *Local Government Act 1993* (Qld), s.35

⁶ Section 9(2)

Resolving defamation disputes without going to Court

The new *Defamation Act 2005* (Qld) sets out a process that someone should go through when they believe that they have been defamed, and *before* they sue for defamation⁷.

The intention of the process is to promote speedy methods to try and resolve defamation disputes without going to court⁸. The process is not compulsory, but it is wise to use it instead of immediately rushing off to court.

We have attempted to summarise this process for you below:

1. If someone feels that they have been defamed, then they can send what is called a “*concerns notice*” to the alleged defamer; it must be in writing, and must tell the alleged defamer why and how they believe they have been defamed.⁹
2. If the alleged defamer believes that the concerns notice does not give enough detail about why and how the person complaining has been defamed, then they may write back requesting those further particulars (called a “*further particulars notice*”).¹⁰ The person complaining must respond within 14 days, or any longer period agreed to¹¹.
3. An alleged defamer can then decide whether or not to make an “*offer to make amends*”. Offers to make amends must have a certain content¹².
4. *If an offer is accepted?* If an offer to make amends is made, accepted and carried out, then the person allegedly defamed cannot start or continue defamation proceedings¹³.
5. *If an offer is not accepted?* When an offer to make amends is made but not accepted, the alleged defamer can defend any defamation proceedings if:
 - a. The alleged defamer made the offer as soon as practicable after becoming aware that they may have defamed the person complaining;
 - b. At any time before the trial the alleged defamer was ready and willing to carry out the offer, if accepted; and
 - c. The offer was reasonable in all of the circumstances¹⁴.

⁷ Part 3

⁸ Section 3(d)

⁹ Section 14

¹⁰ Section 14(3)

¹¹ Section 14(4)

¹² Section 15

¹³ Section 17

¹⁴ Section 18 – (note that section 18(2) provides guidance to the Court on whether the offer was reasonable)

What defences are available?

Some of the defences or lawful excuses for publishing defamatory matter are:

1. the material published (and any imputation carried by it) is *substantially true*¹⁵;
2. the material is published, or the statement is made, by Judges and witnesses in Court, or by Members of Parliament when in Parliament (absolute protection)¹⁶;
3. the material is:
 - a. a *public document* (or a fair copy, fair summary or fair extract of it)¹⁷; and
 - b. published honestly for public information or advancement of education¹⁸ (e.g. it must not be published with ill will or malice); (qualified protection)
4. the material is:
 - a. a report of court proceedings, a public meeting or Parliamentary proceedings¹⁹;
 - b. published honestly for public information or advancement of education²⁰ (e.g. it must not be published with ill will or malice); (qualified protection)
5. the material published is:
 - a. the honest opinion of the publisher;
 - b. related to a matter of public interest; and
 - c. based on proper material.²¹

More defences are set out in Part 4, Division 2 of the *Defamation Act 2005* (Qld).

What is a 'SLAPP' suit?

Some developers run 'SLAPP' Suits (Strategic Lawsuits Against Public Participation) with poor prospects of success to try and stop criticism of their projects.

¹⁵ Sections 25 & 26

¹⁶ Section 27

¹⁷ Section 28

¹⁸ Section 28(2)

¹⁹ Section 29

²⁰ Section 28(2)

²¹ Section 31

How can I avoid a 'SLAPP' suit?

You cannot rule out the possibility of defamation suits against you or your group entirely. However, if you follow certain tips then you can both reduce the chance that you or your group will be sued for defamation, and also be in a better position to defend the suit if it occurs.

1. Ensure your group has insurance so that the group and members are covered if there was a defamation action against the group or a member acting for the group. Insurance might appear expensive; however it is ethical to protect a spokesperson for the group from huge court damages awarded against them.
2. Decide who your spokesperson is on a particular issue. Make sure everything that person says or writes on the issue is checked by a second responsible person before it goes out.
3. Try to get issues out into the public arena by a method protected from liability for defamation. For example, ask a Member of Parliament to ask questions in the Parliament.
4. Get a copy of the *ABC All Media Law Handbook* on defamation for around \$15 and read it.
5. If your group intends to criticise a corporation or a public body, then do not identify a person specifically (eg. CEO or a Company Director), as a direct reference to an individual involved in a corporation may still invoke the laws against your group's publication.
6. Prepare your press releases on the basis of relying on the *fair comment* defence; that is, carefully check your facts, state facts, then give opinions clearly distinct from (but based on) those facts. Keep a copy of the press release, material on which it was based and a record of where it was sent.

If you are threatened with a defamation action

1. If you receive a threatening letter from a solicitor (or someone allegedly defamed), do not panic. Write back straight away saying that you are obtaining legal advice and will respond within a defined period (e.g. two weeks after the date of the letter). *Note: the letter may be a "complaints notice" referred to under the heading "Resolving defamation disputes without going to Court".*
2. Immediately obtain legal advice from a local solicitor or, for public interest environmental matters, ring the Environmental Defenders Office closest to you

for help. While obtaining legal advice, do not repeat the statement complained of to any person other than your solicitor as this might aggravate the situation.

3. Do not give the other side any information they do not know, such as how many leaflets were published or who in the group worked on them, as they might use it against you.
4. If you are insured you may need to notify your insurer.
5. With your lawyers, seriously consider an apology or an offer or amends to the other side to settle the case and avoid the stress and expense of Court. Few people can afford the time or expense of defending themselves.

Further information

If you have any further questions or concerns about any of these matters, then please contact us on the details below.

While we have limited resources, often we can give you quick advice over the phone or direct you to someone who may help on a free or reduced rate basis.

Stay in contact with your local Environmental Defenders Office. We will be running community workshops on as many useful legal issues as we can in 2008.

USEFUL CONTACTS

EDO-NQ	EDO (Qld)
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To become a member of the Environmental Defenders' Office of Northern Queensland, or for more information about factsheets and legal advice, please contact us at edonq@edo.org.au or on 07 4031 4766. Our web address is www.edo.org.au/edonq