

MinterEllison |
L A W Y E E R S

A REPORTER'S LAW GUIDE

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CONTENTS

1	Introduction	1
2	Defamation	2
	<i>Introduction</i>	
	<i>Important elements</i>	
	<i>Defamatory meaning</i>	
	<i>Defences</i>	
3	Court hierarchy	10
	<i>Magistrates' Court</i>	
	<i>District Court</i>	
	<i>Supreme Court</i>	
	<i>Federal Court</i>	
	<i>High Court</i>	
4	Contempt of Court	13
	<i>Contempt while proceedings are pending</i>	
	<i>Scandalising the Court</i>	
	<i>Suppression Orders</i>	
	<i>Improper Behaviour in Court</i>	
5	Some restrictions on court reporting	18
6	Contempt of Parliament	19
7	Defence Secrets – 'D' Notices	20
8	Recording conversations	21
	<i>Recording private conversation</i>	
	<i>Recording telephone conversations</i>	
	<i>Are recorded conversations admissible as evidence in court?</i>	
9	Offensive material	24
	<i>Racial vilification</i>	
	<i>Obscene material</i>	
	<i>Blasphemous material</i>	
10	Intellectual property	26
	<i>Copyright</i>	
	<i>Trade marks</i>	
	<i>Breach of confidence</i>	
11	The Press Council	28
12	Dealing with lawyers	29
13	Minter Ellison offices	30
	Appendix A: Qualified privilege	32

The law as it affects journalism in Australia is not only complicated but, like law everywhere, still in the process of evolution and therefore subject to constant change. Furthermore, each jurisdiction, whether domestic or international, has its own defamation rules and since many publications circulate throughout the world you are subject to all of them.

You should not feel intimidated by the complex nature of the restrictions. The principles themselves are relatively straightforward. For example, if you are writing something about someone which you would not like said about you personally, it is likely to be defamatory. Thus your antennae should be up.

Minter Ellison has prepared this Guide to assist reporters through the legal issues facing you. It is not aimed at creating rival media lawyers. It is designed to set off alarm bells in appropriate circumstances.

We trust that you will find it useful.

Peter Bartlett
Minter Ellison
October 2001

Introduction

The importance of understanding defamation law is obvious, from an ethical, legal and commercial perspective.

Lawyers define defamation as any statement that injures a person's reputation. It is potentially a very broad concept.

What material can be defamatory?

Articles (including a paragraph, sentence or word), pictures (and also the caption), cartoons, headlines, artwork and even the position of these (nearby a potentially related item) can all be defamatory.

Anything you report, including when you quote what one person has said about another, can be defamatory.

There is often a way around a potential defamation, by substituting, adding or re-jigging words. Done skillfully, this need not detract from the strength, style or newsworthiness of the item.

What if what I'm reporting is true?

In the Northern Territory, South Australia, Western Australia and Victoria, the truth of facts is a complete defence against any action for defamation. In New South Wales, not only must the truth of the facts be proven, it must also be shown that publication was in the public interest. Similarly in Queensland, as well as truth, the Defendant must prove that the publication was for the public benefit.

Therefore, a good preliminary question to ask is: 'Can this be proved in a Court if it is necessary to do so?' If the answer is 'No', then do not print.

Is there an arbitrary list of words or phrases I should avoid?

Whilst it is difficult to list all the words or combinations of words to avoid, a basic question can be asked: 'Would the use of these words or this picture damage my reputation?'

Who can sue for defamation?

Any person who is alive (including a company) can sue for defamation. However, certain organisations cannot sue, such as a local council.

Tip

Try to verify facts with as many sources as possible. If a complaint is made about an article, whether the allegation is true and how we prove it are critical.

In addition, in the States and Territories referred to above, ask yourself: 'Is the publication in the public interest or to the public benefit?'

Important elements

Where does publication take place?

Publication is considered to take place in each place where the publication is distributed or on-line where the site is accessed.

A person suing for defamation can sue in one jurisdiction and claim damages for the publication in each jurisdiction. Given that many publications are distributed nationally, it is necessary to consider potential liability in all states and territories. Also, be conscious of liability arising from publication of your on-line article.

Beware of on-line publications

Any article that is published on-line is subject to the same defamation laws as any other medium. The potential complexity dramatically increases when publishing on-line due to the multitude of jurisdictions that the article may reach.

