# DEFAMATION

## Greens Local Councillor Forum

### 1. What is defamation?

Defamation is a good old common law tort that, to a large extent in NSW, has been codified in the *Defamation Act* 1974. A statement is defamatory if it tends to lower a person's, or company's, reputation in the eyes of the general community. In NSW you can't be sued for defamation by a local council, a land council or a company with fewer than 10 employees and no subsidiaries at the time of publication.

The question is not did it actually damage a person's reputation in the eyes of any one individual, rather the test is an objective one that is meant to reflect existing community standards. A Court asks itself:

> *"Would an ordinary and reasonable person tend to form a significantly lower opinion of the person as a result of the statement."*

The fact that a particular person did or did not form a lower opinion as a result of hearing the statement is irrelevant. The law, normally by a Supreme Court judge, creates for itself a "reasonable person" and uses that creation to test if a statement was defamatory. For example it is probably not actionable to call some a "Liberal Party Member", even though many people might find it defamatory to be called that. Calling them a "Green" however …

Obvious examples of defamatory statements are:

- Calling someone a liar;
- Suggesting someone is corrupt or has taken a bribe;
- Saying someone is a criminal or has committed a criminal offence.

## 2. When is a defamatory statement actionable?

A defamatory statement becomes actionable only once it is published. Publication is a term of art in defamation law and means a communication from one person to another person, other than the one who you are saying unpleasant things about.

It is not defamation to quietly take someone aside and tell them what you think of them. It is defamatory however if someone else is listening.

Obvious publications are if the statement is:

- published in a newspaper;
- put on a web page;
- emailed to a person (remember of course that once you email a defamatory publication to person A, he or she might email it on to others outside your control and it will still be your statement); and
- said at a public meeting (including a council meeting).

You can defame a person other than by words. For example if someone asks you in a public meeting is Jane Developer is a crook and you nod – you have just published a defamatory imputation of Ms Developer.

## 3. How can you cause damage to a person who already has a poor reputation?

Don't worry, you can. The law assumes that a defamatory publication causes damage to a person's reputation, no matter what the state of that reputation prior to your efforts.

## 4. Who can be sued for the statement?

Effectively anyone actively associated with the making or repeating of the statement. That means the author, the publisher, the emailer, the internet service provider, the webmaster etc. The plaintiff can choose to sue all or only a select few of such people.

## 5. Common Misconceptions

You cannot escape a statement being defamatory by prefacing it with "it is alleged that …". If a statement conveys a "defamatory imputation", then it is defamatory. If you are "alleging" a person is corrupt, or repeating another's "allegation" then you are imputing corruption.

Imputation can also come about from context. For example if you say:

> *"I saw Councillor X speaking with Massive Units Developer Yesterday. Everyone knows that Massive Units Developer is willing to buy its way to a development approval."*

Whilst you don't explicitly say Councillor X is taking the developer's money – it is imputed.

You can also identify someone even if you don't use their name. Giving a visual description can be enough in certain contexts. People can also understand who you are talking about by the use of "extrinsic material." That is material known to an identified group of people. For example, people tend to read statements with a lot of prior knowledge from material published in newspapers, from a person's history or from shared cultural or religious knowledge etc.

You can defame a group of people with a single statement if you really try. However the individuals in that group need to be identifiable as individuals and not just an

amorphous group. For example saying "all Australians are violent criminals" will not be defamatory of any individual Australian. However saying "the Labor councillors on X council have so few scruples that they would take money from the Klu Klux Klan if offered" would be defamatory of each individual Labor councillor as they would each be able to be readily identified.

## 6. What defences are there?

If you are looking for a defence then you have probably already made a mistake.

In NSW there are a number of "common law" defences and a number of "statutory defences" under the *Defamation Act* 1974. There is talk of national "defamation law reform" at present and the law may therefore change. This paper will not deal with all the defences, only the most pertinent for present purposes.

*(i) Truth*

The NSW Act makes it clear that simply because a statement is true does not mean that the publisher of the statement has a defence. The truth is only a defence if **both** the following are satisfied:

- The statement is a matter of substantial truth; and
- The statement either relates to a matter of public interest or is made under qualified privilege.

Scurrilous gossip about a person's private life rarely has an element of public interest. Therefore even if true, would likely still be defamatory. However it has been held that:

> "… the marketing of real estate, particularly real estate which has unusual and not commonly understood qualities as to the uses to which the property may be put, is a

> matter of public interest. So also is concern expressed by a local council about the manner in which a particular piece of real estate is being, or is to be, marketed.[1]

Unfortunately for the defendant in that case, whilst succeeding on public interest, it failed on truth. It is often a long, hard and expensive exercise to prove the truth of a statement in a court of law.

