

## Fact Sheet

# Defamation in Victoria

Defamation commonly refers to an unjustified and damaging attack on the good reputation of a person, or a company. If someone sues you for defamation and is successful, you can be liable to pay damages, which can be quite substantial.

However, not all criticism of, or disagreement with, people is defamatory. Threats of defamation are sometimes used against community members or people trying to protect the environment as a way to suppress criticism. Such threats can be intimidating – but often have no legal basis.

The purpose of this fact sheet is to help you understand what defamation is, what must be proven for you to be found liable for defamation, and what the available defences are. The fact sheet also includes some practical tips about how to avoid being found liable for defamation.

This fact sheet is intended to be a general guide only. Since 2006, defamation laws across Australia are all now largely the same, with each state or territory introducing laws similar to that in the *Defamation Act 2005* (Vic). This fact sheet therefore can be used as a general guide for how defamation laws work across Australia. However, there are some slight inconsistencies between the states, and there is nothing to prevent states passing their own specific laws in future.

If you are accused of defamation, you should seek specific legal advice.

## What is defamation?

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‘Defamation’ is the wrong of injuring another’s reputation without good reason or justification.

Defamation is a ‘tort’ – that is, a civil wrong, which involves you breaching a duty owed to others.

Defamation is largely governed by the *Defamation Act 2005* (Vic) and the common law (that is, rules set down by judges in previous legal decisions). The *Defamation Act 2005* has not replaced the common law: both the Act and the common law apply alongside each other.

# What must be proven for me to be found liable for defamation?

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Defamation has four different legal elements, each of which must be proven for you to be found liable for defamation, namely:

1. a **communication** or **publication**
2. to a **third party**
3. of a **defamatory** matter
4. **concerning** and **identifying** the plaintiff.

The responsibility for proving each of these elements lies with the person accusing you of defamation, known as 'the plaintiff'. Each of these elements is explained in more detail below. However, even if all the above elements are proven, you cannot be found liable for defamation if you have a lawful excuse based on one of the available defences (see 'Defences' section below).

## 1. Communication or publication

To be found liable for defamation, you first need to have 'communicated' or 'published' something. For the purposes of defamation, these terms are defined very broadly, and include the communication or display of visual, verbal or written matter. This could include publishing something in a newspaper, announcing something on the radio, or displaying something on a sign. Communication or publication also includes emails, or publications on a website. Cyber-defamation is discussed in more detail below.

## 2. To a third party

The communication or publication must be to a third party – that is, someone other than the person who claims they have been defamed. Communication only to the person defamed is not enough. However, communication to just *one* person other than the person allegedly defamed is sufficient in proving this element of defamation.

## 3. Of a defamatory matter

Once it has been established that there has been a communication to a third party, the key question in most cases concerning defamation is whether that communication was of a 'defamatory matter'.

A 'defamatory matter' may be a blatant and obvious lie about a person. However it also includes a false representation, also known as an 'imputation', meaning that you have created a misperception or incorrectly insinuated something about someone. An opinion, even a critical opinion, is not necessarily a defamatory matter.

A matter is considered to be defamatory if the plaintiff can prove that their reputation has been damaged by the publication of the defamatory matter. Importantly, to prove this the plaintiff must show that they have a reputation to be damaged in the place where the matter was published (this will usually be the plaintiff's usual place of residence, or their place of employment). For example, if you publish something negative about an Australian person in Russia, where that person is not known, you will not have committed defamation because that person has no reputation in Russia.

Damage to reputation is proven by showing that the publication has harmed or lowered the plaintiff's reputation in the eyes of ordinary reasonable people in the community in general. This is the objective test utilised by courts in assessing damage.

To avoid publishing defamatory matters, it is usually best to keep your publications confined to truth or opinion that can be justified through proper material – for example, material that from a reliable source. For example, where your publication refers to an allegation that someone is unlawfully clearing native vegetation, you should be able to demonstrate that the person has been found by an investigative authority such as council to have committed the clearing, or you witnessed it and can demonstrate it with evidence such as photos.

## 4. Identifying the plaintiff

For a publication to be defamation, the defamatory matter must identify the plaintiff. Identification can be by name, but could also be by title or other sufficient information that a reasonable person would be able to identify the plaintiff. For example, publishing a defamatory matter about the Chief Executive Officer of X Company would be sufficient to identify that person.

