

# Defamation factsheet

From Legalpedia Qld

Defamation is a tort, or a civil wrong, which occurs when defamatory material relating to an individual is published. Material will be defamatory if it could:

injure the reputation of the individual by exposing them to hatred, contempt or ridicule; cause people to shun or avoid the individual; or lower the individual's estimation by right thinking members of society. For a defamation action to be successful, three elements must be satisfied:

1. the information was communicated by the defendant to a third person other than the plaintiff (**publication**);
2. the material identifies the plaintiff (**identification**); and
3. the information/material contains matter that is defamatory, regardless of whether the material was intentionally published or not (**defamatory matter**).

Provided that no defences are applicable, if the elements are satisfied then the defendant will be liable to pay damages to the plaintiff to compensate him or her for the damage caused to his or her reputation. Defences are further discussed below.

There is now no distinction between defamation communicated in writing and defamation communicated verbally. Both are actionable.

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## What is the relevant legislation?

On 1 January 2006, uniform defamation legislation was enacted in all Australian States, based upon model provisions agreed to by the Standing Committee of Attorneys-General. In Queensland, the *Defamation Act 2005* (Qld) ([http://www5.austlii.edu.au/au/legis/qld/consol\\_act/da200599/](http://www5.austlii.edu.au/au/legis/qld/consol_act/da200599/)) (**2005 Act**) repealed the *Defamation Act 1899* (Qld) (**1899 Act**).

The 2005 Act now governs the law of defamation in Queensland. The 2005 Act will apply to defamatory matter published after 1 January 2006. If the defamation occurred prior to 1 January 2006, the 1889 Act will apply.

## Who can sue for defamation?

Under the 2005 Act, the following can be a plaintiff:

- A person; or
- A corporation (that is not a public entity), if it is either:
  - a not for profit organisation; or
  - it employs fewer than 10 people and is not related to another corporation.

A corporation that does not fit within the point above cannot sue for defamation under the 2005 Act. This limitation was introduced in response to community concern that large corporations were able to use a threat of defamation to suppress legitimate public criticism and debate.

In addition a person cannot claim defamation or continue an existing action for defamation in relation to the publication of defamatory matter about a deceased person.

## Who can be sued for defamation?

Any natural person or legal entity including local governments, companies and incorporated associations may be liable for defamation. Any person who contributed to the publication, including but not limited to the original author, the publisher, journalists, television and/or radio stations may also be held liable.

## **Time frame to bring an action**

If the defamatory matter was published after 1 January 2006, then the action is governed by the 2005 Act and it must be brought within 1 year from the date of the publication of the matter complained of (section 10AA of the *Limitation of Actions Act 1974*). This may be extended to 3 years if the court is satisfied that the action could not reasonably have been commenced within 1 year.

If the defamation occurred before 1 January 2006, then the action is governed by the 1889 Act and the action must be commenced within 6 years from the date on which the cause of action ([http://www.legalpediaqld.org.au/index.php?title=Cause\\_of\\_action/](http://www.legalpediaqld.org.au/index.php?title=Cause_of_action/)) arose (i.e. when the defamatory matter was published).

## **Elements of civil defamation - Defamation Act 2005**

The 2005 Act does not define the meaning of the elements of a defamation action. Instead, they are defined by the common law, or the body of “judge-made” law that has been developed through cases decided by the courts.

### **1. Publication**

Publication means that the material is made known to a third person other than the person being defamed. Publication can be oral, in writing or in pictures.

Publishing occurs in each place the material is seen or heard, thus every time defamatory information is repeated to a third person, a separate publication occurs.

### **2. Identification**

The plaintiff must be able to show that the defamatory matter could reasonably be taken to be about him or her. It is a question of whether an ordinary reasonable person having knowledge of the relevant circumstances would read the material as referring to the plaintiff. This is most easily satisfied when the publication actually names the plaintiff. However, there is no need for the plaintiff to be expressly named. It is enough that the publication is made to persons with knowledge of other facts which would reasonably enable them to identify the plaintiff.

### **3. Defamatory matter**

Whether a matter is defamatory will depend on the circumstances of each individual case. It is necessary to consider:

1. whether the material was capable of conveying the defamatory meaning alleged by the plaintiff to an ordinary person. If this is answered positively, the next issue for determination is:
2. whether, in fact, an ordinary person would have taken the publication as conveying the meaning alleged.

In answering these questions the standard to be applied is what the ordinary reader, listener or viewer would understand or infer from the statement. The audience is taken not to have any special prejudices. The actual intention of the person making the statement is irrelevant.

There are three ways that a statement can convey a defamatory meaning (otherwise known as an *imputation*):

1. On the *natural and ordinary meaning* of the words: the meaning coming from a literal reading of the words.
2. The court may find that the statement is a *false innuendo*. In other words, there is a secondary meaning which comes from reading between the lines.
3. The statement may be a *true innuendo*. This is where the alleged meaning arises from the natural and ordinary meaning of the words being read in light of other facts not mentioned in the publication. The statement must be published to at least one person who knows of other facts.

