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TIPS FOR ACTIVISTS ON HOW TO DUCK DEFAMATION AND SLIP SLAPP SUITS

This factsheet is for general information purposes only and is not legal advice. Details have been omitted to provide a brief overview of the law. If you require legal advice relating to your particular circumstances you should contact your solicitor or EDO.

What is defamation?

Defamation law in Queensland has undergone an overhaul in the last year or so. All Australian states now have a uniform approach to defamation legislation. Traditionally, prior to these changes, it was deemed *unlawful* in Queensland to *publish defamatory matter unless such publication is protected, or justified, or excused by law*. The recent changes have scrapped this direct approach, favouring a common law (case based) approach to defining ‘defamatory matter’. Now, at least in Queensland, defamation is best defined as any ‘matter’ (ie published material) that has a tendency to ‘lower the plaintiff in the estimation of right thinking members of society generally’.¹ That is, if the ‘matter’ causes a person to be shunned, ridiculed and embarrassed in various facets of the community, then defamation will have occurred.

Generally speaking, ‘matter’ includes spoken word, signs or gestures and delivering or exhibiting written words to person other than the person defamed (including internet media). The defamatory matter must refer to an identifiable person. These general rules apply regardless of which State the alleged defamation takes place.

Some of the defences or lawful excuses for publishing ‘matter’ which is seen prima facie as “lowering the thinking of members of society” include:

1. absolute protection against liability for statements by Judges and witnesses in Court and for speeches made by Members of Parliament in Parliament; (known as ‘absolute privilege’).
2. qualified protection² if a person publishes in *good faith*, (i.e. not activated by ill will, and reported in the manner usually used for news publication), a *fair report* of court proceedings, public meeting or Parliamentary proceedings.

¹ From the case *Sim v Stretch* (English appeal case).

² A new aspect of the legislation regarding ‘qualified protection’ (both in *good faith* and *fair comment*) is that the alleged defamer may have to show the court that the publication was reasonable in the circumstances. Aspects of ‘reasonability’ can be found in section 30 (3) of the Defamation Act 2005.

3. qualified protection for *fair comment* about, for example, the results of court proceedings or about the conduct of public servants or about the conduct of people who take part in public affairs. *Fair comment* involves stating facts, then giving your opinion based on those facts, so that anyone reading it can form their own opinion based on the facts. For example:

Twelve birds were seen dead outside the Acme factory air stacks yesterday (fact). This raises the question of whether Acme factory is releasing substances harmful to our birds (opinion) and I call on the EPA to require Acme to conduct an environmental report (opinion);

Recent amendments to the law, what do they entail?

Under the new uniform defamation laws of Australia, three significant changes have occurred, which your group may find fascinating (and useful). These changes are:

1. Almost all corporations are now sidelined from suing for defamation. If a company has more than 10 personnel (at the time of publication), and has an intention in its business to make a profit, then it can no longer rely on legislation to pursue defamation actions. In a practical sense this means that activist actions such as those which prompted *McLibel* are protected in Australia.
2. Public bodies, including eg. local government, cannot sue for defamation.
3. A defamation action can only be instigated within 1 year of the publication release date (except in very exceptional circumstances).

These adjustments to the law assist activists in exercising free speech against corporate behaviour and public bodies.

Tips for Activists

You cannot rule out the possibility of defamation suits against you or your group entirely, as some developers run suits with poor prospects of success to stop criticism of their projects (“Slapp Suits”). However if you follow these 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.

So to reduce the risk of a successful suit against you or your group...

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 on a particular issue is. 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. 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 groups publication.
5. 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

6. If you receive a threatening letter from a solicitor, do not panic. Write back straight away saying that you are obtaining legal advice and will respond within a defined period, for example two weeks after the date of the letter.
7. Obtain legal advice from a local solicitor, or for public interest environmental matters, ring the Environmental Defenders Office for help. While obtaining legal advice, do not repeat the statement complained of as this might aggravate the situation. 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. If you are insured you may need to notify your insurer.
8. With your lawyers, seriously consider an apology 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.

Jo Bragg
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