Local laws

On-line publishers are in a tough position. Defamation laws vary between jurisdictions (countries) and it is difficult to know what material will offend certain laws. On the other hand, if past history is any indication, foreign individuals are less likely to pursue a publisher on the other side of the world!

Is a publisher liable for printing the quote of one person referring to another?

A publisher is not only liable for publishing the quote of one person referring to another, but also for any republication in another newspaper or on television if that is a foreseeable consequence of the initial publication.

Does a person need to be named?

A person who claims to be defamed needs to show the material was published about them. They do not need to be named in the material, only identifiable by other persons acquainted with them.

Basically, any connection that one can make between the material published and the person will 'identify' the person.

Can members of a group sue if the group is defamed?

A member of a group can only sue if the group is so small as to make members easily identifiable (eg. the 'Fraud Squad').

Tips

- When publishing a story about a large group, avoid printing an accompanying photo of one member of that group. It may be defamatory of that person by singling them out.
- Always unambiguously identify the subject of your article, using their age, address and occupation, to distinguish them from others who may have the same name.
- Thoroughly research your topic and related facts to prevent inaccuracy. Mistake is not a defence. To say that Detective Lee is corrupt may be true, but what if there are three Detective Lees!

Defamatory meaning

When will material be defamatory?

Material will be defamatory if the imputations arising from the material, including any inferences, injure the reputation of the person by:

- exposing them to hatred, contempt or ridicule; or
- lowering their estimation in the eyes of right minded observers; or
- making others shun or avoid them.

To determine if an imputation is defamatory, the material is read as a whole.

Tips

- Do not use sensational headlines or prose, unless it is clear the material warrants it and there is a strong defence available.
- When reporting on police investigations, be wary of inferring the guilt of a person. Carefully select the words you will use to avoid any implication of guilt and possible exposure to defamation proceedings.

Defences

So far it may seem that journalism means being condemned to a life plagued by lawsuits! Fortunately, however, there are a number of defences which provide protection from liability for otherwise defamatory statements. The 4 major defences are:

1 – Truth

Why is truth a defence?

Since defamation law is about protecting reputation, it is considered that by telling the truth about someone, their reputation is not lowered beyond its proper level but merely brought down to it.

For example, truth is a complete defence in Victoria. Some other states require an additional element to be satisfied, namely, that the publication be of public interest (NSW) or to the public benefit (Qld).

What must be proven as ‘true’?

Relying on ‘truth’ as a defence requires more than proving the literal truth of the material. It is in fact necessary to show that each imputation or meaning arising from the material is true.

Clearly, good journalism relies upon accuracy and attention to detail. If in doubt about a sentence or word always ask yourself: ‘What imputation does this convey?’ and ‘Can this be proved if it is necessary to do so?’ If the answers are ‘no’ then do not print.

Tip

If you are re-publishing rumours or statements made by others and you wish to rely on truth as a defence, it is not sufficient to show that the rumour was in fact circulating or the statement was in fact made. It will be necessary to prove the truth of the rumour or statement.

2 – Fair comment

What does this defence cover?

This defence protects the public interest in freedom of discussion. It enables publications to publish reviews of theatre, music, literary works and restaurants. It allows journalists to make comments on matters such as government policy, and in so far as it relates to or affects their official duties, the conduct of politicians and public servants.

How is this defence established?

A ‘comment’ is an honestly expressed point of view.

To be considered ‘fair’ the comment at issue must be:

- on a matter of public interest;
- honestly held; and
- based on facts stated in the article which are substantially true.

Rationale

The philosophy behind the defence is that if the facts are stated accurately, then the reader can form their own view as to whether they agree with your comment.

This defence encourages us to focus on the material rather than the individual. For instance, we should say that a painting is bad, and not say that the painter is clearly cross-eyed and colour-blind.

3 – Privilege

Absolute privilege

As most journalists would be aware, statements made in the course of parliamentary or judicial proceedings are absolutely privileged. Anyone involved in the proceeding (ie. participants) can rely on this defence to avoid liability for otherwise defamatory comments.

Qualified privilege

When will this defence apply?

Newspaper reports of parliamentary proceedings and judicial proceedings in other states may attract the protection of ‘qualified privilege’. The material reported must be in the public interest, not founded on malice, and be fair and accurate.

To succeed in a qualified privilege defence, other than parliamentary or judicial proceedings, it is necessary to show that:

- readers had an interest in receiving the information; and
- you had a duty to publish the material.

How strong is this defence?

The media rarely succeed in this defence because they publish to too wide an audience, and the readers do not have the required interest as would, say, an employer to a complaint of discrimination.