The defamatory meaning can be directly stated or it can be implied. An implication that arises from another implication is not actionable. This is important in the context of criminal allegations. A statement that somebody is charged with a crime carries the implication that the person is suspected of committing that crime; to conclude that this means the person did in fact commit the crime requires a second implication, and would not be actionable.

It is possible that a single statement may convey several defamatory meanings. However, multiple imputations in the same publication will only give rise to one cause of action ([http://www.legalpediaqlld.org.au/index.php?title=Cause\\_of\\_action/](http://www.legalpediaqlld.org.au/index.php?title=Cause_of_action/)). This means that a plaintiff cannot take several actions against a defendant in relation to a single publication.

## Defences to civil defamation

There are several defences available under the 2005 Act. It is important for the aggrieved party to consider what, if any, defences may apply as this may help to determine the likelihood of success in a defamation action and whether it is worthwhile to commence an action.

The defences available under the 2005 Act are:

### **Justification: section 25 of the 2005 Act**

It is a defence to the publication of defamatory matter if the defendant proves that the defamatory allegations are substantially true. Substantially true is defined as being “true in substance or not materially different from the truth”.

This defence was not present in the 1889 Act. Its introduction in the 2005 Act represents one of the most substantial differences between the two statutes. Under the 1889 Act, a defence arose if the publication is both true and in the public interest. Truth here is actual truth, not substantial truth; being in the public interest can be a relatively difficult test to meet, and requires something more than a curiosity on the part of the public.

### **Contextual truth: section 26 of the 2005 Act**

The defendant will not be liable for the publication of defamatory material if the defendant can prove that:

- in addition to the defamatory imputations, the matter contained one or more other imputations that are substantially true (**the contextual imputations**); and

- as a result of the substantial truth of the contextual imputations, the plaintiff's reputation was not further harmed by the defamatory imputations.

### **Absolute privilege: section 27 of the 2005 Act**

If the defamatory material was published on an occasion of absolute privilege the defendant will not be liable. Occasions of absolute privilege are statements made:

- during the course of proceedings of a parliamentary body;
- during the course of an Australian court/tribunal hearing;
- on an occasion that, if published in another Australian jurisdiction, would constitute absolute privilege in that jurisdiction.

The rationale for this section is that there are certain occasions where freedom of expression is so important to society (such as the enactment of laws by parliament and the determination of legal issues by courts) that absolute protection should be afforded.

### **Publication of public documents: section 28 of the 2005 Act**

It is a defence if it can be proved that the material in dispute was contained in a public document, or a fair copy, summary or extract from a public document.

A public document includes, but is not limited to, reports by a parliamentary body, a judgment by a court, government documents and records open to the public.

### **Fair report of proceedings of public concern: section 29 of the 2005 Act**

A person will have a defence to the publication of defamatory matter if they prove the matter was, or was contained in, a fair report of any proceedings of public concern. Public proceedings include those of a parliamentary body, international organisations and conferences, international and domestic courts and tribunals, sport/recreation/trade associations, Ombudsman's reports and other proceedings that are treated as proceedings of public concern.

This defence will be defeated if the plaintiff can prove that the defamatory material was not published honestly to either inform the public nor to advance education.

### **Qualified privilege: section 30 of the 2005 Act**

It is a defence for the publication of defamatory material to a person (the recipient) if the defendant proves that:

- the recipient has an interest or apparent interest in having information on some subject;
- the matter is published to the recipient in the course of giving to the recipient information on that subject; and
- the conduct of the defendant in publishing that matter is reasonable in the circumstances.

This protection is qualified because the privilege can be lost if abused or misused. If it is proven that the publication was motivated by malice, the defence will be unsuccessful.

## **Implied Freedom of Political Communication**

In addition to the statutory defence of qualified privilege, the laws of defamation must also be read subject to an implied freedom of political communication in the Constitution in relation to publications concerning government and political matters that affect the Australian people. This means that certain material that is otherwise defamatory may be immune if it is a fair and accurate report of parliamentary or judicial proceedings, or public meetings concerning matters of public interest. The defendant must not believe that the imputation was untrue nor can the publication be actuated by malice.

## **Honest opinion: section 31 of the 2005 Act**

Persons are free to express an honest opinion provided the matter was expression of the defendant's opinion (as opposed to a statement of fact); the opinion was a matter of public interest, and this opinion is based on proper material.

The opinion is based upon proper material if it is substantially true, published on an occasion of qualified privilege, or the aforementioned defences of publication of public documents or fair report of proceedings of public concern apply.

## **Innocent dissemination: section 32 of the 2005 Act**

This defence applies where the defamatory publication was disseminated by an employee or agent of a subordinate distributor (i.e. not the author of the matter or first distributor of the matter). The defendant must have been unaware that the publication was defamatory and this lack of knowledge must not have been due to the defendant's negligence.

This defence is of particular significance to booksellers, newsagents and broadcasters of live programs as they are not the original source of the defamatory publication.

