



## Speaking Out in Public

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Activists often operate in a highly stressed environment, with campaigns frequently being long-running and emotionally difficult. Amidst all this, 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.

### Defamation

Each state and territory of Australia recently enacted uniform defamation laws.<sup>2</sup> The New South Wales version of the uniform legislation is the *Defamation Act 2005* (NSW). The Act operates in conjunction with the common law which was established in this area.<sup>3</sup>

#### 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 to defamation – publication, identification and damage to reputation.

<sup>1</sup> [http://www.edonsw.org.au/legal\\_advice](http://www.edonsw.org.au/legal_advice)

<sup>2</sup> As of 26 April 2006

<sup>3</sup> See for example *Habib v Nationwide News Pty Limited* [2006] NSWCA 14, where it was held that the new provisions of the 2005 Act will only apply to publications subsequent to 1 January 2006.

## **Publication**

A publication is a communication by one person to at least one other person (other than the one defamed).<sup>4</sup> A publication may be spoken, written or communicated in any form including television, radio, photograph, facial expression, drawing, letter, book, fax, e-mail or internet chat.<sup>5</sup> It should be noted that cyberspace is not a law-free zone and internet defamation is treated as seriously as defamation in traditional forms.

## **Identification**

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

## **Damage to reputation**

Something – a media release, photo or radio interview – 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.<sup>6</sup>

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.<sup>7</sup> 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.

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<sup>4</sup> See *Webb v Bloch* (1928) 41 CLR 331; *Dow Jones & Co. Inc. v Gutnick* (2002) 210 CLR 575.

<sup>5</sup> Defamation Act 2005 (NSW), s. 4 "Definitions": under "matter".

<sup>6</sup> *Mirror Newspapers v World Hosts* (1979) 141 CLR 632; *Sungavare v Middle East Airlines Airliban* (1975) 134 CLR 1.

<sup>7</sup> *Nixon v Slater and Gordon* (2000) 175 ALR 15; (2000) Aust Torts Reports 81-565.

**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, a plaintiff need not prove actual financial or other losses flowing from a defamatory publication.<sup>8</sup>

### **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.<sup>9</sup>

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.

### **Defences**

There are a number of defences against defamation.

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<sup>8</sup> See *Defamation Act 2005* (NSW), s. 7(2). Note however that there is a defence that the circumstances of publication were such that the defamed person was not likely to suffer harm: s 33.

<sup>9</sup> *Defamation Act 2005* (NSW), s. 9. However, you may be liable for misleading and deceptive conduct and injurious falsehood in similar circumstances. There have been a number of cases in which the overlap between defamation, misleading and deceptive conduct and injurious falsehood have been considered, with some important implications for non-profit and community organisations. See, for example, *Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic)* (2002) 120 FCR 191.

### **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.<sup>10</sup> 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.<sup>11</sup> There is no longer a requirement that the matter should also be of public interest or public benefit. The removal of the public interest requirement may mean that sensational revelations about private conduct will be a more common occurrence. The defence reflects the defence of justification at common law.

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**

The defence of honest opinion replaces what used to be known as the defence of fair comment. 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.<sup>12</sup> This type of defence is only available in relation to opinions regarding a matter of public interest.<sup>13</sup>

This defence is also available, in similar terms, to an employee or agent of the defendant, or of a third party.<sup>14</sup> 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.<sup>15</sup>

### **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.<sup>16</sup> 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.<sup>17</sup>

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.

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<sup>10</sup> *Defamation Act 2005* (NSW), s. 33.

<sup>11</sup> *Defamation Act 2005* (NSW), s. 25: the defence of justification. See also *Defamation Act 2005* (NSW) s. 26 regarding the defence of contextual truth.

<sup>12</sup> This is typically material that is substantially true or privileged: *Defamation Act 2005* (NSW), ss. 31(1)(a) and (c).

<sup>13</sup> *Defamation Act 2005* (NSW), s. 31(1)(b).

<sup>14</sup> *Defamation Act 2005* (NSW), ss. 31(2) and (3).

<sup>15</sup> *Defamation Act 2005* (NSW), s. 31(4).

<sup>16</sup> *Defamation Act 2005* (NSW), s. 29(1).

<sup>17</sup> *Defamation Act 2005* (NSW), s. 29(4).

### **Offer of amends**

The *Defamation Act 2005* (NSW) provides that 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.<sup>18</sup> 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.<sup>19</sup> This defence can be claimed (under the common law) if they did not know or ought not to have known that the published material was defamatory.<sup>20</sup>

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.

The person who claims defamation must prove that the parties 'ought to have known' that the material was defamatory for the defamation action to succeed.

### **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.<sup>21</sup>

### **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.<sup>22</sup>

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.

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.<sup>23</sup>

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<sup>18</sup> *Defamation Act 2005* (NSW), ss. 13, 14, 15 and 18.

<sup>19</sup> *Defamation Act 2005* (NSW), s. 32(3).

