



Environmental Defenders Office

Avoiding Defamation in the ACT

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It is important to be aware that some things that are said and written – even unintentionally – can result in you being sued for defamation. Defamation laws attempt to balance freedom of speech with the need to protect the reputation or privacy of individuals.

What is defamation?

Defamation law in the ACT is governed by Chapter 9 of the [Civil Law \(Wrongs\) Act 2002 \(ACT\) \(CLA\)](#).

Defamation is primarily a civil (as opposed to criminal) action. A person or entity (the plaintiff) can bring a defamation claim against another person (the defendant) seeking damages if the defendant has published matter that is defamatory of the plaintiff, and the publication of the defamatory material has caused loss of the plaintiff's reputation.

There are three aspects to defamation:

- publication
- identification; and
- damage to reputation.

Publication

The first aspect is that the defendant must have published defamatory matter to a third party.

'Publication' is not defined in the CLA. However, at common law, a publication is a communication by one person to at least one other person (other than to the plaintiff).

‘Matter’ is defined broadly in the CLA and includes newspaper articles, internet publications, letters, oral communication, a gesture, or ‘any other thing by means of which something may be communicated to a person’.¹ This means that publication of a defamatory matter can be both oral and written.

It should be noted that the internet is not a law-free zone and internet defamation, including on social media, is treated as seriously as defamation in traditional forms.

Identification

The second aspect is that the plaintiff must be able to be identified through the publication. The plaintiff does not have to be specifically named; a court will consider whether a reasonable person who is familiar with the relevant circumstances would be able to identify the plaintiff through the content of the publication.

Damage to reputation

The third aspect is that the publication is defamatory of the plaintiff.

A court will consider whether an ordinary person would take the meaning of the publication to be defamatory of the plaintiff. The threshold is that the matter must have caused, or is likely to cause, serious harm to the plaintiff’s reputation.²

A publication will be defamatory if it conveys a meaning which is likely to either:

- lower the person’s reputation in the eyes of ordinary reasonable members of the community,
- lead people to ridicule, avoid or despise the person, or
- injure the person’s reputation in business, trade or their profession

In terms of this element, it is important to note several things.

First, the meaning behind the publication can be implied as well as express. Much will depend on the context. Defamation may arise from the direct meaning of words used when taken on face value, through an innuendo from the statement itself, or from an innuendo based on known facts that are not included in the statement. If media coverage about a person is widespread, the courts are more likely to assume that the ordinary person has a greater knowledge of the facts.

Second, it is irrelevant whether the defendant intended to make a defamatory statement. The test is an objective one: whether or not a statement is defamatory is judged against contemporary community standards, from the point of view of a reasonable person.

¹ *Civil Law (Wrongs) Act 2002 (ACT)* s 116 (‘CLA’).

² *Ibid*, s 122A(1).

Third, the test is quite specific. Not all criticism or abuse is necessarily defamatory. The question is whether or not the ‘ordinary’ person would tend to form a significantly lower opinion of the plaintiff just because they are the subject of that criticism or abuse.

Fourth, there is a common misconception that a person can avoid being defamatory by reporting something as an ‘allegation’ (which implies that it has not been substantiated). This is not always true. Statements couched as allegations can be defamatory, where the ordinary person is likely to conclude that there is some factual basis to the allegation. The one exception is for criminal proceedings. Stating that a person has been charged with an alleged offence will not be seen as a statement that the accused is guilty, as ordinary people are assumed to know that the law presumes innocence until guilt is proven.

Fifth, damage to reputation is presumed in Australia – that is, the plaintiff need not prove actual financial or other losses flowing from a defamatory publication.

Who can be defamed?

Any person or entity can claim the right to protect their reputation using the defamation laws, provided they are identified in a publication.

However, corporations cannot sue in defamation, unless they are an excluded corporation.³ Excluded corporations are defined as:

- not-for-profit corporations (corporations with objects that include obtaining financial gain for its members or corporators); and
- small corporations with fewer than 10 employees that are not an associated entity of another corporation or sole corporations with less than ten employees.

Government organisations that are corporations also cannot sue for defamation (unless they are an excluded corporation).

However, individual members of corporations (whether private or public) can still sue to defend their own reputations, if the defamatory statement points to them in particular. In addition, even if a publication does not specifically name or otherwise identify an individual member of a corporation, it might be possible to argue that the individual is still identifiable and defamed by a publication if they are considered the ‘face’ of the organisation.

³ CLA, ss 121(1)-(2).

Who can be sued?

The writer or speaker of a statement can be sued for defamation. In addition, the following people and entities can be sued:

- the broadcasting, television or newspaper corporation that publishes the statement;
- the person or journalist who wrote the material;
- a person being interviewed;
- a speaker in a talk-back program;
- the producer, executive producer or editor; and
- any other person who contributed in any way to the publication or authorised the making of the statement can also be sued, if their contribution can be identified.

For example, you cannot avoid personal liability for defamation by making a statement on the letterhead of an incorporated association.