## Who can sue for defamation?

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Most corporations cannot sue for defamation under the legislation.<sup>1</sup> The exceptions to this are non-profit corporations and corporations with less than ten employees that are not related to another corporation.<sup>2</sup> A government body, such as a local Council, cannot sue for defamation. People within corporations or public/government bodies may still sue as individuals if they are defamed in a publication, even if the corporation or government body is also defamed in the same article.

## Who can be sued?

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Everyone who *publishes or participates in the publication of* defamatory matter is potentially liable for defamation. The same applies to any person who repeats or republishes the defamatory matter. However, this is subject to certain defences, a number of which are explained below.

## Defences

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Even if a plaintiff can show that the material published was defamatory, if the person accused of defamation can establish that one of the defences discussed below apply, they will not be liable for defamation. (Other defences are available, but those listed in this fact sheet are the most relevant.)

### 1. Opinion

Statements that are not stated as fact may be published as opinion. The opinion needs to be on a matter of public interest and based on proper material.<sup>3</sup> The comment must be a matter of opinion, criticism, observation or conclusion. The facts on which the comment is based must be stated, in order to satisfy the 'proper material' element of this defence. The opinion must also be honestly held. Previously published opinion may have a bearing on whether someone can rely on this defence.

Ultimately, commentary based on facts is allowed, however suggesting that defamatory statements are basic facts is prohibited.

### 2. Truth

As noted earlier, you can say, write or display whatever you like, so long as it is true and you can demonstrate this based on proper material. For this defence to apply, you must prove that what you have published is substantially true.<sup>4</sup> Minor inaccuracies or mistakes which are immaterial and material which does not add to the sting of the defamation may be disregarded by the Courts when deciding if someone has been defamed.<sup>5</sup>

There is no requirement to prove publication in the public interest for this defence.

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<sup>1</sup> Note that corporations may be able to sue under other common law causes of action such as injurious falsehood if you publish something untrue about them. It is therefore advised that you avoid publishing untrue statements about corporations.

<sup>2</sup> *Defamation Act 2005*, s. 9.

<sup>3</sup> *Defamation Act 2005*, s. 31.

<sup>4</sup> *Defamation Act 2005*, s. 25.

<sup>5</sup> *Halsbury's Laws of Australia* (LexisNexis online version) at [145-1020].

### 3. Contextual truth

It is a defence to a claim of defamation if you have published a defamatory matter amongst one or more other matters that you can show to be substantially true.<sup>6</sup> This defence only applies if you can show that because of the substantially true comments, the reputation of the plaintiff has not been further harmed.

### 4. Qualified privilege

This defence is available if you, as the defendant:

- provide defamatory matter to a person (the *recipient*) who has an interest in obtaining information on some subject that includes the defamatory matter; or
- believe on reasonable grounds that the recipient apparently has such an interest; and
- have reasonable grounds for publishing that matter in the circumstances.<sup>7</sup>

An example of where this defence would apply is the provision of an employment reference to a prospective employer, who would have an interest in obtaining information about the relevant job applicant including any defamatory matter. It would not be hard for you to establish that it was reasonable for you to provide the information in the circumstances.

You can only rely on this defence if the statements you make are reasonable, and not malicious.

### 5. Absolute privilege

Those things published during parliamentary debates or in a court or tribunal judgment are privileged and can be published with immunity.<sup>8</sup>

### 6. Public document

Matter contained in public documents, or 'fair copies' (meaning copies that are accurate and don't distort the original document), summaries or extracts of public documents, can also be published without risk of being defamatory. Public documents are those published by Parliament, governments, courts and tribunals.<sup>9</sup>

### 7. Fair report

A fair report (meaning reports that are accurate and don't distort the original document) of any proceedings of public concern is a defence to a defamation action.<sup>10</sup>

It is also a defence if the defendant can show that the matter was contained in a report published earlier on a proceeding of public concern and has been utilised by the defendant in a fair copy, summary or extract from that published report, without any knowledge that would make the defendant reasonably aware that the earlier published report was not fair.<sup>11</sup>

### 8. Innocent dissemination

This defence applies to people who distribute publications, but who have no control over the publications' content. It typically applies to mechanical distributors or conduits, such as internet service providers.<sup>12</sup>

### 9. Triviality

If the publication of defamatory material can be shown to be unlikely to cause the person substantial harm, the defence of triviality will apply.<sup>13</sup>

<sup>6</sup> *Defamation Act 2005* s. 26.

