



# ***Defamation***

A guide for Western Australian local government officers and elected members.

***It's imperative that elected members and local government officers have a sound understanding of defamation and how it applies to them. As public figures who may find themselves at the coalface of community disagreements with heightened emotion; there is ongoing potential of defamation.***

LGIS provides members with protection and support against defamation actions.

It's a common belief that defamation cases are most often commenced by high profile figures against mainstream media organisations for the publication of false and unsubstantiated material that serves to harm the defamed individual.

It is, however, also a concern for elected members and senior employees of local governments who may be exposed to the consequences of defamatory publications. The risk of defamation is increased with greater use of social media (e.g. Facebook), live streaming council meetings, and communication in open forums such as public meetings or community events.

This guide provides LGIS members with an overview of what constitutes defamation, particularly in a local government context, and the protections and support provided by LGIS.

## What is defamation?

Defamation is broadly defined as the publication of facts that damage an individual's reputation or tend to cause that individual to be shunned, avoided, hated, ridiculed, or treated with contempt.

Historically there were two types of defamation slander and libel; slander is spoken word while libel is written. Although still commonly used terms, from a legal perspective, there's no distinction between the two types of defamation.

In the *Defamation Act 2005 (WA)* (the Act), WA has adopted national uniform legislation to encourage non-litigious avenues to resolve disputes, provide remedies, and not unreasonably limit freedom of expression throughout Australia.

If an individual's reputation is tarnished by another who has published statements about that person, they may pursue defamation.

The individual who believes their reputation has been tarnished is known as the 'aggrieved'. A 'publisher' is the person who made the defamatory statement.

Written forms of communication which may be defamatory include:

- Writings (letters, reports...etc.)
- Printed media
- Blog posts
- Social media posts, statuses and updates
- Drawings.



***'Publication' is broadly defined to include all written forms of communication as well as speech. Speaking to another person who is not the aggrieved in a way that tarnishes the reputation of the aggrieved may be sufficient for a defamation cause of action.***



## Social media and defamation

***The internet, and social media in particular, provides opportunity for individuals to publish statements that are potentially defamatory. Individuals should take care of what they post on their social media platforms – whether it is on their own profiles or commenting on others.***

The law of defamation does not hold the internet platform or service provider liable for defamatory statements published on their platform without their knowledge.

However, if an individual copies and pastes, emails, or links to defamatory information, they are considered a publisher for defamation actions.

Individuals and organisations can also be liable for comments by third parties on their page. This is the main reason that media organisations now switch off comment functionality when they no longer have the capacity to actively moderate comments on a post on their page or profile.

Ultimately you should consider anything that you publish using social media is in the public domain. Apps that you may think are private such as What's App chats, or time limited and transitory such as Instagram stories or Snapchat can get into the public domain. When you post or share something you have no control over the action of the receiver who can, amongst other things, easily screen shot and save anything that you post.

***Think before you put anything on social media. This includes Facebook, Instagram, Snapchat, WhatsApp, X (Twitter), LinkedIn and other social media. Generally anything you post on social media can be considered 'published.'***



# Defamation in Western Australia

In WA you have one year to make a claim against the publisher if you are the aggrieved. The WA Act applies to publications made in WA. However, if the ‘publication’ occurs in another jurisdiction (for example, if an internet post, made in Western Australia was read in New Zealand) then the applicable law of the jurisdiction in which the post was published would apply.

In a local government context, the publication of allegedly defamatory content would generally occur in Western Australia. However, with the increasing nature of internet-based publications, it is wise to consider that words printed or spoken in Western Australia could be published in almost any jurisdiction.

To make a defamation claim there must be ‘**publication of defamatory content to another that identifies a person without lawful excuse**’.

## Let’s break that down

- **Publication** means a verbal and written statement.
- **Of defamatory content** refers to either false information, an imputation, or representation that leads another person to believe false information (it is important to note that in an action for defamation, it is assumed that the information published is false). If an aggrieved’s reputation is or reasonably could be damaged by the imputation, then it is defamatory.
- **To another**, that is it must be made to someone other than the aggrieved.
- **Identifying a person** means that the aggrieved can be identified from the imputation. If they can’t be identified, then no defamation has occurred.
- **Without lawful excuse** means that when/where there is a legal reason as to why the publisher published the information, any defamation is excusable.