See Appendix A for a table on which institutions are subject to qualified privilege.

4 – Political discussion

How far-reaching is the defence?

Much has been written about this new defence arising from the decision in *Lange v ABC*. Many reporters appear to believe that the defence enables them to say far more about politicians and other public officials or political figures. That may be so, but only if you are deemed to have acted reasonably.

When does the defence exist?

The defence exists where the material published was discussing government and political matters, at either a Federal or state level.

What is protected?

The defence protects any comments made on the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office or comments on the political views and public conduct of persons engaged in activities that have become the subject of political debate.

The courts recognise that the general public has a legitimate interest in receiving information concerning matters relevant to the exercise of public functions and powers vested in public representatives and officials.

What is not protected?

The defence does not cover commercial speech aimed at selling goods and services and enhancing profit-making activities unless it has political content.

Nor does it cover the private conduct of members of parliament unless it bears upon the propriety, appropriateness or significance of official conduct.

Tip

- The burden of proof is on you, the publisher, to establish that you acted reasonably.
- The defence is lost if the person defamed establishes that the material was published for an improper purpose (ie. maliciously).

What is 'reasonable'?

According to the High Court, publication will generally not be reasonable unless:

- you had reasonable grounds for believing that the imputation was true
- you took proper steps, so far as they were reasonably open, to verify the accuracy of the material
- you did not believe the material to be untrue
- you sought a response from the person defamed and published the response.

As with qualified privilege, you will find that judges not entirely sympathetic to the media will closely examine your preparation of an article.

Tip

Where you get it wrong, don't be hesitant to apologise. An apology is relevant on the question of damages, where you are sued.

There are various levels of courts in Australia. The following is a brief guide:

Magistrates' or Local Court

This is the lowest level court in the state and Federal legal system and deals with the vast majority of cases heard in our courts.

Lesser criminal charges, traffic offences and committal proceedings are heard here in the state system and lesser federally related issues (eg family law) in the Federal system.

Reports of proceedings in this court can use the title 'Magistrate' or simply Mr, Ms or Mrs 'X' thereafter. The Chief Magistrate heads the court.

District Court

The District Court (or County Court in Victoria) represents the next level of the Court hierarchy. However, in the Australian Capital Territory, Tasmania and the Northern Territory, this level does not exist.

Criminal trials requiring a jury (in some states) with the exception of serious armed robberies, murders and other major crimes are heard here.

Some appeals from the Magistrates' Court are heard here.

Substantial civil cases are also heard in the District Court.

Judges can be referred to as Judge 'X'.

The head of the District Court is usually the Chief Judge.

Tip

District Court Judges should not be referred to as Mr or Ms 'Justice' X.

Supreme Court

The Supreme Court is the highest state or territory court, dealing with the major civil cases and the most serious criminal cases and appeals from all other courts and tribunals.

Most jurisdictions have a Court of Appeal as the final avenue of redress. It hears appeals from both the District Court and a single judge of the Supreme Court.

The senior judicial officer is the Chief Justice of the Supreme Court.

Reports of Supreme Court proceedings should refer to Justice 'X' or Chief Justice 'Y' or 'X' J, 'X' CJ or 'X' P, as the case may be.

Federal Court

As its name indicates this is a national court hearing matters falling within the Commonwealth Government's legislative powers.

It hears matters such as trade practices and bankruptcy.

Federal criminal offences are heard in the State courts.

The appropriate title for Federal Court judges is Justice 'X'.

High Court

The High Court is the ultimate court of appeal and sits mainly in Canberra.

It is the final court of appeal on all matters relating to Commonwealth laws or any other matter coming before it.

Some matters are heard before one or more judges, depending on the importance of the issue. Very significant cases such as the Mabo case and constitutional cases, are heard before the full bench of the High Court, comprising all seven justices.

Leave to appeal must be sought before appeals are heard in the High Court, in contrast to appeals lower down the court hierarchy which are heard as of right.

The correct title to use is Justice 'X' or Chief Justice 'Y', making it clear that you are referring to the High Court.

Tip

It is all too often that barristers are incorrectly described as a 'QC'. If you are in doubt, ask. New South Wales and Victoria have recognised recent appointments as Senior Counsel (SC) rather than Queen's Counsel (QC).