<sup>7</sup> See *Defamation Act 2005*, s. 30.

<sup>8</sup> See *Defamation Act 2005*, s. 27.

<sup>9</sup> *Defamation Act 2005*, s. 28.

<sup>10</sup> *Defamation Act 2005*, s. 29(1). The term 'proceedings of public concern' is defined in subs. 29(4) and includes proceedings in public of a parliamentary body and proceedings in public of a court or tribunal of any country.

<sup>11</sup> *Defamation Act 2005*, s. 29(2).

<sup>12</sup> See *Defamation Act*, s. 32. The three key matters which a defendant has to prove to make out this defence are set out in subs. 32(1).

<sup>13</sup> *Defamation Act 2005*, s. 33.

## If someone wants to sue me for defamation, when must they do it by?

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If a person wants to sue you for defamation, they must do commence their action within one year of the publication of the defamatory material.<sup>14</sup>

If this one-year time limit has been missed, a court may extend the limitation period to a period of up to three years from the date of publication. For the extension, a plaintiff must show that it was not reasonable for him/her to commence proceedings within the allowable one year.<sup>15</sup> These time limits are known as 'limitation periods'.

## Multiple publication rule

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Defamation is based on the multiple publication rule, a common law rule which states that *each* time there is a communication or publication of defamatory matter, it gives rise to a new cause of action. This has implications for the limitation period (see preceding section) for publications on websites, because cached defamatory content and even archived content will re-ignite a limitation period if it is downloaded in a place where the plaintiff has a reputation.

## Cyber-defamation

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Everyone who *participates* in, *authorises* or *repeats* the publication of defamatory matter is potentially liable for defamation. Liability may also arise by omissions, so the failure to remove defamatory content, where you have the power to do so, means you could be liable for defamation. For example, the failure to remove an online posting of defamatory content from a website you manage means you are a publisher for the purposes of defamation law and could be liable for publication.

Liability is not confined to original authors. Publishers and printers are liable as well as original authors, but only if they disseminate the publication. If they merely print out the publication and return it to the original author, then they are not liable.

### Linking to defamatory content

If you provide a link to defamatory content, you may be liable for defamation. However, if you are not the original author and merely innocently or accidentally pass on the content and have not exercised any editorial control over the content, then the defence of 'innocent dissemination' may save you (discussed above). Whereas, if you are aware of the defamatory content and there is evidence of your awareness, then your involvement in publication will not be considered to be innocent dissemination.

Internet service providers and internet content hosts<sup>16</sup> are logically exempt from liability for defamatory publications, provided that they lack knowledge of the defamatory nature of the publication. The innocent dissemination defence generally applies to the makers of systems, carriage providers or broadcasters of live programs who do not exercise control over the content and generally do not have knowledge of the defamation.<sup>17</sup>

### E-mails and defamation

For the purposes of defamation law, e-mails are no different to other modes of publication. An image or representation of a person, transmitted through e-mail, still amounts to a publication. Those publishing and those authorising, for example, employers who provide facilities for the sending and receipt of e-mails will be liable for defamation, if no defence exists.

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<sup>14</sup> *Limitation of Actions Act 1958*, s. 5(1AAA).

<sup>15</sup> *Limitation of Actions Act 1958*, s. 23B.

<sup>16</sup> The definition of 'internet content host' in Schedule 5 of the *Broadcasting Services Act 1992* is not particularly helpful, but it is generally assumed that the term refers to providers of services that allow other people to put their content online through a provision of some carrier service.

<sup>17</sup> The defence does not, however, save operators of websites and those exercising editorial control over their content.

