
Defamation: what you need to know

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Freedom of Speech

- Purpose of defamation law
 - Why do we have a law of defamation?
 - The purpose of defamation law is to protect and/or vindicate the reputations of persons or corporations
 - Local governments and statutory bodies such as the Western Australian Planning Commission cannot be defamed
 - The Constitution does not provide explicitly for freedom of speech, but a constitutional right of free speech exists by implication

Free speech should not be harmful: for example if I say today that a poultry farm in the South West is infected with avian flu, knowing that this is false, then everybody would agree that there should be a right to recover damages for economic loss and some would say to punishment via damages or imprisonment.

There are limits on the Constitutional right to free speech: see [2003] SASC 398 (9 December 2003)

Law reform proposals

- There is no uniform national law of defamation
- In WA the common law governs the law of defamation as modified by legislation
 - viz: the *Criminal Code*, ss 354-369,
 - the *Newspaper Libel and Registration Act 1884* and
 - the *Slander of Women Act 1900*,s1

Proposals for law reform have resulted in the Issues Paper (March 2003) and Report (September 2003) of the WA Defamation Law Reform Committee appointed to address anachronisms in the law. Legislation is expected this year.

The *Criminal Code* contains laws as to criminal defamation. Criminal defamation is seldom invoked, and principally by the police. Nevertheless the statutory defences in the *Criminal Code* will be canvassed in this presentation. The misdemeanour of publishing defamatory material is liable to a \$600 fine but knowingly publishing false defamatory matter can incur a prison term of up to 2 years and to a fine of \$1000. *Criminal Code* s 360.

Elements of Defamatory Publication

- Must be published
 - Must have a meaning
 - Must impute an act or condition to someone
 - Must tend to lower the reputation of a person in the eyes of the community, cause others to shun him or her, or subject him or her to hatred contempt and ridicule
 - Halsbury's *Laws of Australia* , Butterworths, [145-15]
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Meaning and Publication elements explained

- The meaning has to be natural and ordinary and may be direct or indirect
- The meaning must be uttered or published to someone other than the person about whom the imputation is made
- The person about whom the imputation is made has to be alive
- Large groups of people cannot sue to save their collective reputation

'Natural and ordinary meaning' means: the literal meaning, plus any implied, inferred or indirect meaning that an ordinary reasonable person (neither unduly suspicious or naïve) would take from the words used. Here, 'indirect' means reading between the lines.

The deceased plaintiff's estate cannot continue with a defamation action commenced before his death after his or her death.

The WA Defamation Law Reform Committee report recommends that:

- the law in relation to large groups of people be amended so that not-for-profit groups would be able to sue, reversing the status quo and
- corporations should not be permitted to sue (as they currently are) without the leave of the Court.

Slander and libel

- Oral and written defamation
 - Oral defamation (slander also includes other forms of defamation made in a transient form)
 - Special proof of damage is required, subject to 4 exceptions
 - Written defamation (or in a permanent form)
 - No actual damage needs to be proved

In all national jurisdictions the distinction between slander and libel has been abolished, save for WA, South Australia and Victoria.

The four exceptions (called 'actionable per se') are:

- Criminal offence
- Contagious disease
- Unfitness for office
- Lack of chastity (in a woman only): see *Slander of Women Act 1900*, s 1

The WA Defamation Law Reform Committee's recommendation is that these anachronisms be removed from the law.

Defences

Truth and Absolute privilege

- Truth is a common law defence and still applies in Western Australia as justification for the imputation made
 - *Criminal Code Act 1913 s 5*
 - A statutory defence of truth in Western Australia also exists **but** it must also be shown that it was for the public benefit that the publication complained of should be made
 - *Criminal Code, s 356*
- Judicial or Parliamentary proceedings are 'absolutely privileged' by common law and statute and in WA Royal commissions or Government Inquiries are also absolutely privileged
 - *Criminal Code s 351- s 353 inclusive*
 - *Constitution Acts Amendment Act 1899, s 51*
 - *Parliamentary Privileges Act 1891 s 1*

The major obstacle to reform of the law of defamation to provide a national code is that in WA truth, if proved by the defendant, is a complete justification whereas, in other States truth must be proven and in addition that the publication was for the public benefit.