Note

- 1 This is not an exhaustive list of Australian legal institutions, which include many other courts, tribunals and quasi-judicial bodies. Examples include the Victorian Civil and Administrative Tribunal and the Federal Magistrates' Court.
- 2 The situation is complicated by Australian governments' penchant for renaming these and similar institutions on a regular basis.

Contempt can be both civil and criminal. Sanctions for criminal contempt can be very serious, including jail sentences and/or large fines.

Tips

- We suggest that all reporters set themselves a rule to which there can be no exception: If you are writing a story that relates in any way to a pending trial, clearly identify that portion of your copy and bring it to the notice of the news editor or the night editor. On the copy, note the trial involved and the stage it has reached. Make it clear that that section of the story should be vetted because of the possibility of contempt.
- If you are unsure whether a relevant trial is part heard then phone the Courts Information Officer in the Supreme Court. They can be very helpful.

Contempt while proceedings are pending (Sub-Judice Contempt)

What is the basis for this form of contempt?

It is a contempt of court to publish anything while proceedings are pending which has a tendency to interfere with the administration of justice (a fair trial).

Publication of material that tends to influence the outcome of a trial is contempt.

In criminal matters, procedures are 'pending' from the time at which the court processes have begun until the time at which all possible appeals are completed. In civil proceedings it would generally mean when a writ, statement of claim or summons has been issued.

Note

It is irrelevant to a contempt case whether or not the administration of justice was actually affected. The rule is concerned with the tendency, assessed at the time of publication.

How far does the 'administration of justice' reach?

A publication may be contempt because it influences any of the following:

- a) a jury, by prejudicing aspects of a case
- b) a judge, in exceptional cases. Although judges are generally presumed to be more difficult to influence than juries because of their legal training
- c) a witness, if it prevents them from coming forward to give evidence or leads them to suppress or distort evidence
- d) a party to the proceeding, by causing a plaintiff to discontinue an action or make a compromise they would not otherwise have made.

Example

Who Weekly magazine received a \$100,000 fine for publishing a photograph of Ivan Milat, the man accused of murdering a number of backpackers in NSW, at a time when identification was still an issue. Even blanking out the face of the accused may not be sufficient if, for example, he/she is wearing a distinctive jumper that he/she was wearing when the offences were committed.

Tips

- Do not publish material that is disallowable in court, such as information about a person's prior convictions or bad character, as this can constitute contempt.
- At no time during or after the trial should you approach or talk with a juror. Radio personality, John Laws, was recently found guilty of soliciting information from a juror about deliberations that occurred in a 1998 trial. You may, in a very strict sense, only report on 'juries' generally.
- In jury trials, do not publish anything said in court when the jury is absent.

Note

Legislation prevents newspapers from publishing the names or pictures of jurors in both criminal and civil trials.

Scandalising the Court

Unlike Sub-Judice Contempt, this form of contempt arises where material is published which is seen to undermine public confidence in the judicial system, regardless of whether proceedings are pending.

Is this form of contempt popular?

Contempt proceedings on this ground are an unusual occurrence, as discussion and even criticisms of the judicial process are recognised as being an integral part of a healthy democracy.

Examples:

- 1. In the Beitzel case, the judge felt that an article published between conviction and sentence was aimed at putting undue pressure on him to send Beitzel to jail, or to jail for a longer term.*
- 2. Another case that was found to scandalise the Court was a comment made by a union official, suggesting that a judge had changed his mind because of demonstrations conducted by BLF members. While proceedings were not issued against the media organisation which republished his remarks, technically they could have been.*

Tip

Read a judgement thoroughly before criticising a judge, to satisfy yourself that the criticism is justified. While significant criticism can be levelled at a judge, they do not take kindly to comments based on a few words from a judgement, taken out of context. The contempt proceedings will be against you, not the interest group you are quoting.

The media should be able to report:

- The arrest and charging of an accused person providing that the report contains no implication of guilt
- The committal, bail application and trial of an accused person, provided those reports are fair and accurate
- Statements made under parliamentary privilege about an accused.

The following may not be published:

- An accused's prior criminal record
- Unfavourable comment on an accused's character
- A pre-trial confession
- A photograph of an accused at a time when identification is a potential issue at the trial
- An assertion of the guilt or innocence of the accused
- A discussion of the merits of the trial or its likely outcome, ie. trial by media
- Publications which may affect witnesses or potential witnesses or the evaluation by the jury of their evidence. For example, publications which discredit a witness, deter a witness from giving evidence, or tend to bolster up or discredit the evidence of a witness
- Evidence prior to trial
- The results of private investigations by the media of a crime, pending trial
- Interviews with jurors.

