

Defamation in Tasmania: Information Sheet

A common threat that we often hear being said is, “I’ll sue you for defamation,” in the context of a dispute. However, this sort of throwaway line is far easier said than proved at law.

This information sheet is intended as a brief overview the law of defamation as it stands in Tasmania, which is largely (but not completely) uniform with other States/Territories.

The Law

Defamation in Tasmania law is largely encompassed in the *Defamation Act 2005* (Tas; the Act). There is no longer any distinction between slander and libel - it has been abolished (see s7 of the Act).

While there is an offence of “Criminal defamation” within the Tasmanian *Criminal Code Act 1924* (s196 specifically), as was said in *Burton v Parker* [1998] TASSC 104 by Justice Evans:

“Prosecutions for criminal defamation and private criminal prosecutions are extremely rare. I was not referred to any prosecution for criminal defamation which has proceeded in Tasmania.”

In a civil law context, a person is able to sue in any State or Territory where the defamatory statement is made - a closeness of connection test is applied as to which jurisdiction’s laws apply (see s11 of the Act). Further, a person may commence a case in the *Federal Court* where the statement is made nationally (e.g. the internet at large).

Going to Court should be the last resort. A person should never commence a case in defamation without first seeking legal advice as to the process involved, time and cost considerations, prospects of success and ability to recover from the other party.

Time Limits

A person who alleges they are defamed has 1 year from the date of publication to commence a case in defamation (see s20A of the Act). This can be extended up to 3 years at the Court’s discretion based on whether it is just and reasonable to do so having regard to all the circumstances (see s20AC of the Act).

What is Defamation?

To sue in defamation, a Plaintiff (which is the person alleging they are defamed) must prove:

1. Information was communicated/published by the Defendant to another person;
2. The communication identifies the Plaintiff;

3. The communication had defamatory imputations about the Plaintiff; and
4. The defamatory statement caused serious harm to the Plaintiff.

A defamatory imputation is another way of describing a meaning which causes a reasonable person to lower their opinion of the Plaintiff.

Defamation can be direct or implied - it does not need to state the name of a person, provided a reasonable person would determine the Plaintiff was being referred to.

Each of the above four elements must be proven/satisfied with the “serious harm” test being introduced to weed out minor or trivial matters (see s10A of the Act). If all four elements are not satisfied, a Plaintiff cannot prove they have been defamed and their case will fail.

Like most civil proceedings, costs typically follow the event. This means, if a person loses their case, they expose themselves to an adverse costs order being made against them. If ordered, this means the unsuccessful party must pay the other party’s legal costs either in full or in part (depending on whether a court scale is ordered to apply - see s40 of the Act).

Generally, corporations are barred from suing in defamation (see s9 of the Act).

Basic Steps Involved in a Defamation Case

Prior to commencing a defamation case, it is important to consider firstly whether the matter complained of is trivial and worth pursuing.

If it is worth pursuing, an appropriate next step is to contact the person involved and ask that they remove the publication and make amends. In its simplest form, this may be to delete a public post and/or publish an apology.

Failing resolving the matter as per the above, the next step is to issue what is known as a “Concerns Notice”. A Concerns Notice **must** be sent prior to commencing **any** case and should outline in writing the specific imputations (statements) that you assert are defamatory and what you want done to resolve this (see s12B of the Act).

Failing resolving the dispute, the options open are to let the matter rest or commence a Court case. Commencing a Court case should not be taken lightly, particularly given the filing fee alone exceeds \$1,100.00 in the *Supreme Court of Tasmania* and the costs involved to reach trial usually exceed \$100,000.00 and can, and do, enter the millions of dollars.

A Defendant may have a good reason to make the publication. For this reason, there are a multitude of defences available to defamation proceedings which need to be carefully considered before filing a claim.

Defences to Defamation Claims

Defamation claims are often regarded as being hard to prove due to the wide-ranging number of defences available to such claims. Some of the more common defences include:

- **Justification** – that is the Defendant proves that the defamatory imputations carried by the matter of which the Plaintiff complains are substantially true.
- **Contextual Truth** – one or more of the imputations are substantially true and those that are not contextual do not further harm the reputation of the Plaintiff because of the substantial truth of the contextual imputations.
- **Absolute Privilege** - the Defendant proves that it was published on an occasion of absolute privilege, such as a publication in the course of court proceedings.
- **Publication of Public Documents** – where the defamatory matters were already published in a public document.
- **Fair Report of Proceedings of Public Concern** - if the Defendant proves that the matter was, or was contained in, a fair report of any proceedings of public concern.
- **Publication of a Matter of Public Interest** – where the matter concerns an issue of public interest and the Defendant reasonably believed that the publication of the matter was in the public interest based on a variety of factors.
- **Qualified Privilege** - providing protection for certain communications made in specific circumstances where there exists a reciprocal duty or interest between the speaker and the recipient.
- **Honest Opinion** – where the publication is an expression of opinion (rather than fact) relating to a matter of public interest and that opinion is based on proper material.

