



## Defamation and Safe Speech

*Those concerned for protection of the environment are sometimes threatened with legal action when they speak out on controversial environmental issues. This can have the undesirable effect of stifling community debate. The Defamation Act 2005 came into force in WA on 1 January 2006. This Act, along with Acts in other States and Territories, has unified the law of defamation in Australia. In particular, a number of defences to defamation are now set out in legislation, although common law defences still apply where there is no inconsistency. This fact sheet encourages responsible free speech on environmental issues by providing a brief outline of the law of defamation, including the reforms in the Defamation Act 2005. Note that statements made before 1 January 2006 are not subject to the Defamation Act 2005.*

### What is defamation?

If you have defamed a person, you can be held liable for damages (money) if certain conditions are met. You have defamed a person if you make a statement which:

- tends to lower the person's reputation in the eyes of ordinary members of the community
- leads people to ridicule, avoid or despise the person, or
- injures the person's reputation in business, trade or profession.

Note that the mere fact that you have defamed somebody does not mean that you will be held liable in court. There may be defences available to you (see over).

A defamatory statement can be written or verbal. To be defamatory, the material must be 'published' or made known to someone other than the person defamed. This can include saying something in front of other people, publishing an article in a newsletter, or writing something on a website.

The reporting of allegations can still be defamatory, because an ordinary reader or listener will infer that there is some factual basis to the allegation.

**Example:** *To say 'it has been alleged that Councillor Smith is corrupt and has been stealing local government funds' is defamatory, unless this is a fair report of court or Parliamentary proceedings.*

A statement may be defamatory even if that was not the intention. If an ordinary reader or listener would understand or infer that the material has a defamatory meaning, then defamation has taken place. As the saying goes: "It's what you hit, not what you aim at". You must also be careful of innuendo or knowledge that a reader or listener may already have. If the reader has knowledge of facts which in addition to your information form a defamatory imputation, you can still be held liable.

**Example:** *A letter to the editor of a local newspaper stating that someone is using mafia-like tactics may be defamatory as readers may have other knowledge of what it means to act in a mafia-like way. Even if the author did not mean that the person was being violent, readers are likely to conclude this is what was meant.*

### Who can be defamed?

Only living (as opposed to dead) persons can be defamed.

Importantly, most large companies are no longer able to sue for defamation in WA. Only not-for-profit companies or companies with less than ten employees (provided they are not public bodies) can be defamed, where their trading or business reputation has been lowered.

#### IMPORTANT DISCLAIMER

This Factsheet is for general information purposes. Important legal details have been omitted to provide a brief overview of this area of law. If you require legal advice relating to your specific circumstances you should contact the EDO or your solicitor. The EDO takes no responsibility for any loss or damage resulting from any errors in this Factsheet.

Local and State governments and statutory authorities (such as the EPA) cannot sue for defamation. However, individual members of a Local or State Government body, as opposed to the body itself, can sue for defamation if they are identified.

**Example:** *A reference to corrupt behaviour by a specific officer of a Government Department will defame the officer, and give the officer the right to sue the maker of the statement.*

The person must be identifiable from the statement that has been made for there to be any basis to a defamation action. A person may be identifiable, even if they haven't been named, if a sensible reader or listener would be able to identify that person or conclude that all the members of a group are the object of the statement.

**Example:** *A reference to 'greedy and malicious developers' does not of itself identify a person, but a reference to 'the greedy and malicious developers in the area', where there are particular identifiable developers in the area, will sufficiently identify those persons.*

In a recent case, non-specific references to "developers" were even held to have identified, and defamed, former developers. Some groups of people are so small (for example, six to ten people) that statements about the group generally will be defamatory to those individuals.

## Who is liable?

Each person who participates in the publication of the defamatory statement, not just the author, incurs liability. This can include the broadcaster, the journalist who wrote the material, the producer of a program or editor of a newspaper, and any other person who contributed to the publication if their contribution can be identified.

**Example 1:** *A person who hands out a defamatory leaflet can be sued, in addition to the person who wrote it.*

**Example 2:** *The committee members of a community group who authorise the issuing of a defamatory media release can be sued, in addition to the person who wrote the media release. If the community group is an incorporated body, that body can also be sued.*

## Defences

There are a number of statutory and common law defences that could apply to different situations. Some of these are discussed below.

You can't be held liable for making a defamatory statement if:

### – You can prove that the statement was true

If a legal action is brought the person sued must prove in court that all defamatory allegations and inferences that can be drawn were substantially true. This can only be done by showing original documents or calling witnesses who themselves saw or heard things directly. It can be very difficult to prove that a statement is true and this is not always a good defence to rely on. There is no defence of "honest mistake".