Suppression Orders

What is a Suppression Order?

A Suppression Order is an order made to the public at large restricting publication of certain information which, among other things, may:

- endanger national security
- interfere with the administration of justice
- offend public decency.

What is the scope of such orders?

The scope of Suppression Orders varies, ranging from a Pseudonym Order for certain parties, to a blanket ban on reporting the proceedings.

Tip

A journalist wishing to challenge a Suppression Order should consult the chief of staff or legal advisers. If time is important, it is acceptable for a journalist to request the judge to adjourn the hearing of the application for a suppression order, so that they can seek legal advice on whether the media should seek leave to appear to put submissions to the court in opposition to the granting of the suppression order.

Improper Behaviour in Court

Who controls how I behave in court?

Journalists should be aware that certain standards of behaviour are expected in court. A judge has absolute control over what happens in the court and its immediate vicinity.

How should I act?

Upon entering and leaving the courtroom a person should bow (or at least nod respectfully) to the judge.

Business attire should be worn in the courtroom.

Can I record court proceedings?

Tape recorders, for the purpose of ensuring accuracy, and specifically not for the purpose of broadcast, are now being permitted in Court by some judges and magistrates. You should check with the judges associate, the court or the courts information officer.

Tip

Promises of confidentiality to sources should not be given unless it is unavoidable. Why? Because refusing to reveal a source in court when requested to do so may expose you to contempt, despite the confidentiality undertaking.

In addition to the law of contempt of court and those occasions on which a court makes a specific Suppression Order, there are a number of statutory restrictions on publication of which journalists must be aware:

Children's Court

In most jurisdictions, there is a prohibition on publishing a report of a proceeding in the Children's Court which might identify the venue of the hearing, or any party to the hearing, including the accused child and witnesses.

Family Court

There is a prohibition in all states on publishing a report of a Family Court proceeding which in any way identifies any of the parties to the case.

Sexual assault

You should not identify the victim of sexual assault (there are some exceptions in some States where the victim consents and there are no proceedings pending – but seek advice before publishing).

What constitutes Contempt of Parliament?

Basically, any conduct which impedes the performance of the functions of a House of Parliament or officer of parliament is capable of constituting contempt.

Unfortunately, because of its arbitrary nature there are no defined categories indicating specifically what does and what does not constitute contempt.

Journalists should be aware of the following categories of publications, given that in the past they have been found to constitute contempt:

- Publishing a comment 'reflecting' on a House of Parliament or its members, eg. Labelling politicians 'lazy two-faced bludgers'.
- Publishing a false or misleading report of debates or proceedings, including in parliamentary committees
- 'Premature' publication of a committee's proceedings, evidence or findings before it has a chance to report to the relevant House of Parliament
- Publishing material which deters witnesses from giving evidence before a House or Committee of Parliament
- Publishing material which tends to obstruct a member of Parliament in carrying out their duties.

Other ways in which journalists may find themselves in contempt of Parliament include disobeying rules of a House, inappropriate behaviour in a gallery, or refusing to answer a question before a committee of a House.

What sanctions can I expect if found in contempt?

Both Commonwealth and state parliaments have the power to fine and/or imprison persons found in Contempt of Parliament.

As with the courts, journalists have no special privilege entitling them to preserve the confidentiality of their sources or to refuse to produce a document. However, it is up to the discretion of the relevant Privilege's Committee as to whether a contempt finding will be imposed.

What is a ‘D’ notice?

‘D’ notices is the shorthand term for the system of voluntary press censorship operating in Australia to protect defence secrets from disclosure.

How is this form of censorship enforced?

Although the system is voluntary and there are no penalties for breaching ‘D’ notices, major publishers abide by the notices.

Types of ‘D’ notices

There are four ‘D’ notices current which:

- restrict publication of information concerning the capabilities of the Australian Defence Force, including aircraft, ships, weapons and other equipment
- restrict publication of information concerning the place of residence of Mr and Mrs Vladimir Petrov
- restrict publication of information concerning signal intelligence and communications, including the Defence Signals Directorate and the Australian Signal Intelligence Organisation
- restrict publication of information identifying agents or concerning the activities of the Australian Secret Intelligence Service.

Tip

Further information concerning the details of ‘D’ notices can be obtained from your editor or legal advisers.

There are laws restricting the circumstances in which you can:

- make a recording of a private conversation (other than a telephone conversation)
- make a recording of a telephone conversation
- publish a report of a recorded conversation.