## **Triviality: section 33 of the 2005 Act**

There is a defence to an action where the circumstances of the publication of the defamatory material were such that the plaintiff was unlikely to suffer any harm.

## **General law defences**

In addition to the defences described above, the courts have recognised several defences that arise independently of the 2005 Act. The 2005 Act provides that a party may raise any of these defences to resist an action for defamation. A party may not raise these defences if the action is governed by the 1889 Act.

Many of these defences are similar to the defences contained in the 2005 Act, and so do not add much to the available range of defences.

## **Non-litigious dispute resolution**

Part 3 of the 2005 Act contains provisions regarding the resolution of civil disputes without recourse to litigation. Division 1 deals with offers to make amends. Division 2 relates to apologies.

## **Offers to make amends**

The defendant may offer to make amends to prevent further legal proceedings from taking place. Promptly correcting a mistake or issuing an apology will aid a defence to a defamation action.

The offer must be made within 28 days of receiving a “concerns notice” which is a notice in writing of what the aggrieved person considers to be the relevant defamatory material. If a concerns notice is received which inadequately describes the alleged defamatory material, a “further particulars” notice may be issued to request further information. The aggrieved person must reply within 14 days for their concerns notice to remain effective.

There are numerous requirements that must be followed in making amends, such as making the apology in writing, it being readily identifiable as an offer to make amends under the 2005 Act, offering to publish a correction, offering to pay the reasonable expenses incurred by the plaintiff and possibly an offer to pay compensation.

The effect of accepting such an offer prohibits the aggrieved person from asserting, continuing or enforcing any action for defamation against the publisher in relation to the matter in question, even if the offer was limited to particular defamatory imputations.

If an offer to make amends is not accepted, then it is a defence to an action for defamation if the publisher made the offer as soon as practicable after becoming aware of the defamatory matter, they were ready, willing and able to carry out the terms of the offer (if it was accepted) and the offer was reasonable

## **Apologies**

An apology made in connection with any defamatory matter published does not constitute an admission of fault or liability on the publisher’s behalf. Evidence of an apology is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter. However, apologies are relevant to the mitigation (or lessening) of damages.

## **Litigation**

A claim for defamation is to be lodged in either the Supreme Court or District Court (depending on the amount of damages being claimed).

### **Trial by jury**

A plaintiff in a defamation claim may elect for the proceedings to be tried by jury unless the trial requires a prolonged examination of records or involves any technical, scientific or other issue that can not be conveniently considered and resolved by a jury.

The jury will then determine whether the matter is defamatory and whether any defence has been established. If the jury determines that there has been a defamatory statement and that no defence applies, then it is for the judge to determine the amount of damages.

## Damages

The amount of damages to be awarded is determined by the judge. Pursuant to Section 35 of the 2005 Act, damages for non-economic loss is capped at \$389,500 [*current as at 23 June 2017 - this amount is reviewed on or before 1 July every year*], however the cap may be exceeded in very exceptional circumstances, such as where the court is of the opinion that the defamation would have warranted an award of aggravated damages (exceptional damages awarded where the defendant's conduct is improper or unjustifiable).

Exemplary and punitive damages (compensation in excess of the plaintiff's actual damage to punish the wrongdoer for their reprehensible conduct and deter them from engaging in such conduct in the future) cannot be awarded for defamation.

The amount of damages can be mitigated if the defendant can raise evidence that it made an apology to the plaintiff about the publication of the matter or they published a correction.

## Other relief – common law injunction

Another common form of relief is an injunction or court order to restrain the publication of defamatory material. Injunctions are discretionary remedies and therefore depend on the circumstances of each case. Courts are very reluctant to exercise this discretion. However, relevant factors include:

- the strength of the plaintiff's case;
- the balance of convenience must favour the granting of an injunction (this involves an evaluation of likely prejudice to each side if the injunction was granted); and
- other factors such as the availability of alternative remedies to the plaintiff, the adequacy of damages as a remedy and any delay on the part of the plaintiff in bringing the application.

## Criminal defamation

In certain circumstances, defamation may also be a criminal offence under the *Criminal Code Act 1899 (Qld)*. Criminal defamation occurs when a person publishes defamatory material knowing it to be false, or without having any regard as to whether it is true or false, and in publishing the material intends to cause serious harm to another. The maximum penalty for this offence is three years imprisonment.

However, criminal defamation will not be established if the defendant can show that he or she had a lawful excuse for publishing the defamatory matter. If the defendant can call evidence that one of the civil defences would have been available, had the matter been a civil defamation case, this will be accepted as a lawful excuse.

## External Resources

Defamation Factsheet (<http://www.edoqld.org.au/wp-content/uploads/2014/09/Understanding-Defamation-for-community-groups-and-environmental-activists.pdf>) - Environmental Defenders Office of North Queensland Inc

*Defamation Act 2005 (Qld)*

(<https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/D/DefamA05.pdf>)

## Contact us

The information in this resource is for general information purposes only. If you would like help with a legal problem, you may be eligible for assistance from a LawRight service or clinic.

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