## Defences against defamation

Even though a publisher might make a statement or otherwise publish information that seems defamatory, they may have a defence, sometimes called an ‘excuse’. These include:

- **Truth** – otherwise called justification, where the publication was true, there will be no defamation.
- **Contextual truth** – the publication was substantially true so any imputation could not have harmed the aggrieved.
- **Qualified privilege** – the publication may have been defamatory, but the publisher was obliged to publish it for a legal, moral, or social reason, and the recipient of the publication had a legal, moral, or social interest in receiving the publication. If these two (2) factors exist, the publisher may be excused from liability. This defence will be defeated if the publication was not made reasonably (for the statutory defence of qualified privilege) or if the statement was knowingly false or actuated by a desire to injure the aggrieved person.
- **Absolute privilege** – no action for defamation will lie if the publication was made during a parliamentary debate, in a court, or tribunal judgment.
- **Public document** – if the defamatory content has also been published in a public document that is a parliamentary debate, tribunal or court judgment or other public government publication, no liability will lie for republication.
- **Fair report** – a publication in a fair report of public concern is not defamatory.
- **Honest opinion** – a publication, which is not read as a fact, but merely as someone’s honest opinion is not defamatory. However, all relevant facts establishing the opinion must be included in the publication, and there must be no material error within those facts.
- **Innocent dissemination** – no liability will arise where the publication distributor did not know about the defamatory content, or did not write, create, or control the content or what was said.
- **Parody** – a publication which is obviously a parody or satire is not defamatory.
- **Triviality** – where a publication is too trivial or inconsequential to cause harm, the publisher will be excused from liability.

**An intention to defame is NOT a required element when determining whether a person has been defamed or not.**

# What is a concerns notice?

The first step in a defamation proceeding is for the aggrieved to issue what is known as a ‘concerns notice’.

The issuing of a concerns notice provides an avenue for the parties to resolve the matter without resorting to formal legal proceedings.

A concerns notice is a formal document which outlines exactly what defamatory statements are alleged to have been made, when the statements were made, who they were published to, what defamatory imputations can be drawn from the publication, and what amends are requested.

The purpose of a concerns notice is to set in motion the offer to make amends set out in Part 3 of the Act.

For a notice to be a concerns notice:

1. It must be in writing (Defamation Act 14(2)(a)); and
2. It must inform the publisher of the defamatory imputations that the aggrieved person considers are or may be carried about the aggrieved person by the matter in question (Defamation Act s14(2)(b)).

When a person receives a concerns notice they may request particulars of the defamatory imputations if they either haven’t been provided or haven’t provided adequately (Defamation Act s14(4) & (5)).

**Once a person has been issued with a concerns notice then the publisher has 28 days to make an offer to make amends (Defamation Act 14(1)(a)).**

# What happens if there’s a claim?

## Local government and defamation

If an elected member or employee of a local government receives a concerns notice, the first thing they should do is tell LGIS.

LGIS provides members with protection and support if they are subject to a defamation claim.

LGIS only has 28 days to respond to the notice on your behalf.

This may seem like plenty of time, but every case is different and early notification means that we can work with you to consider the matter and determine the way forward.

The clock starts ticking when the concerns notice is received by the publisher, so the longer it takes to get to LGIS the less time we have to consider the matter and respond.

## Managing the claim

Claims can be stressful and time-consuming, but defamation cases can take it to another level since they’re often emotive and adversarial.

Once LGIS knows about a defamation claim we brief one of our specialist law firms. Defamation can be complex and the way the matter is handled from the beginning matters.

There is no cookie cutter approach available to defamation claims and every matter is determined on a case-by-case basis. We work with you, to carefully consider the nuances and merits of the matter.

**Tell LGIS as soon as possible!**  
**Early notification is a vital element of your defence and how the matter is handled.**

**Yes, LGIS provides members with protection for defamation.**  
  
**We consider a variety of issues, including the defences available, before working out the options available.**



## First steps

WA has a system that favours non-litigious remedies to defamation. An offer to make amends is a quick way to resolve a dispute and is a reasonable and effective means of avoiding litigation.