Recording private conversations (other than telephone conversations)

When can I make a recording of a private conversation?

Journalists in Queensland, Victoria and Western Australia can tape record a private conversation (other than a telephone conversation) *which they are a party to* even if the other party to the conversation does not know the journalist is making the recording. However, this is prohibited in the Australian Capital Territory, New South Wales, the Northern Territory and South Australia.

If you are not a party to the conversation, you cannot make a recording without the consent of every party to that conversation.

When can I publish a report of a private conversation that I have recorded?

For publishing a report of a conversation that was recorded (whether legally or illegally) you put yourself at risk of imprisonment or a hefty fine.

In the Australian Capital Territory, New South Wales and Queensland, you cannot publish the contents if the conversation was illegally recorded. This is not the case in the Northern Territory, South Australia, Victoria and Western Australia.

Generally speaking, you must not publish an article which quotes, paraphrases or refers in any way to that recorded conversation, unless you fall within one of these broad exceptions:

- i) Each party to the conversation consented to the publication of a report of the conversation. To come within this exception, you must tell the other party that you are a journalist who is writing an article and you would like to ask the person some questions for this purpose.

- ii) The disclosure is no more than is reasonably necessary in the public interest. Most journalism will fall within this exception provided:
- you adequately give the other person a chance to put their case (which they might not do if they are unaware they are being recorded)
 - the subject matter of the article is sufficiently in the public interest, and not just gossip or an unwarranted attack on an individual.

Recording telephone conversations

When can I make a recording of a telephone conversation?

In the case of recording telephone conversations, you can only record the conversation if the *recording device is external to the phone system*, and does not intercept the call during its passage over the phone line.

Examples

Tape recording a conversation by placing a tape recorder next to the telephone's speaker or hand piece is OK.

Making a recording on your answering machine is a 'grey area'. The relevant law did not anticipate such types of technology. If you are making a recording on your answering machine, it is advisable to make the other party to the conversation aware of the fact you are making a recording. If the other party knows you are recording, it is definitely OK.

Putting in place special technology which intercepts a phone line is illegal unless all parties to the conversation are aware that tape recording is taking place.

Tip

If in doubt, at the start of the phone conversation, *ask the other person for their permission to make a recording*. You can be imprisoned for 'intercepting' a phone call without the other person's permission.

When can I publish a report of a telephone conversation that I have recorded?

If you make a recording of a telephone conversation using a device which intercepts a phone call during its passage over the phone line (including an answering machine), you should not publish an article which quotes, paraphrases or refers in any way to that recorded conversation.

Publishing such an article can lead to imprisonment. If in doubt, seek legal advice.

For conversations that are recorded *legally*, you can still put yourself at risk of imprisonment or a fine by publishing an article which quotes, paraphrases or refers in any way to that recorded conversation. Again, you are generally safe if you fall within an exception outlined above.

Tip

If you do not fall within one of the exceptions described in recording private conversations, it is best to seek legal advice before publishing.

Are recorded conversations admissible as evidence in court?

Recordings are generally admissible

Recordings will usually be admissible in court – and may help you defend an action brought against you. However, you will not be able to rely on a recording in court proceedings if you made that recording by ‘intercepting’ a phone line, as described above.

Racial vilification

In our multi-cultural society, legislation prohibiting racial vilification has been debated and introduced in various states and Federal Parliament.

What exactly is prohibited?

The Commonwealth Parliament has passed the *Racial Hatred Act 1995*, which prevents the communication of offensive material based on racial vilification.

The Act makes it unlawful to communicate to the public any item that is:

- reasonably likely to offend, insult, humiliate or intimidate another person or group of people
- done because of the race, colour or national or ethnic origin of that person or some or all of the people in that group.

Defences

Communications will **not** be deemed unlawful if they were made in good faith, or for the purpose of reporting or making comment on a matter of public interest.

Obscene material

What is 'obscene'?

It is unlawful to publish material that has a tendency to 'deprave and corrupt' or is offensive or indecent to members of the community.

Examples include nudity, pictorial and written representations of sex, violence, certain expletives and favourable descriptions of drug use.

Note

Regard is had to contemporary Australian standards and the material is assessed in context.

Blasphemous material

Extreme blasphemy is still an offence

Surprisingly, it still remains an offence to publish material that has a tendency to shock and outrage the feelings of members of the Christian religion.