There are many other possible defences to Defamation Claims, some of which can be found in Division 2 of Part 4 of the Act.

Remedies

Essentially there are two main remedies available following a successful defamation action - an injunction stopping defamatory material being published and damages (monetary compensation) being awarded. In determining the dollar amount of damages to be awarded, the Court must ensure that there is an appropriate and rational relationship between the harm sustained by the Plaintiff and the amount of damages awarded. As a result, there are a range of mitigating factors that the Court can consider when assessing damages (see s38 of the Act).

A successful party may also be awarded their own costs (or a portion of them) be paid by the unsuccessful party. This can be financially devastating to both parties involved, noting legal costs can on occasion exceed the damages awarded by a Court (see s40 of the Act).

Key Takeaways from Recent Notable Cases

The following cases are all illustrative of the considerable risk, time, financial cost, and stress involved in defamation proceedings. Sometimes a case goes to plan and the Plaintiff succeeds, other times they do not. For all the reasons noted in this information sheet, considerable care ought to be exercised and all attempts to resolve matters outside of Court should be considered. Some recent cases of note are:

The Lehrmann case (*Lehrmann v Network Ten Pty Ltd* [2024] FCA 369):

- Mr Lehrmann sued the Defendants (Network Ten and journalist Lisa Wilkinson) alleging he was defamed by their publication of a story in which it was alleged that he had raped Ms Brittany Higgins at Parliament House.
- Mr Lehrmann had no findings against him in his criminal trial (which was aborted due to juror misconduct) although in the civil case it was found on the balance of probabilities by Justice Michael Lee that he had raped Ms Higgins.
- The effect of the above finding was that his case backfired on him - this resulted in a Court finding he had raped Ms Higgins on the civil standard of proof.
- The costs involved in this case exceeded 1 million dollars between Mr Lehrmann, Lisa Wilkinson, and Network 10. Mr Lehrmann did not have sufficient assets to meet the costs award made against him meaning that ultimately the successful Defendants have not had their costs Order satisfied.

The Ben Roberts-Smith case (*Roberts-Smith v Fairfax Media Publications Pty Limited (No 41)* [2023] FCA 555):

- Mr Roberts-Smith sued in relation to a number of articles published against him alleging he engaged in serious conduct including war-crimes and family violence.
- The Defendants successfully argued justification and contextual truth defences, meaning that Mr Roberts-Smith led a Court to make negative findings against him.
- The total cost of the case is reported as exceeding 25 million dollars. Most of those costs are likely payable by Mr Roberts-Smith given he lost the case.

Moira Deeming v John Pesutto (*Deeming v Pesutto* (No 3) [2024] FCA 1430):

- Ms Deeming successfully sued Mr Pesutto relating to defamatory statements she alleged the (now former) Victorian Liberal party leader made regarding her.
- Ms Deeming was ultimately successful and was awarded approximately \$315,000 in damages.
- On the issue of costs, Mr Pesutto in addition to the above award was ordered to pay \$2.3 million of legal costs to Ms Deeming.
- The key point is that the costs involved in this case clearly outweigh any award of damages on either case.

A Tasmanian example (*Lakaev v McConkey* (2024) TASSC 8):

- Ms Lakaev (a psychologist) sued Ms McConkey in relation to a book Ms McConkey published, "The Cult Effect" and associated publications. The book was about Ms McConkey's time as a member of a cult that she alleged was run by Ms Lakaev and made a number of serious allegations regarding her conduct.

- The alleged defamatory “imputations” included that Ms Lakaev was unfit to practise as a psychologist, abused the Defendant, was likely to suffer from mental illness, and is a violent extremist.
- The Defendant largely admitted the imputations but raised a number of defences permitted at law to argue, unrepresented, at a trial that extended for in excess of 30 days.
- Justice Stephen Estcourt ultimately found in favour of Ms McConkey that all imputations were at least substantially true and the defences made out.
- The launching of this case ultimately backfired on the Plaintiff and resulted in a Court making serious findings adverse to her.

Summary

Defamation actions are complex, often difficult to prove and expensive. If you feel you have been defamed or if someone is threatening to sue you, you should seek advice at an early stage from a lawyer. If you’re not sure where to start, you can contact your local Community Legal Centre for advice, that’s us for North-West and Western based Tasmanians. You may contact the *North West Community Legal Centre* on (03) 6424 8720 or email office@nwclc.org.au to arrange an appointment or referral to a lawyer that can assist.

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