The Courts also take the view that the more unpleasant the allegation then greater the evidence required to prove it. This is known as the *Briginshaw* test. In that case the High Court held that in civil cases it is necessary for a court to be satisfied of a fact on the balance of probabilities but that:

> ... reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal."

*(ii) Unlikelihood of harm*

It is a defence if a person defamed was not likely to suffer harm from the statement. Don't rely on this defence. This defence has an unlikelihood of succeeding.

*(iii) Qualified Privilege*

Qualified privilege is a defence if the person who publishes the statement has an interest or duty to communicate the information and the recipient of the information has an interest or a duty in hearing it and the conduct of the publisher of the statement was reasonable. The comment must be:

> …fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified

[1] West & Anor v Nationwide News Pty Ltd t/as Cumberland Newspaper Group [2003] NSWSC 505

> defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."

This is a difficult test to apply. The High Court has said it is easier to say than implement.

*(iv) Constitutional Qualified Privilege*

The High Court held in *Lange v The Australian Broadcasting Corporation* (1997) 189 CLR 520 that there is a limited qualified privilege that allows for public discussion about governmental and political matters. In the words of the majority:

> Accordingly, this Court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion – the giving and receiving of information – about government and political matters. The interest that each member of the Australian community has in such a discussion extends the categories of qualified privilege. Consequently, those categories now must be recognised as protecting a communication made to the public on a government or political matter. It may be that, in some respects, the common law defence as so extended goes beyond what is required for the common law of defamation to be compatible with the freedom of communication required by the Constitution. For example, discussion of matters concerning the United Nations or other countries may be protected by the extended defence of qualified privilege, even if those discussions cannot illuminate the choice for electors at federal elections or in amending the Constitution or cannot throw light on the administration of federal government.
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> Similarly, discussion of government or politics at State or Territory level and even at local government level is amenable to protection by the extended category of qualified privilege, whether or not it bears on matters at the federal level. Of course, the discussion of matters at State, Territory or local level might bear on the choice that the people have to make in federal elections or in voting to amend the Constitution, and on their evaluation of the performance of federal Ministers and their departments. The existence of national political parties operating at federal, State, Territory and local government levels, the financial dependence of State, Territory and local governments on federal funding and policies, and the increasing integration of social, economic and political matters in Australia makes

> this conclusion inevitable. Thus, the extended category of common law qualified privilege ensures conformity with the requirements of the Constitution. The real question is as to the conditions upon which this extended category of common law qualified privilege should depend." (pp 571-572)

It is worthwhile noting that the Supreme Court has held[2] that a debate or discussion that took place at a Council meeting, whilst involving local planning issues, was not a political debate:

> It was a discussion concerning the development approval that had been given to the second plaintiff by the Land and Environment Court, and the manner and extent to which he had or had not complied with the conditions, and the ramifications for residents of the Council municipality as a result.
>
> …
>
> The references in **Lange** to "government matters" extending to local government are seductive, but I do not think the High Court intended to include in the "extended category of qualified privilege" discussion of the kind of issue under consideration at the Council meeting. Their Honours explained the incorporation of local government matters by reference to the interconnection of the various tiers of government, and their connection with the Constitution. I am satisfied that, by no stretch of the imagination, could the discussion at the Council meeting properly be described as a debate or discussion about "government or political matters". As I have held in relation to the defence of qualified privilege at common law, the councillors were expressing their concerns, not about matters of policy or government, but about what they perceived to be the flouting by the plaintiff of the terms of the development consent, and their opposition to the development consent that had been granted by the Land and Environment Court.

It appears that for some, local politics is not politics.

## 7. Conclusion

Remember, this is a brief outline only and is not legal advice. Do not use it to test a particular statement before you make it. It also only deals with the law in NSW. The law is different in different states and territories and publications, particularly on the internet, have a habit of crossing borders.

[2] See once again West & Anor v Nationwide News Pty Ltd t/as Cumberland Newspaper Group [2003] NSWSC 505

In the author's opinion, unless you have the good fortune to make your statements in parliament, the best way to avoid being sued for defamation is to avoid saying things that are hurtful of others' reputations.

Stick to the issues. Avoid attacking the person.

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