In relation to the statutory defence the onus of proving public benefit lies on the defendant, and, in other states, the case law on public benefit is extensive: the publication must be seen as relevant to promoting the public good and/or raise for public discussion or information matters which are properly of public concern (motive is irrelevant).

The WA Defamation Law Reform Committee did not suggest any alteration to these defences, but suggested that absolute privilege be extended to administrative tribunals and local government.

Defences

Qualified Privilege and Public Meetings

- Qualified Privilege, including Lange defence
- Fair report
 - The common law requires the the comment be based on the facts as truly stated, but these need not be for the public benefit
 - The statutory defence of fair report on matters of public interest applies to the comment not the facts and if the comment is not fair the defence fails

In WA there is qualified privilege on an occasion where the publisher of the statement has a common and legitimate interest with the person to whom it is made in exchanging the information.

Note that publication is highly unlikely to be to the public at large. Publishing the submission beyond the occasion of privilege may not be protected. Some examples are:

- A report to the Department of the Environment that a neighbour is involved in illegal land clearing, or
- a statement in an EDO publication to its members about a decision of the Federal Environment Minister being wrong are potentially privileged in this way.
- submissions to Ministers or officials who are empowered to make a decision and have invited or would benefit from views and representations from interest groups. If you send your submission to that person you don't have to be able to prove the precise truth of defamatory material it contains. If the submission is later published by the Minister as part of the submission process the occasion of qualified privilege is not lost. (But if you put it on your website then it is lost.)

Administrative tribunal or local government proceedings not currently protected by absolute privilege are likely to be protected by qualified privilege.

However, if express malice is proved on the part of the defendant claiming qualified privilege, then the privilege is lost.

A subset of qualified privilege is the so-called constitutional defence discussed by the High Court in *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520. The High Court of Australia said that the concept of freedom of speech and communication implied in the Australian Constitution requires, not a separate defamation defence for public debate but rather, that the common law categories of qualified privilege include the dissemination and receiving of information about government and political matters that affect the people of Australia. This extends to the conduct of any elected representatives of the Commonwealth the State or local governments. The defendant must act reasonably and conduct will not be reasonable unless the publisher had reasonable grounds for believing the defamation was true, took all reasonable steps to verify the accuracy of the material, did not believe the defamation was untrue and sought a response from the person defamed and published any such response.

A defence of fair report from public meetings exists in addition to the statutory protection for reports on matters of public interest, Criminal Code s 354.

- This can be obtained by malice – or ill-will - by the person making the publication to the person defamed or by any other improper motive
- Public meeting includes any meeting lawfully held for a lawful purpose and for the furtherance of discussion in good faith of a matter of public concern

The same defence is provided in the Newspaper Libel and Registration Act 1884, s 2, with the following rider:

- Provided always that the protection intended to be afforded by this section shall not be available as a defence in any proceeding if the plaintiff or prosecutor can show that the defendant has refused to insert in the newspaper in which the report containing the matter complained of appeared, a reasonable letter or statement of explanation or contradiction by or on behalf of such plaintiff or prosecutor.

Other defences

■ Fair comment

- Criminal Code s 355

■ Polly Peck defence

- Available in WA: *Nationwide News Pty Ltd v Moodie* [2003] WASCA 273
- Defendant pleads alternative meanings, and truth of those meanings
- WA Defamation Law Reform Committee suggested
 - substantial revision of the fair comment/honest opinion defence
 - an express new defence of triviality, for people too thin-skinned.

Moodie's case: Facts

The first instance Judge held in his decision that “acting in the manner of the mafia” as published was too different from “overbearing secretive management style” as pleaded by the defendant to be permissible at trial. The Supreme Court disagreed, and said that the publication “acted as a mafioso in performing his duties (using mafia tactics, dishonest, ruthless mafioso style executive)” related to management style of the plaintiff, and allowed a defence of justification to the imputations based on style.

Prompt correction/offer of amends

- Take care in making a correction: seek legal advice
- A publisher considers a retraction and writes to the offended party, who uses this offer as an admission in later proceedings
 - Recommendation from the WA Defamation Law Reform Committee to provide a procedural solution to this quandary to encourage mending of fences

No power exists in the Courts to order a retraction and an apology.

