



Avoiding Defamation

Disclaimer: This factsheet is a guide only and is designed to give readers a plain English overview of the law. It does not replace the need for professional legal advice in individual cases. To request free initial legal advice on a public interest environmental or planning law issue, please visit our [website](#).

While every effort has been made to ensure the information is accurate, the EDO does not accept any responsibility for any loss or damage resulting from any error in this factsheet or use of this work.

This factsheet was last updated on 25 June 2024

What is this factsheet about?

This factsheet provides a general overview of defamation laws in Australia.

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 of individuals. Plaintiffs also bring claims sometimes to try to protect against the disclosure of confidential or private information, though is the not the primary reason the action exists.

1. [What is defamation?](#)
2. [Who can be defamed?](#)
3. [Who can be sued?](#)
4. [What Defences are available?](#)

What is defamation?

Defamation is primarily a civil 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 or ‘elements’ to the defamation action:

- publication;
- identification; and
- damage to reputation.

Since July 2021, claimants in all Australian states and territories (except Western Australia and the Northern Territory) must establish that the published matter caused ‘serious harm’ to the reputation of the person.¹

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, drawing, letter, book, fax, e-mail or online. It should be noted that the internet is not a law-free zone and people often sue in defamation over material on the internet, including on social media. In most states and territories, it must also be proven that the publication caused ‘serious harm’ to the persons reputation, as explained below.

Identification

A publication may only be defamatory if it identifies the person who it is said to defame. That person does not need to be identified by name. They can be identified where people can identify them, even where those people would need to know some further information to do that. Sometimes, a reference to a small group of people may be sufficient to identify its members and therefore lead to defamation of some or all of them.

Damage to reputation: Defamatory meaning

A publication will be defamatory if it conveys a meaning (often called an ‘imputation’) 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.

This means a court (including, sometimes, a jury) must decide:

- whether the publication in fact conveys the meaning, and
- if it does then whether that meaning had a defamatory effect on the plaintiff’s reputation of the kind described above.

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

First, the meaning or ‘imputation’ a person sues over does not need to appear in the publication in precisely those words. In other words, a person can sue on a meaning they say the ordinary reasonable reader would have taken away from what they read or saw.

¹ See *Civil Law (Wrongs) Act 2002* (ACT) (**ACT Civil Law Wrongs Act**) s 122A); *Defamation Act 2005* (NSW) (**NSW Defamation Act**) s 10A; *Defamation Act 2005* (QLD) (**QLD Defamation Act**) s 10A; *Defamation Act 2005* (SA) (**SA Defamation Act**) s 10A; *Defamation Act 2005* (TAS) (**TAS Defamation Act**) s 10A; *Defamation Act 2005* (VIC) (**VIC Defamation Act**) s 10A.

Much will depend on what the whole publication says, and its context. Defamatory meanings might be conveyed in 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 outside facts that help the meaning arise.

Second, it is irrelevant whether a person intended to convey the defamatory meaning, or to defame the plaintiff. The test is an objective one: whether a meaning is conveyed and whether it 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 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, as a general rule (see below regarding the serious harm threshold), 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.

The serious harm threshold

In all Australian jurisdictions, except Western Australia and the Northern Territory, defamation plaintiffs also have to establish the publication of defamatory matter about a person has caused, or is likely to cause, "serious harm" to the reputation of the person.² The Defamation Acts across the country do not define 'serious harm', and courts are still interpreting and explaining its full meaning, however the Courts have held to date that:

- a) "serious" harm means something more than "substantial" harm, but less than "grave" harm³;

² ACT Civil Law Wrongs Act s 122A; NSW Defamation Act s 10A; QLD Defamation Act s 10A; SA Defamation Act s 10A; TAS Defamation Act s 10A; VIC Defamation Act s 10A. As above, in Western Australia, criminal defamation does involve an element of "intending to cause serious harm": s 345 *Criminal Code Act Compilation Act 1913* (WA).

³ See *Rader v Haines* [2022] NSWCA 198 at [27].

- b) plaintiffs need to satisfy this requirement relying on actual, proven or provable facts about the impact or likely impact of the publication. In other words, evidence showing the actual impact or likely impact⁴; and
- c) it is not enough to point to the seriousness of the meaning a publication conveys to satisfy the serious harm requirement. The court needs to be satisfied that serious harm has been caused or is likely to be caused.⁵

The legal test on this threshold is quite technical, and in practice it is difficult to anticipate what harm a particular publication may or may not cause. If you have any doubts, seek legal advice.

