

Guide to Defamation Law

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1. Introduction

The Environmental Rights Centre for Scotland (ERCS) aims to increase awareness of environmental rights and to ensure that people can effectively exercise them.

This is a brief guide to defamation law in Scotland. It is intended to help understand what defamation is, what defences are available in defamation cases and to help people avoid being sued for defamation when exercising their environmental rights.

This is not a comprehensive legal guide. ERCS provides free advice to individuals, community groups and organisations on environmental and related planning law – please [contact us for advice if you have a defamation-related query](#).



2. What is defamation?

The law of defamation is intended to protect reputations from false and harmful claims.

Defamation is the Scots law equivalent of the English legal concept of libel and slander.

The law of defamation is largely contained in the [Defamation and Malicious Publication \(Scotland\) Act 2021](#).

A statement about a person is defamatory “if it causes harm to the person’s reputation (that is, if it tends to lower the person’s reputation in the estimation of ordinary persons)”.¹

For someone to be able to take legal action over a defamatory statement, that statement must also be made to a third person and it must have caused (or be likely to cause) “serious harm” to the defamed person’s reputation.²

3. Who can sue for defamation?

A natural or legal person (e.g. a company) may be defamed and may sue for defamation. Legal action regarding defamation usually involves suing for the payment of damages.³

A public authority cannot sue for defamation.⁴ Individuals who work for a public authority who are defamed in a personal capacity (as distinct from their capacity as office holder) may sue for defamation.⁵

Legal action for defamation must be started within one year of the date the right to sue for defamation first arose.⁶



4. Who can be sued for defamation?

The following categories of people can be sued for defamation:

- the author of a defamatory statement;
- the editor of a defamatory statement (a person with editorial responsibility for the content or the decision to publish);
- the publisher of a defamatory statement (a commercial publisher who publishes material in the course of its business); and
- an employee or agent of the author, editor or publisher, with responsibility to decide on publication, may be sued in respect to a defamatory statement.⁷

5. Publication online and on social media

A person who posts an original defamatory statement online would be the author of that material and could be sued.

However, a person who only provides a link to a defamatory statement or ‘likes’ it on a social media platform, but does not alter it, cannot be sued for defamation unless by doing so they “materially increase the harm caused by the publication of the statement”.⁸

It may not be defamatory for most individuals to simply link to or like material containing a defamatory statement. However, if the person who does that is a social media ‘influencer’ or a large environmental organisation with many followers, then that could be argued to be defamatory because doing so could bring the statement to the attention of a much wider audience, thereby materially increasing the harm caused.



6. Defences

There are several defences available to a person who is sued for defamation.

Defences can be an effective way to defeat being sued for defamation, but they are not a bar to being sued in the first place.

You need to be sure of your ground if you knowingly making a defamatory statement and intend to rely upon a defence.

6.1 Truth

It is a defence to show that the defamatory statement is true or is 'substantially true'.⁹

6.2 Publication on a matter of public interest

It is a defence to show that the statement complained of was on a matter of public interest and that the maker of the statement reasonably believed that publishing the statement was in the public interest.¹⁰

There is no definition of 'public interest' in the Act.

This defence could be particularly important because environmental matters are often of public interest. Generally, matters of public interest are those that affect the public at large, but this will depend upon the circumstances of the case in question.

6.3. Honest opinion

It is a defence to show a defamatory statement was:

- A statement of opinion;
- The statement indicated the evidence on which it was based; and
- An honest person could have held the opinion on the basis of the evidence.¹¹

6.4 Privileged statements

Contemporaneous, fair and accurate statements reporting court proceedings are 'absolutely privileged' from a claim for defamation.¹²



Various types of statements including those in peer-reviewed academic journals and those reporting on local government proceedings (such as planning meetings) are generally protected from claims for defamation, unless they were made with malice.¹³

7. Offer to make amends

A person being sued for defamation, can make an offer to make amends by taking steps such as offering to publish a correction, giving and publishing an apology and paying appropriate compensation to the person who claims they have been defamed.¹⁴

If such an offer is made but rejected, that rejection can become a defence to a claim for defamation.¹⁵

8. SLAPPs

There is increasing publicity and concern about strategic law suits against public participation (SLAPPs).

We have been contacted by individuals who have been threatened with legal proceedings as a result of exercising their environmental rights.

A SLAPP is a lawsuit, usually based on the law of defamation, which aims to stifle free speech or deter the exercise of some other right by intimidating the defender into silence.¹⁶

An outline understanding of the basics of defamation law may help avoid being sued. However, it may be little use when faced with an opponent who is using the law to silence free speech.

[Contact us for advice](#) if you are concerned about a SLAPP.



9. Tips to avoid being sued for defamation

You or your group are entitled to express opinions on activities which you are concerned will harm the environment.

However, you do need to take care of what you say or write, as there can be significant consequences if you damage the reputation of a person or company without good justification.

Here are some tips to avoid being sued for defamation:

- As a general rule, before you make any statement¹⁷ about another person, ask yourself whether it is likely to hurt their reputation. If it is, then make sure that it is factual and/or honest and/or in the public interest (that may give you a defence).
- Check your facts (and their sources) carefully. Refer to your sources in your statements (e.g. “at the planning committee last week it was said that...” or “at page ten of the report it is stated that...”).
- Give opinions which are based on facts which you have confidence in.
- If you are concerned that your statement may be defamatory, [contact ERCS for legal advice before publication](#).
- Larger organisations which regularly publish statements on contentious issues, should have a written media policy, nominated spokespeople and should look into obtaining legal costs insurance.
- Keep copies of any press releases, notes of the sources on which they were based and a record of where they are sent.

10. Other useful resources

[Defamation and Malicious Publication \(Scotland\) Act 2021](#).

[University of Aberdeen Anti-SLAPP Research Hub](#).



References

¹ Defamation and Malicious Publication (Scotland) Act 2021, Section 1(4)(a).

² Ibid, Section 1(2).

³ A non-natural person which has as its primary purpose trading for profit (e.g. a company) will not be considered to have suffered serious harm to its reputation unless it has suffered (or is likely to suffer) “serious financial loss” as a result of the defamatory statement (Ibid, Section 1(3)).

⁴ Ibid, Section 2.

⁵ Ibid, Section 2(5).

⁶ Prescription and Limitation (Scotland) Act 1973, Section 18A.

⁷ Defamation and Malicious Publication (Scotland) Act 2021, Section 3(1).

⁸ Ibid, Section 3(3).

⁹ Ibid, Section 5(1).

¹⁰ Ibid, Section 6(1).

¹¹ Ibid, Section 7.

¹² Ibid, Section 9.

¹³ Ibid, Section 11 & Schedule 2 Part 2 (11).

¹⁴ Ibid, Sections 13-18.

¹⁵ Ibid, Section 16(2).

¹⁶ See [Greenpeace ‘Sued Into Silence’](#) (2020).

¹⁷ “Statement” is widely defined in Section 36(b) of the Defamation and Malicious Publication (Scotland) Act 2021 to include “words, pictures, visual images, gestures or any other method of signifying meaning”.