However, it is the manner in which a comment is expressed, rather than the nature of the comment that determines whether it is blasphemous.

Tip

If you exercise moderation, even a comment denying the fundamental doctrines of Christianity, will not, legally speaking, be considered blasphemous.

Intellectual property law exists to encourage creative work and to prevent unfair use of someone else's work.

What remedies exist?

Injunctions are often used to prevent an infringement of intellectual property rights, while other sanctions exist where the breach has already occurred.

An injunction can be granted if you unfairly use someone else's work without their permission.

Tip

Material that could be the subject of an injunction should preferably not be included in pre-published supplements, as an injunction after the supplement has been printed would be very expensive.

Copyright

Copyright protects literary works including news reports, photographs, cartoons and artwork.

How far does the protection extend?

Copyright is said to protect the *form* in which an idea is expressed, it does not protect the idea itself.

While a news report is a literary work, there is no copyright in the facts or the information reported.

Defences

It will be a defence to say you published the work for the purpose of:

- reporting the news, or
- criticism or review, provided there is sufficient acknowledgment.

Note

There is some difficulty in establishing that publication of a leaked document is a fair dealing.

Trade marks

Contractual arrangements with sporting bodies

Publishers should be conscious of any restrictions that prevent them from using, commercially or otherwise, photographs, audio or video. For example, the use of photographs taken at AFL venues and containing the AFL logo may only be used for editorial or non-advertising purposes.

Restrictions will vary depending on the arrangement in place and/or the relationship with the sporting body. The first port of call is always the media accreditation contract itself.

Breach of confidence

In certain circumstances, a media organisation can be liable for publishing confidential information.

When does a breach of confidence occur?

Breach of confidence occurs where:

- the information was not in the public arena
- the information was given in circumstances where an obligation of confidence attached; and
- there was unauthorised use of the information.

Note

Government material must satisfy another test to establish a breach of confidence. That is, that the public interest in suppressing the material, outweighs the public interest in publishing it.

The Press Council is an organisation that has the dual functions of upholding ethical standards in journalism and defending and promoting free speech.

Its membership consists of members of the public, representatives of the publishers and journalists.

It is funded by the major publishers, rather than by government.

What are the powers of this body?

The Press Council can investigate a complaint against any newspaper printed in Australia. If the Council upholds a complaint, it is the practice of the publisher to publish that decision even if adverse to a particular journalist.

Tip

Journalists wanting to avoid having to publish an adverse finding should familiarise themselves with the Press Council's General Principles, which are similar to the Journalists' Code of Ethics.

All reporters and sub-editors must inform their relevant departmental head of any legal concerns arising from a story. The departmental head, in turn, must tell the editor, the managing editor or the deputy editor – before publication – about any legal problems that have arisen.

In practice, this means that reporters or subs must tell their departmental heads that they are proposing to telephone the legal advisers and that, at the end of the discussion, the departmental head must also speak to the lawyer to confirm the lawyer's opinion on the story in question. If, after this, the departmental head still has any doubts whatsoever about legal aspects of the story he should consult the editor or his deputy.

If you, as a journalist, are concerned about a legal aspect of your material, the lawyers should be contacted through an editor. It is advisable to err on the side of caution, as in legal matters, prevention is cheaper and easier than post-publication resolutions.

Often, if the solicitors are contacted they will wish to speak to the journalist who wrote the material. In discussing stories with the lawyers before publication, you should disclose all facts. The responsibility to get the story both right and within the law rests ultimately with you, not the lawyer.

Minter Ellison's media practice

Minter Ellison is a leading Australian law firm with an international reputation and practice. We have over 280 partners working with 900 lawyers, and offices in major cities in Australia and NZ, as well as London, New York and Hong Kong. We also have associated firm relationships in Jakarta and Bangkok. Operating through an integrated structure of legal, industry and client knowledge groups, Minter Ellison provides a comprehensive range of legal services to business and government.

The firm has been advising publishers for over 135 years, and offers a 24 hours a day, seven days a week service to major publishers needing pre-publication advice. Long term clients include The Age, Text Media, SBS Television, Fairfax and Grundy Television.

In the 2000/2001 edition of Legal Profiles, Minter Ellison's national media and broadcasting group was rated as premier in Melbourne, Adelaide and Perth, highly regarded in Sydney and recognised in Brisbane.