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 generally sue in defamation, unless they are an '*excluded corporation*', meaning a corporation with less than ten employees or a not-for-profit entity.⁶

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 refers to them personally.

Who can be sued?

A person who makes a written or verbal defamatory statement may be sued for defamation. In addition, liability can extend to any person who broadcasts, publishes, or publicises defamatory statements or material. This can include:

- the writer of a newspaper article as well as the 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.

⁴ See *Newman v Whittington* [2022] NSWSC 249 at [64]-[69].

⁵ See *Selkirk v Hocking (No 2)* [2023] FCA 1085 at [14]-[32].

⁶ ACT Civil Law Wrongs Act s 121; NSW Defamation Act s 9; QLD Defamation Act s 9; SA Defamation Act s 9; TAS Defamation Act s 9; VIC Defamation Act s 9; *Defamation Act 2005* (WA) (**WA Defamation Act**) s 9; *Defamation Act 2006* (NT) (**NT Defamation Act**) s 8.

You cannot avoid personal liability for defamation by making a statement on the letterhead of an incorporated association.

It is also important to be aware that publication can include sharing material on social media platforms. It is important for community groups to be careful about what sort of information can be shared and consider restricting who can administer the social media page or site. It would also be prudent to have a documented system to regularly check and remove any potentially defamatory comments from the site or page.

Redfern Legal Centre 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 several defences against defamation.

Triviality (in Western Australia and the Northern Territory)

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.⁷ This defence, however, rarely succeeds.

In states and territories other than Western Australia and the Northern Territory this defence has been replaced by the serious harm threshold requirement explained above. While different to the defence of triviality (including because it is the plaintiff, not the defendant, who must prove it), that requirement has a similar effect in that a trivial publication would not be actionable.

Truth

A defamation action will fail if it can be shown that the allegation complained of is substantially true.⁸ Generally this is regarded as the ‘best’ defence, however it is important to remember that it is the person who made the publication who needs to prove that the defamatory meaning is true.

That means you need to overcome the various hurdles of 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 admissible evidence of the truth of your statement. So even if you are sure something you plan to publish is true, it is worth getting the advice of a lawyer to understand what you would need to prove that if you were sued.

⁷ WA Defamation Act s 33; NT Defamation Act s 30.

⁸ NSW Defamation Act s 25; ACT Civil Law Wrongs Act s 135; QLD Defamation Act s 25; SA Defamation Act s 23; TAS Defamation Act s 25; VIC Defamation Act s 25; WA Defamation Act s 25; NT Defamation Act s 22.

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.⁹ 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.¹⁰ Such proceedings are broadly defined and include proceedings of the courts, Parliament, matters of adjudication before recreation or sport associations, and public meetings held anywhere in Australia relating to a matter of public interest.

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. It is also important that the report is truly 'fair', in the sense that it gives a fair and accurate representation of the proceeding, without omitting key details.

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.¹¹ There are important time limits and mechanisms involved in accessing this defence, so it is important to get advice or refer to the relevant Act in your state or territory once a Concerns Notice is received.

It is also important to remember that in all states and territories (except the Northern Territory and Western Australia) a plaintiff must send a valid Concerns Notice (one that complies with the requirements under the Defamation Act of the relevant jurisdiction).¹² If you receive something purporting to be a Concerns Notice, you should seek legal advice.

⁹ NSW Defamation Act s 31; ACT Civil Law Wrongs Act s 139B; QLD Defamation Act s 31; SA Defamation Act s 29; TAS Defamation Act s 31; VIC Defamation Act s 31; WA Defamation Act s 31; NT Defamation Act s 28.

¹⁰ NSW Defamation Act s 29; ACT Civil Law Wrongs Act s 139; QLD Defamation Act s 29; SA Defamation Act s 27; TAS Defamation Act s 29; VIC Defamation Act s 29; WA Defamation Act s 29; NT Defamation Act ss 11-18.

¹¹ NSW Defamation Act ss 13-18; ACT Civil Law Wrongs Act ss 124-131; QLD Defamation Act ss 12-19; SA Defamation Act ss 12-19; TAS Defamation Act ss 12-19; VIC Defamation Act ss 12-19; WA Defamation Act ss 12-19; NT Defamation Act s 22.

