

Defamation of local government elected members and officers

By Adam Watts

Introduction

It is a common belief that defamation cases are most often commenced by high-profile public figures against mainstream media organisations for the publication of false and unsubstantiated material that serves to harm the defamed individual. The most recent commonly known examples of such cases are –

- The Rebel Wilson action against Bauer Media (the owner of Woman’s Day Magazine) in the New South Wales Supreme Court in 2018 for a series of defamatory statements published in the magazine. In that case, the Court awarded Ms Wilson damages in the amount of \$4.5 million, which was at that time a record award for damages in defamation in Australia. However, those damages were reduced on appeal.
- Similarly, in 2019, actor Geoffrey Rush commenced action against Nationwide News in 2019 relating to defamatory statements published in the Daily Telegraph that alleged Rush behaved inappropriately towards a female co-star in the Sydney Theatre Company production of Shakespeare’s King Lear. At the conclusion of that case, defamation was proven and ultimately \$2.9 million in damages was awarded to Mr Rush.

However, the potential consequences associated with the publication of defamatory material are not just confined to movie stars like Ms Wilson and Mr Rush. Elected members and senior employees of local governments may also be exposed to the consequences of defamatory publications because of the positions they hold in the community, especially in light of the increased use of social media such as Facebook.

Accordingly, if elected members and/or local government employees may be exposed to or suffer the consequences of defamation, the utilisation of Australia’s defamation laws to ensure reputations are preserved against the threat of publication of defamatory material should be considered. So, what constitutes defamation and in connection to a local government context? We provide a summary of the principles of that area of law below together with a recent case example relevant to local government.

Meaning of defamation

Defamation, at common law, may occur when a publication could be considered defamatory in the sense that it is likely to cause an ordinary and reasonable member of society to –

- think less of, shun or avoid the defamed person; or
- subject the defamed person to hatred, ridicule or contempt.

Importantly, Australia’s defamation laws apply to posts and comments made on social media (e.g. Facebook or Twitter) to

the same extent as they would apply to newspapers and other magazine publications. A post or comment on Facebook will constitute a “publication” on the basis that the comment or post may be read by any visitor on the page. Accordingly, if a comment or post is defamatory in nature, then the author of the comment or post will be liable under Australia’s defamation law. There have been several cases to date in which defamation actions have been upheld by Australian courts in respect of defamatory comments made on social media: *Reid v Dukic* [2016] ACTSC 344 and *Google v Duffy* [2017] SASFC 130.

It is important to note, however, that a local government authority cannot itself maintain an action in defamation for claims made by a person or entity that may be construed as derogatory in respect of the local government’s administrative functions: *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680; s 9(2)(b) *Defamation Act 2005*. However, an elected member or local government employee may nonetheless maintain an action in defamation against material that is defamatory to them personally.

Case of *Bolton v Stoltenberg*

A recent and instructive illustration of defamation in a local government context is the NSW case of *Bolton v Stoltenberg* [2018] NSWSC 1518. In that case, Stephen Stoltenberg made a series of posts on a public Facebook page called “Narri Leaks”, which concerned the professional conduct of the then Mayor of Narrabri Shire Council. It was alleged that those Facebook posts conveyed imputations to the effect that the Mayor had in the course of his employment –

- committed deliberate breaches of the *Local Government Act 1993* (NSW);
- engaged in deliberate corruption of the selection process for the General Manager of the Council;
- deliberately lied, coerced and intimidated employees, contractors, residents and elected councillors to suppress views on Council matters;
- engaged in conduct that warranted an ICAC inquiry; and
- acquired millions of dollars through dishonest means.

The Mayor subsequently commenced defamation proceedings against Mr Stoltenberg and Anne Loder, who had liked and made several comments on Mr Stoltenberg’s posts in support of his claims. Payne J of the Supreme Court of NSW held that the Facebook posts were defamatory on the basis that they were false and tended to lower the plaintiff’s (the Mayor) reputation in the minds of “right thinking ordinary members of the community”. His Honour also found that Mr Stoltenberg was a publisher on the basis that he was the author of the material and had posted it online. Payne J rejected Mr Stoltenberg’s qualified privilege defence, which was based on his claim that the Narri Leaks Facebook page was “dedicated to dealing with issues of interest to persons within the Narrabri Shire”. Payne J found that the Mr Stoltenberg failed to establish that the readers of the Narri Leaks Facebook page were residents of the Narrabri Shire Council with a sufficiently reciprocal interest in the financial issues of the Narrabri Shire, as it was clear in the circumstances that the posts were read by a much wider audience.

Accordingly, Payne J ultimately found Mr Stoltenberg liable for defamation and ordered that he pay damages in the amount of \$100,000. Interestingly, Payne J found Ms Loder liable as a secondary participant in Mr Stoltenberg’s defamatory publications on the basis that her likes and comments drew the attention of others to the posts. Ms Loder was ordered to pay \$10,000 in damages. Mr Stoltenberg subsequently commenced an appeal in the NSW Supreme Court of Appeal, in which the Court of Appeal affirmed the original decision of Payne J.

Considerations for elected members and local government employees

The outcome of the *Stoltenberg* case is noteworthy, particularly given the significant award of damages, as the type of defamatory comments the subject of the action are not particularly unusual in a local government context. However, there are some additional, important considerations for any elected member or local government employee the subject of potentially defamatory material.

Firstly, as an action in defamation is personal to the plaintiff, an action would generally need to be funded by the elected member or employee themselves, notwithstanding that the defamatory material relates to the discharge of the official functions of the elected member or local government employee. Generally speaking, it will only be in exceptional circumstances that the funding of a personal action in defamation would fall within the general function of a local government.

Secondly, even if comments published were defamatory as a matter of law, consideration would need to be given to whether any defences to defamation would apply. Common defences to defamation that could apply include:

- the defence of justification – where the defendant demonstrates that the defamatory imputation was substantially true (section 25 of the *Defamation Act 2005*);
- the defence of qualified privilege – where the defendant proves that the person who received the publication of a defamatory matter had an interest or apparent interest in having that information, it was published to that person in the course of giving that information to the recipient on that subject and the defendant’s conduct in publishing the matter was reasonable under the relevant circumstances (section 30 of the *Defamation Act 2005*); and
- the defence of honest opinion and fair comment – where the defendant demonstrates that his or her comments were expressed as opinion rather than fact in respect of matters of public interest (section 31 of the *Defamation Act 2005*).

Conclusion

In the event a local government, particularly an elected member of Council for example, becomes aware of published material that may be construed as defamatory in nature, that material must be considered by the individual as to whether any allegation made toward the conduct of the particular elected member is truthful or untrue and, if the latter, is the publication intended to do harm by defaming the character of the elected member. The *Stoltenberg* case is a clear example of the potentially significant damages that may be awarded in a matter involving an elected member where an action in defamation is made out. Furthermore, the *Stoltenberg* case illustrates that some of the more common defences to defamation may not apply to unreasonable statements of a defamatory nature made in a social media context.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information on matters discussed in this article please contact Adam Watts at awatts@mcleods.com.au or Nathan Sloan at nsloan@mcleods.com.au or by telephone to 9383 3133.

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