## Some general information on cyber-defamation

Cyber-defamation, like other types of defamation, does not occur until defamatory matter is communicated or published. Publication for online content does not occur until this content is downloaded.<sup>18</sup> Until content is downloaded in a place where the plaintiff has a reputation, there is no defamation, despite the global and persistent availability of cyber content. The Victorian Supreme Court Rules allow for suing someone who is outside the jurisdiction (that is, an international defendant) if Victoria is the place where the plaintiff has a reputation and it has been damaged by an international defendant, through publication on its website or other medium.

The location where a website is hosted does not have a bearing on the jurisdiction of a claim. This means that a plaintiff is able to sue in any Australian State (or even internationally) where cyber content is downloaded, *so long as the plaintiff also has a reputation in this location*. If the plaintiff does not have a reputation in the location where defamatory matter is published or downloaded, then there is no damage to reputation.

## Some practical tips to avoid being found liable for defamation

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- As indicated above, you should take reasonable steps to ensure that anything you publish is demonstrably true (or at least substantially true) and that where you express opinions, these are soundly based on proper material.
- It is important to remember that plaintiffs can only sue in places where they have a reputation. So if publication occurs in a place where they do not have a reputation, then there are no grounds for an action. However for cyber publications, if the content is downloaded in a place where the plaintiff has a reputation, then s/he will be able to commence proceedings.
- You can always reduce your potential liability and save yourself some legal fees by deleting, retracting and/or apologising for the publication of defamatory content.
- Even if you have not explicitly identified the person being defamed, before you publish consider whether there is something within your publication that may still enable others to identify this person.

It is also important to remember that it is not merely your communications with media outlets that may give rise to a defamation claim. It is publication to *any* third party. If the plaintiff gains awareness of him/her being the subject of these defamatory statements, then s/he may choose to sue. Of course, this is tied in with reputation, so if you verbally defame a plaintiff overseas and s/he has no reputation there, then no defamation will have occurred.

## Where can I get more information?

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If you require specific legal advice about defamation you could contact:

- **Victoria Legal Aid:** Victoria Legal Aid is a state-wide organisation that can provide legal assistance to socially and economically disadvantaged people in Victoria.  
Phone: 9269 0120 or 1800 677 402  
Website: [www.legalaid.vic.gov.au](http://www.legalaid.vic.gov.au)
- **Community Legal Centres:** Community Legal Centres are independent community organisations that provide legal advice to the public, particularly for those facing economic and social disadvantage. Victoria has 49 Community Legal Centres based all around the State. To find your nearest Community Legal Centre, contact the Federation of Community Legal Centres.  
Phone: 9652 1500  
Website: [www.communitylaw.org.au](http://www.communitylaw.org.au)

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<sup>18</sup> *Dow Jones Company Inv v Gutnick* [2001] VSCA 249.

# About the Community Environmental Legal Service (CELS)

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Providing legal help to Victorians as part of the Community Environmental Legal Service (CELS) program is one of the many ways Environmental Justice Australia pursues access to justice.

The CELS program provides legal help for Victorians through the publication of kits, fact sheets and videos which provide accessible and practical environmental law information to the Victorian community. Through the CELS program we also conduct legal workshops in Victoria, run by one of our expert environmental lawyers to suit the needs of community groups or groups of individuals concerned about or impacted by environmental issues.

Environmental Justice Australia believes that all Australians have a right to clean air, clean water, and intact ecosystems. It's also crucial that our communities have a real say over what happens to our environment, and that means participating in decision-making processes. We're working to pursue environmental justice for communities affected by environmental harm by supporting their right to information, their right to participate in the legal and legislative process, and their right to participate in decision-making about their communities and the places where they live.

If you have a query about anything in this Fact Sheet, or would like the Community Environmental Legal Service to assist you to protect the environment, please call us:

**8341 3100 (metropolitan) or 1300 336 842 (regional)**

**Donate at: [www.envirojustice.org.au/donate](http://www.envirojustice.org.au/donate)**

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## SEEK LEGAL ADVICE REGARDING SPECIFIC CASES

**While all care has been taken in preparing this publication, it is not a substitute for legal advice in individual cases. For any specific questions, seek legal advice. Environmental Justice Australia accepts no responsibility for any loss or damage suffered by people relying on the information on this fact sheet.**

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Produced & published by the Community Environmental Legal Service, Environmental Justice Australia  
ABN 74 052 124 375

Publication date: November 2014