Visit: Redfern Legal Centre's [Speaking Wisely: Considerations and strategies for managing public comment](#) toolkit. The toolkit is designed to provide a practical guide on how organisations can use and manage public comment. However, please note that RLC is a NSW-based organisation and any references to law in its toolkit are references to NSW law.

Defences

There are a number of defences against defamation,⁴ which we have summarised below. The defendant's publication of defamatory matter may be found to be lawful if the defendant can prove one of these defences.

Truth

A defamation action will fail if it can be shown that the allegation complained of is substantially true.⁵

There are practical problems involved in proving the truth of a statement in court. You may, for example, need persuasive and authentic documents to prove this, or have witnesses who can and will give evidence of the truth of your statement.

⁴ Defences against defamation are set out in the CLA Part 9.4 Division 9.4.2.

⁵ CLA, ss 135-136.

Public interest

This defence applies if the matter concerns an issue of public interest, and the defendant reasonably believed that the publication of the matter was in the public interest.⁶

In determining whether the publication of the matter was in the public interest, the court will have regard to a wide range of factors including, for example, the seriousness of the harm caused by the publication, the extent to which the matter published distinguishes between suspicions, allegations and proven facts, and the importance of freedom of expression in the discussion of issues of public interest.⁷

Honest opinion

This defence only applies if the matter represents an expression of opinion of the defendant (rather than a statement of fact) which is based on proper material.⁸ This type of defence is only available in relation to opinions regarding a matter of public interest.

This defence is also available, in similar terms, to an employee or agent of the defendant, or of a third party.⁹ However, this defence is not available if it can be shown that the matter did not represent the opinion of the defendant or that the defendant did not believe the employee, agent or third party honestly held the opinion.¹⁰

Fair report

This defence will be made out if the defendant proves that the matter published was a fair report of any proceedings of public concern.¹¹ Such proceedings are broadly defined and include proceedings of the courts, Parliament, matters of adjudication before recreation or sport associations, and any public meetings held anywhere in Australia.¹²

This defence is limited to circumstances where the plaintiff proves that the defamatory matter was not published honestly for the advancement of education or for information to the public.¹³

Scientific or academic peer review

This defence applies if the defamatory matter was published in a scientific or academic journal, the matter relates to a scientific or academic issue, and an independent review of the matter's scientific or academic merit was carried out before the matter was published in the journal by the editor of the journal or someone else with relevant expertise.¹⁴

⁶ CLA, s 139AA.

⁷ Ibid, s 139AA(3).

⁸ Ibid, s 139B.

⁹ Ibid, ss139B(2)-(3).

¹⁰ Ibid, s 139B(4).

¹¹ Ibid, s 139.

¹² Ibid, s 139(4).

¹³ Ibid, s 139(3).

¹⁴ Ibid, s 139AB(1).

A similar defence is open to the publication of any assessment of the matter in the same journal,¹⁵ and in a fair summary or extract from the matter or assessment.¹⁶

However, this defence does not apply if the plaintiff can prove that the defamatory matter or assessment was not published honestly for the information of the public or the advancement of education.¹⁷

Offer of amends

Where a publisher receives a Concerns Notice (a notice in writing informing the publisher of alleged defamatory imputations), a publisher can, within 28 days, make a written offer to make amends to the aggrieved person which can be later relied upon as a defence.¹⁸ There are important time limits and mechanisms involved in accessing this defence, so it is important to get advice or refer to the Act once a Concerns Notice is received.

Innocent dissemination

This defence can be claimed if the defendant did not know or ought not to have known that the published material was defamatory.¹⁹

Newsagents, booksellers, libraries and certain service providers may be able to take advantage of this defence. Activist groups may be able to rely on this defence, for example if they regularly let other organisations put material in their bookshop, foyer or stand at the markets.

Absolute privilege

Publication of statements made in parliament, parliamentary papers and certain court proceedings are subject to absolute privilege and, consequently, are immune from legal proceedings. It is a defence to a defamation action if the defendant can prove that the defamatory matter was published on an occasion of absolute privilege.²⁰

However, a person reporting a defamatory statement made by a member of Parliament or by a witness in court does not have the protection of the maker's absolute privilege – just as the maker of the statement does not have the protection of absolute privilege if he or she repeats the statement outside the Parliament or the courtroom. A person reporting a defamatory statement made in Parliament or in court has a defence of qualified privilege for fair and accurate reports of proceedings. The reporter does not have a derivative of absolute privilege but rather has an independent qualified privilege.

¹⁵ CLA, s 139AB(2).

¹⁶ Ibid, s 139AB(3).

¹⁷ Ibid, s 139AB(5).

¹⁸ Ibid, ss 126, 130.

¹⁹ Ibid, s 139C.

²⁰ Ibid, s 137.

The defence of absolute privilege extends to the publication of matter that would be subject to absolute privilege under the corresponding law of another Australian jurisdiction.²¹

Qualified privilege

This defence is available if the recipient of the defamatory matter has an interest in having information on a subject, the matter was published to the recipient in the course of giving information on that subject, and the defendant's conduct in publishing the matter is reasonable in the circumstances.²²

The defence can be defeated by proving that the publication was done maliciously.²³

The justification for this defence is that in such cases the advantage of public knowledge is outweighed by any private injury resulting from the publication.