<sup>20</sup> See *Defamation Act 2005* (NSW), ss. 32(1) and (2) and *Thompson v Australian Capital Television* (1996) 186 CLR.

<sup>21</sup> *Monson v Tussauds* [1894] 1 QB 671 at 691.

<sup>22</sup> *Defamation Act 2005* (NSW), s. 27

### **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.<sup>24</sup> 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.<sup>25</sup>

### **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.<sup>26</sup>

The *Defamation Act 2005* (NSW) outlines various factors which a Court may take into account in determining whether a publisher has been reasonable in the circumstances, which largely mirror the factors relevant under the common law.<sup>27</sup> The defence can be defeated by proving that the publication was done maliciously, as under the common law.<sup>28</sup>

In NSW there are four varieties of the defence of qualified privilege:

- the defence of common law qualified privilege, which is founded upon the notion of reciprocity of duty between the publisher and the audience;<sup>29</sup>
- the defence of statutory qualified privilege under section 30 of the *Defamation Act 2005* (NSW), which moves away from this reliance on reciprocity and is instead founded by the notion of reasonableness of publication;<sup>30</sup>
- the defence of fair and accurate report of parliamentary and judicial proceedings. The reporter's qualified privilege is defeated by a lack of fairness or accuracy, or by the presence of malice; and
- importantly, for environmental activism, the defence of *Lange* qualified privilege.

Broadly, the defence of *Lange* qualified privilege protects publications about governmental or political matters. The High Court decision in *Lange*<sup>31</sup> found that the

<sup>23</sup> *Defamation Act 2005* (NSW), s. 27(2)(c).

<sup>24</sup> *Defamation Act 2005* (NSW), s. 28(1). The Act defines "public document" as including any paper or report published by Parliament, Court or Tribunal determination or any record of other documents open to inspection by the public that is kept by an Australian jurisdiction or statutory authority: s 28(4).

<sup>25</sup> *Defamation Act 2005* (NSW), s. 28(3).

<sup>26</sup> *Defamation Act 2005* (NSW), s. 30(1).

<sup>27</sup> *Defamation Act 2005* (NSW), s. 30(3). See *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 and note that the NSW Court of Appeal refused to follow the more liberal view of the common law taken by the House of Lords in *Reynolds*.

<sup>28</sup> *Defamation Act 2005* (NSW), s. 30(4). For discussion on malice, see *Robert v Bass* (2002) 212 CLR 1 at 30-33.

<sup>29</sup> *Adam v Ward* [1917] AC 309.

<sup>30</sup> *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 204 ALR 193; (2004) 78 ALJR 737.

common law is subject to the Commonwealth Constitution, with the effect that the defence of common law qualified privilege must expand to accommodate the implied freedom of political communication.<sup>32</sup>

An example of qualified privilege may be when 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.

### **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 *Defamation Act 2005* (NSW) protects the publisher from express or implied admission of fault or liability.<sup>33</sup>

However, if the case does go to court, the main remedy available is monetary damages (even though this clearly isn't the most appropriate way to restore an injured person's reputation). 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.<sup>34</sup>

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.<sup>35</sup>

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 are no guidelines for awarding damages, so the results are often unpredictable. However, under the *Defamation Act 2005* (NSW) there are now factors that the court can take into consideration in mitigation of damages.<sup>36</sup>

However, the *Defamation Act 2005* (NSW) seeks to place a cap of \$250,000 on general damages.<sup>37</sup> A Court is also able to award aggravated damages.<sup>38</sup> However,

<sup>31</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

<sup>32</sup> Strictly speaking, the defence of *Lange* qualified privilege is not a separate defence, merely an expansion of an existing defence. However, it is useful to treat it separately, given that it relates specifically to publications about governmental and political matters. For recent, important decisions on the defence of *Lange* qualified privilege and the implied freedom of political communication, see *Herald & Weekly Times Ltd v Popovic* [2003] VSCA 161; *Coleman v Power* [2004] HCA 39.

<sup>33</sup> *Defamation Act 2005* (NSW), s. 20.

<sup>34</sup> *Defamation Act 2005* (NSW), s. 34.

<sup>35</sup> *Defamation Act 2005* (NSW), s. 36.

<sup>36</sup> *Defamation Act 2005* (NSW), s. 38(1). The list of factors is not exhaustive: s 38(2).

<sup>37</sup> *Defamation Act 2005* (NSW), s. 35(1).

<sup>38</sup> *Defamation Act 2005* (NSW), s. 35(2).

exemplary or punitive damages cannot be awarded.<sup>39</sup> The Court is able to award only a single sum of damages where there is more than one cause of action to assess.<sup>40</sup>

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 in the uniform scheme is one year.<sup>41</sup>

### **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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<sup>39</sup> *Defamation Act 2005* (NSW), s. 37.

<sup>40</sup> *Defamation Act 2005* (NSW), s. 39.

<sup>41</sup> *Limitation Act 1969* (NSW), s. 14B.