Melbourne

Level 23 Rialto Towers, 525 Collins Street, Melbourne VIC 3000

Tel: (03) 8608 2000 Fax: (03) 8608 1000

Peter Bartlett

Partner

Tel: (03) 8608 2623 Fax: (03) 8608 1000

Mobile: 0411 415 065

Email: peter.bartlett@minterellison.com

Cindy Christian

Senior Associate

Tel: (03) 8608 2673 Fax: (03) 8608 1000

Email: cindy.christian@minterellison.com

Andy Evans

Lawyer

Tel: (03) 8608 2673 Fax: (03) 8608 1000

Email: andy.evans@minterellison.com

David Poulton

Partner

Tel: (03) 8608 2692 Fax: (03) 8608 1000

Mobile: 0417 523 506

Email: david.poulton@minterellison.com

Anthony Strahan

Lawyer

Tel: (03) 8608 2673 Fax: (03) 8608 1000

Email: anthony.strahan@minterellison.com

Marc Jongebloed

Lawyer

Tel: (03) 8608 2623 Fax: (03) 8608 1000

Email: marc.jongebloed@minterellison.com

Sydney

Aurora Place, 88 Phillip Street, Sydney NSW 2000

Tel: (02) 9921 8888 Fax: (02) 9921 8123

Patrick George

Partner

Tel: (02) 9921 4509 Fax: (02) 9921 8123

Mobile: 0411 481 444

Email: patrick.george@minterellison.com

Paul Wentworth

Partner

Tel: (02) 9921 4801 Fax: (02) 9921 8123

Mobile: 0413 005 651

Email: paul.wentworth@minterellison.com

Charles Alexander

Partner

Tel: (02) 9921 4826 Fax: (02) 9921 8123

Email: charles.alexander@minterellison.com

Ross Patterson

Partner

Tel: (02) 9921 4482 Fax: (02) 9921 8123

Mobile: 0411 021 681

Email: ross.patterson@minterellison.com

Brisbane

Waterfront Place, 1 Eagle Street, Brisbane QLD 4000

Tel: (07) 3119 6000 *Fax:* (07) 3119 1000

Khory McCormick

Partner

Tel: (07) 3119 6162 *Fax:* (07) 3119 1000

Mobile: 0411 403 344

Email: khory.mccormick@minterellison.com

Canberra

15 London Circuit, Canberra City ACT 2601

Tel: (02) 6274 3000 *Fax:* (02) 6274 3111

Robert Clynes

Partner

Tel: (02) 6274 3001 *Fax:* (02) 6274 3111

Mobile: 0401 144 915

Email: robert.clynes@minterellison.com

Adelaide

1 King William Street, Adelaide SA 5000

Tel: (08) 8233 5555 *Fax:* (08) 8212 7518

Andrew Short

Partner

Tel: (08) 8233 5637 *Fax:* (08) 8212 7518

Mobile: 0412 332 779

Email: andrew.short@minterellison.com

APPENDIX A: Qualified privilege

It may be possible to claim qualified privilege as a defence to a defamation action when reporting on the proceedings of the following institutions and documents. Note that qualified privilege is not always automatic, and advice should be sought before publishing sensitive material.

Item reported on	Privilege Status
Australian Parliaments	<i>Qualified (except the Australian Capital Territory)</i>
Tabled documents in Australian Parliaments	<i>Qualified (except the Territories)</i>
Other parliamentary documents	<i>Sometimes qualified</i>
Comments made by Members outside Parliament	<i>None</i>
Family and Children's Courts	<i>None (as there are statutory restrictions on publishing)</i>
Royal Commissions	<i>Often qualified</i>
Courts and Royal Commissions held in closed session	<i>None, until findings released</i>
Other Government established inquiries	<i>Often qualified</i>
Registers set up by Government	<i>Often qualified</i>
Government press releases	<i>None</i>
Public company meetings	<i>Qualified (except in Victoria)</i>
Industrial Relations Commission	<i>Qualified</i>
Professional tribunal hearings	<i>None</i>
Union meetings	<i>None</i>
Sporting disciplinary tribunals	<i>Possibly qualified</i>
Material released by police	<i>Often qualified (eg, Victoria - if released for publication by an officer of at least Inspector Rank)</i>
Municipal council meetings	<i>Qualified</i>

DISCLAIMER

A Reporter's Law Guide was prepared by the Minter Ellison Legal Group and represents the law as at March 2001. It is not intended to be fully comprehensive nor is it intended to be a substitute for legal advice.

Your local Minter Ellison contact partner can update you with the most current information.

Professional advice should be sought before applying the information to particular circumstances.

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