¹² See NSW Defamation Act s 12B; ACT Civil Law Wrongs Act s 124B; QLD Defamation Act s 12B; SA Defamation Act s 12B; TAS Defamation Act s 12B; VIC Defamation Act s 12B.

Innocent dissemination

Newsagents, booksellers, libraries and certain service providers can usually take advantage of this defence.¹³ Internet platforms may also, within certain limits, take advantage of this defence (before they are put on notice of the content on their platform). This defence can be claimed if they did not know or ought not to have known that the published material was defamatory, where such lack of knowledge was not due to negligence.

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. This defence is only used rarely, as the factual scenario of a person seeing and consenting to a potentially defamatory publication ahead of time is quite unusual.

Absolute privilege

Statements made in Parliament, Parliamentary papers and certain court proceedings are subject to absolute privilege and, consequently, are immune from legal proceedings.¹⁴

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 for fair and accurate reports of proceedings, as explained above.

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.¹⁵

¹³ NSW Defamation Act s 32; ACT Civil Law Wrongs Act s 139C; QLD Defamation Act s 32; SA Defamation Act s 30; TAS Defamation Act s 32; VIC Defamation Act s 32; WA Defamation Act s 32; NT Defamation Act s 29.

¹⁴ NSW Defamation Act s 27; ACT Civil Law Wrongs Act s 137; QLD Defamation Act s 27; SA Defamation Act s 25; TAS Defamation Act s 27; VIC Defamation Act s 27; WA Defamation Act s 27; NT Defamation Act s 24.

¹⁵ NSW Defamation Act s 30; ACT Civil Law Wrongs Act s 139A; QLD Defamation Act s 30; SA Defamation Act s 28; TAS Defamation Act s 30; VIC Defamation Act s 30; WA Defamation Act s 30; NT Defamation Act s 27.

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.

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 committee member would likely be able to defend a claim that their statement was defamatory on the basis of qualified privilege.

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.¹⁶ 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. As in the case of the fair report defence, it is important that the report is truly 'fair', in the sense that it gives a fair and accurate representation of the document, without omitting key details.

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 necessarily taken to have admitted fault or liability.¹⁷

¹⁶ NSW Defamation Act s 28; ACT Civil Law Wrongs Act s 138; QLD Defamation Act s 28; SA Defamation Act s 26; TAS Defamation Act s 28; VIC Defamation Act s 28; WA Defamation Act s 28; NT Defamation Act s 25.

¹⁷ NSW Defamation Act s 20(1); ACT Civil Law Wrongs Act s 132(2); QLD Defamation Act s 20(1); SA Defamation Act s 20(1); TAS Defamation Act s 20(1); VIC Defamation Act s 20(1); WA Defamation Act s 20(1); NT Defamation Act s 19(1).

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.¹⁸

Damages are mainly awarded for injury to reputation (to both people and legal entities) and for hurt feelings (to people only).

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.

A Court is also able to award aggravated damages, as well as damages for any specific, actual loss (like loss of a valuable contract or job) that a plaintiff sustained. However, exemplary or punitive damages cannot be awarded. The Court can 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.¹⁹ The court can extend this limitation period in certain circumstances.

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?

¹⁸ NSW Defamation Act s 34; ACT Civil Law Wrongs Act s 139E; QLD Defamation Act s 34; SA Defamation Act s 32; TAS Defamation Act s 34; VIC Defamation Act s 34; WA Defamation Act s 34; NT Defamation Act s 31.

¹⁹ *Limitation Act 1969* (NSW) s 14B; *Limitation Act 1985* (ACT) s 21B; *Limitation of Actions Act 1974* (QLD) s 10AA; *Limitation of Actions Act 1936* (SA) s 37; TAS Defamation Act s 20A; *Limitation of Actions Act 1958* (VIC) s 5; *Limitation Act 2005* (WA) s 15; *Limitation Act 1981* (NT) s 12.

Third, if you or your group maintain social media pages, consider having a statement on the page about the type of material that can be shared. It would be prudent to have a documented system to monitoring any posts made by third parties on the site and remove any potentially defamatory comments as soon as possible.

Fourth, if you have any concerns about material being potentially defamatory – get independent legal advice before publishing or don't publish 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.

Evaluate this resource

EDO welcomes feedback on this factsheet. Your feedback will help us ensure we are providing useful information.

If you have any concerns or suggestions regarding this factsheet, please fill out the Legal Resources evaluation form by clicking [here](#) or scanning the QR code below:

