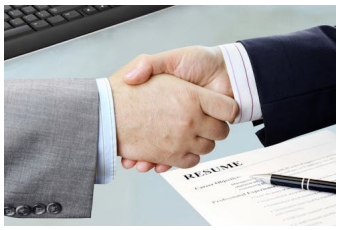

Giving a reference is protected, in defamation law, by the common-law defence of qualified privilege.shutterstock

It may be that, on the basis of a reference, you do not get the job or the scholarship or the finance for which you were applying. But despite the wide application of Australian defamation law, if you've been given a bad reference, you have very limited recourse.

Defamation law applies to all forms of communication, no matter how widely or how narrowly distributed. It recognises there can be real reputational consequences from publications, large and small. Certain types of publication are intended to have reputational consequences.

Giving an employment reference is a clear example of this. Often it will be positive. In many cases, though, a reference will contain negative things about the subject. This is part of a reference's design: the referee should give a full and frank assessment.

The defence of qualified privilege

Giving a reference is protected, in defamation law, by the common law defence of qualified privilege .

Qualified privilege means there are certain occasions when an individual's right to protect their reputation must be subordinated to a higher interest. These privileged occasions are those recognised by the case law as being necessary for "the common convenience and welfare of society".

Since the 19th century, it has been well-established that giving a reference is a privileged occasion. Indeed, judges regard it as an archetypal case of a privileged occasion.

It is not surprising that English defamation law took this position at that time. During the

mid-19th century, when the common law defence of qualified privilege was crystallising, there was a line of English cases in which servants sued their former masters over unflattering references.

Courts favoured the masters' right to give their full and frank assessment of former servants over the servants' right to protect their reputations – and to secure employment.

The "common convenience and welfare of society" meant it was more important that prospective masters knew what they were getting themselves in for than for servants to be able to sue successfully for defamation. It is hard to get good help these days, but it was ever thus.

The common law defence of qualified privilege still applies today. It provides the person giving a reference with broad protection. However, it does not provide absolute protection. As the name suggests, the protection it offers is qualified.

What are the exceptions?

There are two ways in which a defence of qualified privilege can be lost and the referee exposed to liability for defamation.

The first is if the privileged occasion is exceeded.

Common law qualified privilege is a narrow defence. It provides protection against liability for defamation where there is communication between people who have a community of interest, or where the person making the communication has a legal, social or moral duty to make it – and the person receiving it has a reciprocal interest.

This complete reciprocity of duty and interest, or community of interest, is fundamental to the common law defence of qualified privilege. So, publication to unrelated people, who have no reciprocal interest in receiving it, will destroy the privileged occasion and potentially expose the referee to liability for defamation.

That means if you are writing a reference, you should send it only to the person who requested it, or to the person who is making the decision about the reference's subject.

The other way in which the referee can lose the benefit of qualified privilege is if they abuse the privileged occasion. Abusing a privileged occasion is normally described as being motivated by "malice".

Malice is best understood as an improper motive. If a referee, in writing a reference, is spurred on by an improper motive, they may not be able to rely on a common law defence of qualified privilege.

An improper motive can be demonstrated by spite or ill-will on the referee's part. But often it is shown by the referee lacking an honest belief in the truth of what's in the reference.

Malice, though, is difficult to prove. In most cases – unless the referee is careless or foolish – there will be little or no direct evidence of malice. Improper motive will have to be inferred, on the balance of probabilities, from what the referee did or said.

The reference's subject bears the onus of proof on establishing malice; the referee does not have to prove an absence of malice. This presents difficulties for the subject of the reference because they have to prove the referee's subjective state of mind when giving the reference.

It is also not enough for the reference's subject to prove the referee had an improper motive. People often have multiple or mixed motives. The reference's subject has to prove the referee's improper motive was the dominant one in publishing the defamatory reference.

It is difficult, then, for a reference's subject to establish that a referee was motivated by malice. This was an intentional part of the design of this defence from the outset. The defence was intended to give latitude to a person speaking on a privileged occasion, so they would not be unduly inhibited by legal constraints.

Balancing the interests between the referee and the reference's subject, Australian defamation law presumptively favours the referee. So, if you are writing a reference, you should have nothing to fear – unless you have an improper motive.

And if you are the subject of the reference, you have to hope the referee will only have positive things to say about you.

David Rolph has received funding from the Australian Research Council.

Read more http://theconversation.com/can-you-sue-someone-for-giving-you-a-bad-reference-70520