**Example:** *There is a major spill of toxic chemicals into the Swan River. A member of the Anti-Pollution Coalition speaks to a local environmental officer who (wrongly) says that company X deliberately dumped the chemicals. The member of the Anti-Pollution Coalition issues a media release to this effect. Company X sues. It is no defence to say that the statement in the media release was an honest mistake.*

### – The statement was an honest opinion on a matter of public (rather than private) interest

You can offer your opinion on a matter of public interest, even if it lowers a person's reputation, as long as it is an "honest opinion" based on facts you state and can prove to be true. Matters are of "public interest" only if the person whom the statement is about inherently invites public criticism or discussion (e.g. politicians). Speaking out about the environment may not necessarily be in the public interest, particularly if the statement is about a private person.

### – The statement is "privileged"

The most commonly used "privilege" defence is "qualified privilege". This applies where information is given to a person who has an interest in having information on a subject and the maker of the statement acts reasonably in giving that information. The maker of the statement must not be motivated by malice. The "qualified privilege" defence will apply, for example, to the reporting of a suspected crime to the police, or an environmental offence to the Department of Environment.

There are a number of factors the court can take into account when deciding whether a person acted reasonably, for example:

- the extent to which the matter published is of public interest
- the seriousness of any defamatory imputation carried by the matter published

- the extent to which the matter published distinguishes between suspicions, allegations and proven facts, and
- the sources of the information in the matter published and the integrity of those sources.

This defence extends to statements made in the course of discussing politics or governmental matters in certain circumstances. The person making the statement must act reasonably (eg, check the facts), not be inspired by ill will and must usually first give the target person the right to comment on the allegation. However, the defence is not so wide as to necessarily protect people who say defamatory things while informing the general public about an environmental issue.

This defence will apply to mass publications as well as giving information to an individual person.

The other “privilege” defence is “absolute privilege”. Where a matter is published in the course of parliamentary proceedings, or in certain court proceedings, the maker is immune from legal proceedings. However, a person reporting a defamatory statement made by a member of Parliament or witness in court does not have the protection of the maker’s absolute privilege. A person reporting a statement made in Parliament or court may have the protection of qualified privilege if they make a fair and accurate report of the proceedings.

There is no general defence of “speaking out in the public interest”.

There are other defences under the Defamation Act or common law that may apply in different situations. Seek legal advice if you concerned about what defences may be available to you.

## Minimising the risk of getting sued for defamation

Your risk of being sued successfully or sued at all for defamation when speaking out to protect the environment will be reduced if you take the following steps when making a statement through letters to the editor, media releases or other means:

- be careful not to unintentionally identify a person if what you are saying could lower their reputation, and avoid sweeping statements and generalisations
- avoid criticising the character of any person you do identify – concentrate on the issue, rather than the possible motives of the people involved
- carefully check that your statements are true and can be backed up
- only give your opinion when it is an “honest opinion” on facts you have stated, and
- if in doubt, check with a lawyer first.

## Apologies

Usually a person who is going to sue for defamation will first give the person who made the statement a chance to apologise. This can be done through a “concerns notice” – a written notice to the publisher that the person has been defamed and would like the publisher to make amends.

Often, a request will be made that an apology using a specified form of words be published in a certain place, such as a local newspaper.

If you are given the chance to apologise, and wish to take it, you can make an “offer of amends” including an apology and an offer of damages if appropriate. Otherwise, the person who believes they have been defamed may proceed with their legal action. If the offer of amends is accepted and the terms are carried out, the person loses their right to sue.

## Going to court

Defamation cases are heard in the Supreme Court of Western Australia. If a defamation action is successful, the Court can order that the person or persons who made the statement in question pay damages to compensate for injury to reputation and any financial loss caused by the defamatory statement (such as loss of business). In addition, the court will usually order that the unsuccessful party pay the successful party’s legal costs.

If legal action for defamation is commenced against you, you should obtain legal representation. If you cannot afford a private lawyer, you can apply for Legal Aid, although defamation is not a priority area for Legal Aid and therefore your request may be refused.

If you are being sued because you have spoken out on an environmental issue, the Environmental Defender’s Office may be able to assist you.

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## Contacts and further information

Law Society of Western Australia, Perth Tel: (08) 9322 7877

Legal Aid Western Australia, Perth Tel: (08) 9261 6222