Publication of public documents

This defence applies to the publication of defamatory matter if it can be proved that it was contained in a public document or a copy or summary of a public document or an extract from a public document.²⁴ The defence can be defeated if the plaintiff proves that the defamatory matter was not published honestly for the advancement of education or the information of the public.²⁵

Apologies, damages and restraining orders

Apologies

Many defamation cases do not proceed and few go to trial. Corrections, rights of reply or an apology can often be negotiated as full settlement when defamation has occurred.

If the defendant issues an apology, the apology is not taken to be an admission of the defendant's fault or liability.²⁶

However, a court will have regard to any correction or apology when considering whether an offer by the defendant to make amends is reasonable.²⁷ A court may also reduce an award of damages in circumstances where the defendant has made an apology to the plaintiff or has published a correction of the defamatory matter.²⁸

²¹ CLA, s 137(2)(c).

²² Ibid, s 139A.

²³ Ibid, s 139A(4).

²⁴ Ibid, s 138.

²⁵ Ibid, s 138(3).

²⁶ Ibid, s 132.

²⁷ Ibid, s 130(2)(a).

²⁸ Ibid, s 139(1)(a)-(b).

Damages

If a defamation case does go to court, the main remedy available is monetary damages (compensation).

The amount of damages awarded by a court depends on whether there is an appropriate and rational relationship between the harm sustained by the plaintiff and the damages awarded.²⁹ In assessing damages, the court will consider all the circumstances and make its own evaluation.

In defamation suits, the court can award 'general damages' (also known as damages for non-economic loss). General damages are mainly awarded for injury to reputation (to both people and legal entities) and for hurt feelings (to people only). There is a cap of \$432,500 on general damages.³⁰ This is the figure as at 1 July 2021 – this amount is adjusted on 1 July each year.³¹

A court is also able to award aggravated damages.³² However, exemplary or punitive damages cannot be awarded.³³ The Court is able to award a single sum of damages where there is more than one cause of action to assess.³⁴

The court must generally disregard the maliciousness or otherwise of the defendant at the time the matter was published when awarding damages.³⁵

The fact that the plaintiff already has a poor reputation may be relevant. Although damage is assumed in defamation cases, it may be possible to prove that the plaintiff's reputation was so poor that there has been no damage.

As noted above, the court may agree to mitigate an award of damages in some circumstances, including if the defendant has made an apology or has published a correction of the defamatory matter.³⁶

Injunctions

Injunctions (restraining orders) to stop the publication of allegedly defamatory material are rarely granted. Courts are reluctant to prevent freedom of speech on matters in the public interest. An action seeking an injunction must be based on evidence that, without the injunction, the plaintiff will suffer injury which an award of damages cannot adequately compensate.

²⁹ CLA, s 139E.

³⁰ [Civil Law \(Wrongs\) Non-Economic Loss Damages Declaration 2021 \(ACT\)](#) s 3.

³¹ CLA, s 139F.

³² *Ibid*, 139F(2B).

³³ *Ibid*, s 139H.

³⁴ *Ibid*, s 139J.

³⁵ *Ibid*, s 139G.

³⁶ *Ibid*, s 139I.

Time limits regarding proceedings

The limitation period for defamation actions is generally one year, starting from the date of publication.³⁷ However, the limitation period can be extended by up to 56 additional days if the plaintiff gives the defendant a Concerns Notice within 56 days before the limitation period expires.³⁸ A plaintiff can also apply to court for an order extending the one-year limitation period.³⁹ If the application is successful, the court may extend the limitation period by up to three years running from the date of the alleged publication of the matter.⁴⁰

Managing defamation risk

There are several things you can do to minimise the risks of having defamation action taken against you, based on an understanding of the basic principles set out above.

First, you should assess any draft press release, statement or document (including on the internet or via email) in light of these principles. Do you identify a person or particular people? Is the publication likely to damage their reputation?

Second, you should assess whether any defences apply, such as fair comment or qualified privilege. For example, can you substantiate any alleged facts and prove that the worst suggestion is both true and in the public interest?

Third, if possible, you should get independent legal advice on your draft before publishing it.

If you are threatened with defamation action, you should seek independent advice from either a lawyer or law firm who specialises in defamation. Legal advice may be available for free or at reduced rates for public interest matters. The EDO does not specialise in defamation law, however we may be able to refer you to another lawyer or law firm who can assist.

If an action for defamation is a serious possibility, a prompt offer of an apology can often be the fairest, quickest and least expensive remedy.

Injurious falsehood

This tort applies where the defendant maliciously makes a false statement (by words or deeds) about the plaintiff to a third person, who acts on that statement to the detriment of plaintiff. Conservation groups who make fraudulent or reckless statements about the business practices of corporations, with a view to moving customers and contractors away from the business, may fall within this category.

³⁷ [Limitation Act 1985 \(ACT\)](#) s 21B.

³⁸ *Ibid*, ss 21B(2)-(3).

³⁹ *Ibid*, s 21BB.

⁴⁰ *Ibid*, s 21BB(2).