

AVOIDING AND RESPONDING TO DEFAMATION THREATS

This information (and updated versions) is posted at www.foe.org.au/defamation



Please encourage new (and old) FoE activists to read this information.

The best way to avoid legal action for defamation is to know the law and do not defame. If you intend to publish or publicly state anything that may result in defamation, please check first with your campaign collective, local group's Management Committee, a National Liaison Officer, or the FoE Australia Committee of Management (FOEA CoM).

WHAT IS DEFAMATION?

One definition: Defamation is the publication of any false imputation concerning a person by which (a) the reputation of that person is likely to be injured or (b) s/he is likely to be injured in profession or trade or (c) other persons are likely to be induced to shun, avoid, ridicule or despise him/her.

WHY SHOULD I CARE?

1. Because in a worst-case scenario, a defamation suit can cause you heaps of stress, cost you heaps of money, and absorb lots of your time over a period of months or even years.
2. If you are representing an organisation, you are also putting that organisation at risk by defaming people.

An example: several people from (conservative) environment groups sued a book author. Seven sets of lawyers were involved. It took several years to resolve. All available copies of the book were pulped. And to think that it would have been soooooo easy for the author to avoid all that trouble by making pointed criticisms without using defamatory language.

AVOIDING DEFAMATION SUITS

1. Write/say things in such a way as to minimise or negate risks of defamation.
2. If in doubt, check first (with your local group's Management Committee, FOEA CoM, NLO, and/or your collective).
3. Stick to the issues. To use a sports analogy: keep your eye on the ball and not your opponent.
4. Be MEGA-CAREFUL when commenting about an individual. It is much easier for individuals to sue for defamation than it is for governments and corporations.
5. Avoid unnecessary generalisations. If you state that "Elias Olman is a thief", you will probably be safe if Olman has been convicted of more than one case of theft. However, one conviction does not necessarily make a man a thief. In the case of one offence, it is safer to be specific and say: "Elias Olman was convicted of theft in 1999".
6. Check that your statements are true and can be backed up.
7. Only give your opinion when it is an "honest opinion" based on facts you have stated.
8. Alternative Annual Reports and other ironical publications. Be careful – just because the publication is ironical, it doesn't mean you have free licence to make defamatory statements. Also be careful of things like breaching copyright by using a company logo – it might be OK so long as there is a clear disclaimer.
9. Can I be sued for comments made at a rally or public meeting, or comments on a banner/placard, or comments on email, social media and SMSs? Yes, yes, yes, yes, yes. You can be sued for any sort of spoken or written word. Never write anything in an e-mail / SMS that you would not want published on the front page of a national newspaper with a FoE by-line. Don't forward messages that contain defamatory material.
10. Do I have to worry about defamation if I'm just quoting someone else? Yes. It is no defence to claim that you were only quoting someone else.

WHAT TO DO IF YOU RECEIVE A LEGAL THREAT FOR DEFAMATION

- Don't panic – most threats are SLAPPs (see below).
- Do not respond individually to any legal letter, email or threat (no matter how menacing) other than to advise that you have received the correspondence and are seeking legal advice.
- Advise your collective and local group immediately. Contact FOEA CoM immediately (currently the contact is Jim jim.green@foe.org.au 0417 318368). A member of the CoM or local group Management Committee will be assigned to work with you and support you through the process. Usually we will seek pro bono legal advice.
- Ensure all documentation and correspondence is kept. You may be asked to provide a copy to the FOEA CoM and/or your local group's Management Committee (members of these boards are ultimately held accountable if legal action is pursued against Friends of the Earth as an organisation).

WHAT ARE SLAPPS?

Strategic Litigation/Lawsuits Against Public Participation – writs which are used, often by powerful companies or individuals, to frighten opponents with the threat of expensive legal action. Here's a fun example of a company being held to account: foe.org.au/paladin-threatens-pensioner

WHO CAN SUE FOR DEFAMATION?

1. Individual people
2. Not-for-profit corporations / organisations
3. For-profit corporations with fewer than 10 employees
4. Incorporated associations (e.g. many NGOs) can sue for defamation
5. Other bodies corporate, such as trade unions, local councils or statutory authorities, may sue for defamation that reflects on the way the body conducts its affairs.

Corporations generally can't sue – but there are exceptions:

- a company can sue on behalf of a staff member (or director etc.)
- a company with less than 10 employees can sue
- corporations may still sue for the tort of injurious falsehood, where the burden of proof is greater than for mere defamation, because the plaintiff must show that the defamation was made with malice and resulted in economic loss.

Governments can't sue – generally. But individual politicians certainly can, and some do. Also, an allegation of corruption levelled at the Ministry of a government has been held by a Queensland Court to give each member of the Ministry a cause for action.

DEFENCES

1. Truth
2. Privilege and protected reports. MPs speaking in parliament or people speaking in court proceedings are protected from defamation by absolute privilege which means they cannot be sued whatever they say or whatever their motive for saying it. Your reports of such proceedings are usually protected by qualified privilege. Protection only usually applies as long as your report is honestly broadcast for the information of the public or the advancement of education and is reasonable.
3. Honest opinion / fair comment. To use the defence of honest opinion you do not need to prove the truth of your comment. In some cases this is not possible, especially if it is an opinion rather than a fact. You need to convince the judge or jury that your comments were your honestly-held opinion and that it was: clearly a matter of opinion and not a statement of fact; and it related to a matter of public interest. A fair comment must be based on facts available to you.
4. Political debate.
5. Triviality.
6. The plaintiff agreed to publication.

QUIZ

Which of these statements are defamatory:

1. Police Minister Mr Grissim Hevi acted dishonestly while in office.
2. The Police Ministry is an office for honest men. Mr Grissim Hevi is obviously in the wrong post.

Answer: Both are defamatory.

1. Sailors protested outside the Hunglo Shipping offices, claiming that the company's ships were overcrowded and unsafe.
2. Sailors claim that shipowners Ron and Wesley Hunglo are trying to kill them in overcrowded and unsafe ships.

Answer: (1) is probably safe, (2) is almost certainly defamatory.

1. Minister Joe Bloggs lied about GMOs.
2. The Minister for Agriculture lied about GMOs.
3. The Government Ministry has lied about GMOs.
4. The Government has misled Australians about GMOs.

Answers: (1) is defamatory. (2) is equally defamatory (because it clearly identifies one person even though he is not named). (3) could get you sued by anyone and everyone in the Ministry. (4) is almost certainly safe.

MORE INFORMATION ON DEFAMATION

- Defamation in Australia – just about everything you could possibly want to know: www.thenewsmanual.net/Resources/medialaw_in_australia_02.html
- Lots of information and links: www.law.uts.edu.au/comslaw/factsheets/defamation.html
- A legalistic briefing paper on Australia's (nearly) uniform defamation laws: www.australian-defamation-lawyers.com.au/Portals/0/Documents/Seminar_Paper.doc