If an offer is reasonable but the aggrieved rejects it, the publisher will have a degree of protection in terms of the legal costs of the defence to the defamation action. Conversely the aggrieved's action may be impacted if a reasonable offer is rejected. An important element of what is considered 'reasonable' is if an apology, correction or retraction is offered.

**It's always a good idea to apologise if you have published something defamatory. However, it is essential that you take legal advice before you do so.**

Remember, an intent to defame doesn't have to be present for a publication to be defamatory. In most cases there's been no intent to defame the aggrieved so an apology for publication usually resolves the matter with both the aggrieved and the publisher's character intact. Apologies, if they are drafted correctly, cannot be considered for liability purposes but may mitigate the amount of damages payable.

A court can't order an apology or retraction but it's usually considered an important part of resolution and settlement offers.

Some form of statement whether it's an apology, retraction, correction, expression of regret (etc), is usually a necessary condition for the aggrieved in any resolution of a defamation claim.

If the matter isn't resolved at this point, it is open for the aggrieved to commence proceedings.

## Matters for consideration

### Defence of qualified privilege and good faith

The standard for proving defamation can be onerous especially when qualified privilege is invoked.

Such privileges, intended to further the social policy of candor on certain prescribed occasions, can be claimed regarding otherwise questionable conversations as long as the dialogue is made:

1. in good faith;
2. about a subject in which the speaker has an interest or duty;
3. to a person who has a reciprocal interest or duty in the matter;
4. within a scope limited to that interest;
5. in a proper matter;
6. between the proper parties; and
7. not otherwise motivated by an improper purpose.

The problem is that the concept of good faith is often either undefined by case law or left unclear. At times, it is described in terms of its inverse—lack of "bad faith." At other times, the term good faith is coupled with lack of "malice," a concept that is equally nebulous. Malice in common acceptance means ill will against a person, but in its legal sense it means an act done intentionally and with a desire to injure, or, specifically in defamation, words spoken when they are knowingly false.

What is clear however is that the defence is an affirmative one, in which defendants are required to prove the existence of their own good faith, rather than requiring plaintiffs to prove its absence.

This requires a positive action from the defendant to support their utterance.

**It's always a good idea to apologise if you have published something defamatory. However, it is essential that you take legal advice before you do so.**



## Protection for local government

Councilors and officers receive some protections against defamation from the *Local Government Act 1995 (WA)*.

Section 9.56 of the Act says that a person who is:

- a. a member of the council, or of a committee of the council, of a local government; or
- b. an employee of a local government ; or
- c. a person appointed or engaged by a local government to perform functions of a prescribed office or functions of a prescribed class,

is a protected person and as such is not liable in an action in defamation if that person has acted in good faith whilst acting in their role as identified above.

Good faith and section 9.56 of the Act is not however a complete answer. In defamation, malice (by the publisher) is assumed. It will be up to the publisher to establish that they have acted reasonably, have acted for a proper purpose, have acted pursuant to their statutory obligations, and have acted therefore in good faith. In substance, it is unlikely that a good faith defence would succeed in circumstances where a qualified privilege defence has failed.

## Remember

**The strength of LGIS rests in our community of members working together.** Our breadth across the membership softens and smooths the variable loss experiences of individual members. The success of LGISWA is dependent on our members.

To get the best outcome remember...

- Tell LGIS as soon as possible! Early notification of the receipt of concerns notice ensures the legislative benefits provided under the Act can be utilised to the advantage of the member.
- Every matter is assessed on its own merit.
- Communicate, collaborate, and cooperate with the advice of those experienced in the management of your claim.
- Defamation actions are highly technical and can be very difficult (emotionally and procedurally). They are usually reserved for the Supreme Court (despite their often relatively modest damages sought), and, due to their technicality, can be amongst the most expensive civil matters to be engaged with.
- The emotional response to a defamation action (by the publisher or by the aggrieved person) can often make settlement of defamation actions very difficult. It is very important to understand what can be achieved in legal proceedings, and what outcome is in your best interests. In such stressful circumstances, LGIS' long experience supporting councillors and officers in defamation proceedings is a critical benefit.
- Members can also help by working cooperatively with us, being reasonable, and respecting the advice of our legal experts.
- When we believe that our member has a good case, we will take a firm defensive position.





*[lgiswa.com.au](http://lgiswa.com.au)*

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