



Environmental Defenders Office

Avoiding Defamation in NSW

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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 is primarily a civil (as opposed to criminal) action where a person or entity seeks damages for loss of reputation from someone who has published defamatory material about them.

There are three aspects to defamation:

- publication
- identification; and
- damage to reputation.

Publication

A publication is a communication by one person to at least one other person (other than the one defamed). A publication may be spoken, written or communicated in any form including television, radio, photograph, facial expression, drawing, letter, book, fax, e-mail or online. 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

A publication will be defamatory if it identifies one or more people.

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Damage to reputation

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. For example, in one well known case a doctor successfully sued for defamation because a file photograph of him was used on the cover of a report on medical negligence. Likewise, if press 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 a person 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.

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 someone 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 defamed person need not prove actual financial or other losses flowing from a defamatory publication.

Who can be defamed?

Any person can claim the right to protect their reputation using the defamation laws, provided they are identified in a publication. Corporations cannot sue in defamation, unless they are an excluded corporation or sole corporations with less than ten employees.

Government organisations, such as local governments and Aboriginal land councils, cannot sue for defamation. However, individual members of these organisations can still sue to defend their own reputations, if the defamatory statement points to them in particular.

Who can be sued?

The writer or speaker of a statement can be sued for defamation. In addition, the broadcasting, television or newspaper corporation which 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.

Redfern Legal Centre (RLC) has released a toolkit called [*Speaking Wisely: Considerations and strategies for managing public comment*](#). The toolkit is designed to provide a practical guide on how organisations can use and manage public comment.

Defences

There are a number of defences against defamation:

Triviality

This defence is available where the circumstances of the publication of the matter complained of were such that the person defamed was not likely to suffer harm. This defence, however, rarely succeeds.

Truth and public interest

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

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.

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. 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. 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.

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. 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.

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.

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. 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

Newsagents, booksellers, libraries and certain service providers can usually take advantage of this defence. This defence can be claimed if they did not know or ought not to have known that the published material was defamatory.

Activist groups may find themselves in similar situations if they regularly let other organisations put material in their bookshop, foyer or stand at the markets.

Consent

Another defence to a defamation action may arise if the person claiming to have been defamed expressly or by implication consented to, assented to, acquiesced in or invited the defamation.

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.

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 they repeat 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.

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.

Qualified privilege

Under this defence, the defendant needs to prove three things. First, that the recipient has an interest or apparent interest in having information on some subject. Second, that publication of the information to the recipient occurs in the course of giving to the recipient that information. Third, that the defendant's conduct in publishing the matter was reasonable in the circumstances.

The defence can be defeated by proving that the publication was done maliciously. In NSW there are four varieties of the defence of qualified privilege.

Example

Where a member of an environmental advisory committee established by local government tells the committee that an enforcement or assessment officer has a conflict of interest or has failed to carry out their responsibilities.

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. 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.

Apologies, damages and restraining orders

Many defamation cases don't 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 an apology is issued, the publisher is not taken to have admitted fault or liability.

However, if the case does go to court, the main remedy available is monetary damages. 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.

Damages are mainly awarded for injury to reputation (to both people and legal entities) and for hurt feelings (to people only). The Court must generally disregard the maliciousness or otherwise of the defendant at the time the matter was published when awarding damages.

The fact that someone already has a poor reputation may be relevant. Although damage is assumed in defamation cases, it is possible to prove that someone's reputation was so poor that there has been no damage. The judge will consider all the circumstances and make their own evaluation.

There is a cap of \$381,000 on general damages (this is the figure as at 1 July 2016 – this amount is adjusted on 1 July each year). A Court is also able to award aggravated damages. However, exemplary or punitive damages cannot be awarded. The Court is able to award only a single sum of damages where there is more than one cause of action to assess.

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.

Time limits regarding proceedings

The limitation period for defamation actions is one year.

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. 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 you maliciously make a false statement (by words or deeds) about a person or company to a third person, who acts on that statement to the detriment of the person or company. 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.

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