Time to sue

- Currently up to 6 years
 - Shorter periods specified for actions against registered newspapers and slander (oral defamation)
 - WA Defamation Law Reform Committee recommendation that 6 months be relevant time limitation here in WA with a further 6 months only by the leave of the Court (c.f. 1 year proposed time limitation in the NSW Law Reform Commission Report)
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Either party can request trial by jury.

Where to sue

- Anywhere the publication is made
- If publication is made in WA then WA law applies
- Nothing limits someone with no reputation here from seeking to sue if a publication defames them
 - Recommendation of WA Defamation Law Reform Committee is that no-one be permitted to sue here in WA unless they have a substantial reputation here or reside here

Entitlement to sue is complicated by a lack of a national approach and the internet. If someone takes steps in WA which result in a publication in California then Californian law applies (and nothing the WA government can do about law reform will change this).

Injunction/damages

- Injunction
- Damages
 - Actual financial loss
 - Loss of reputation and self-esteem
 - Aggravated damages
 - Exemplary damages

The Court can issue an injunction to restrain further publication.

Aggravated damages are where the conduct of the defendant has been unreasonable unjustifiable or lacking in good faith with the result that the damages were aggravated.

Exemplary damages are the opportunity for the court to punish the defendant for his or her behaviour.

Public interest groups: defamation

- Know the law
- Don't trust publishers to know the law – look after yourself
- Learn how the media Codes of Practice and complaint systems work and can be used for, or against you!
- Learn how effectively to use and mobilize the media in your campaign

These 4 suggestions, slightly shortened, come from an EDO (NSW) publication by Don Boyd, Solicitor.

Examples to work through

- CONSERVATION COUNCIL OF SA INC & ORS v CHAPMAN_ & ORS No. SCCIV-98-81 [2003] SASC 398 (9 December 2003)
 - Qualified privilege and malice
 - Constitutional defence of political discussion
 - Defence of Truth

The plaintiffs, Thomas Chapman, Wendy Chapman and Andrew Chapman claimed damages for defamation arising from eleven publications. The claims were made against the Conservation Council of South Australia Inc, Margaret Bolster, Professor David Shearman and Richard Owen.

On 30 September 2002 a judge ordered that Mrs Chapman recover \$20,000 from the Conservation Council and Mr Shearman in respect of a publication described as "publication 6", that Mr Chapman and Mrs Chapman each recover \$25,000 from Ms Bolster, Mr Owen and the Conservation Council in respect of a publication described as "publication 7", and that Mr and Mrs Chapman each recover \$30,000 from the Conservation Council in respect of a publication described as "publication 11". The claims involving all other publications were dismissed.

The learned trial judge concluded that publications 6, 7 and 11 were defamatory. The defences of justification, fair comment, common law qualified privilege and extended qualified privilege were rejected. The judge found that the defendants were motivated by express malice.

The judge ordered that Mr and Mrs Chapman (but not their son Andrew) recover costs fixed at \$50,000. The Conservation Council and Mr Shearman were held to be jointly and separately liable for \$10,000; the Conservation Council, Ms Bolster and Mr Owen jointly and severally liable for \$20,000, and the Conservation Council liable for an additional \$20,000.

The work sheets for this session are the text of publications 6,7 and 11.

Publication 6 and 7

What is the defamatory content?

Could it be taken out with no loss of meaning? Could it be reworded?

The Judge said that there were insufficient facts in Publication No 7 to make it fair comment.

Advice

- Think carefully about your article or comment as to which meanings could be defamatory
 - Ask yourself “can these be deleted without losing the sense of the argument?”
 - Can you take out the sting?
- Identity
 - ensure you have the right person if you intend to rely on truth
- Qualified privilege
 - seek legal advice before publishing
- Fair comment
 - can you take the comment out and lose the sting?

A common account in an environmental flyer or newsletter is that a decision that a government body has made a decision which lacks independence because the government body did not seek an independent assessment of the subject matter. For example the government body relied on the proponent’s flora and fauna reports or on its management plan. This is not good enough. The fact that no additional information was presented by the government body does not necessarily mean that no independent assessment was done. You first have to make sure that no-one within the department was providing an internal assessment. If you know that you can say that, rather than stating that the decision-maker lacked independence.

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