Freedom of expression

The Australian Constitution does not expressly protect the freedom of expression and there are also limitations that can inhibit creative freedom in some situations, including defamation, anti-vilification, classification and censorship laws and the treason and urging violence offences.

Introduction

The Australian Constitution does not expressly protect the freedom of expression. Though Australia is a signatory to the International Covenant on Civil and Political Rights, there has been no express implementation of its principles, which include the right to hold opinions without interference and the right to freedom of expression (Article 19).

The High Court has held that the freedom of expression with regards to political discussion is an implied constitutional right. However, the right does not extend more generally to cases where political issues are not involved. Arts Law advocates for the right to freedom of expression to be recognised so as to protect artistic expression and foster cultural growth in Australia.

This information sheet aims to introduce artists to the limitations they are most likely to be confronted with or ought to consider. While these limitations do exist, Arts Law encourages artists to seek legal advice regarding specific queries before opting not to create or exclude certain expression from their artistic work.

This sheet provides a general overview of the following limitations to the freedom of expression.

1. Defamation law
2. Discrimination and anti-vilification laws
3. Classification and censorship of obscenity and offensive behaviour
4. The treason and urging violence (formerly, sedition) offences
5. Defences to treason and urging violence offences
6. Current debate surrounding the treason and urging violence legislation
7. Disclosure of sensitive government information
8. Whistleblowing and disclosures in the public interest
9. Disclosures of confidential information in the public interest
10. Contempt of court and non-publication or suppression orders
11. Activism and the communication of surreptitiously obtained video & photographs

1. Defamation law

Defamation is a communication from one person to at least one other that lowers or harms the reputation of an identifiable third person, where the communicator (the publisher) has no legal defence. The law of defamation aims to balance free speech with the right of an individual to enjoy a reputation from indefensible attack.

Defamation actions are very costly, difficult to defend and substantial monetary damages can be awarded. In some cases plaintiffs can obtain a court order called an “injunction” preventing any further communication of the offending publication or material.

In 2006, the “uniform” defamation laws were enacted in all States. However, be aware that this legislation is still not entirely uniform and there are still some differences from State to State. If the material in issue was published prior to 2006, please refer to our *Defamation Law (for material published before January 2006)* Information Sheet. For material published on or

© 2026 Arts Law Centre of Australia

after 1 January 2006, please refer to our *Defamation Law (for material published after January 2006)* Information Sheet.

2. Discrimination and anti-vilification laws

The discrimination and anti-vilification laws were designed to encourage tolerance for and acceptance of, social diversity coexistent with freedom of expression. These laws were intended to set boundaries for conduct that incites hatred, serious contempt for or severe ridicule of a person or group of people because of race and ethnicity, disability, religion or sexuality (which includes homosexuality, gender identity and HIV/AIDS status). At a Commonwealth level the discrimination and anti-vilification laws are contained in the: *Age Discrimination Act 2004 (*ADA); *Disability Discrimination Act 1992* (DDA); *Sex Discrimination Act 1984* (SDA); and the *Racial Discrimination Act 1975* (RDA). The ADA, DDA, SDA & RDA provide for offences of committing an act of victimisation against another person and in relation to advertisements that breach each statute. However it is the RDA that has greatest potential to impact on the freedom of speech. An important purpose of the RDA is to enable Australia to comply with its obligations pursuant to the *International Convention on the Elimination of All Forms of Racial Discrimination*. Article 4 of this Convention condemns racial vilification, ideologies based on racial superiority, and institutionalised racial discrimination, in any form.

Section 9 of the RDA states that it is “unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.”

Section 18C of the RDA makes it unlawful for any person to do an act that is “reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate” another person or group of people because of their “race, colour, descent or national or ethnic origin”. An unlawful act under the RDA is not necessarily a criminal offence. However engaging in conduct that is racial discrimination or vilification can result in civil proceedings being brought by a person that is subjected to the racial discrimination or vilification. Complaints relating to racial vilification can be lodged with the Australian Human Rights Commission (AHRC).

The essence of racial vilification is (a) a comment or some other act directed to the race or ethnic origin of a person or group of people, (b) committed in public, (c) which is reasonably likely to “offend, insult, humiliate or intimidate” the individual or group. The offence must occur in a public place and be witnessed by a third party. A private remark, though offensive, is not with s. 18C. A public place includes any place to which the public have a right of access or are permitted to have access. That is, it includes private property to which the public are permitted to have access. Offensive words or images broadcast on radio or television or printed in a newspaper or on the Internet are presumed to be publicly communicated.

Complaints generally can only be made by a member of the race or ethnic community which has been vilified or by an organization or individual representing them. Though persecution of minorities by extreme racists is the primary concern of anti-vilification laws, racist acts between ethnic communities are also covered. Situations that are exempted from the effect of the RDA include, (a) a fair report of an act of vilification; (b) an act done reasonably and in good faith for academic, artistic, scientific or research purposes in the public interest; or (c) material in parliamentary, court or tribunal proceedings or other government inquiries.

Aspects of anti-vilification laws reflect similar concepts to those contained in defamation offences. They are not meant to preclude ordinary, everyday behaviour, rather the laws are intended to minimize speech, images, or actions that has the potential to cause serious harm. The AHRC provide examples of racial vilification under s. 18C including comments made by users on online websites advocating violence against people because of their ethnicity and publishing racial insults and offensive racial stereotypes. Courts that have considered the test to be applied under s. 18C have stated that the conduct in question must cause “profound and serious effects, not to be likened to mere slights”.

A defence exists in s. 18D of the RDA where the relevant conduct was in the course of a “performance, exhibition or distribution of an artistic work”. This exemption includes kinds of performances or exhibitions that may cause offence to some

© 2026 Arts Law Centre of Australia

people. While there is no precise definition of what constitutes an 'artistic purpose' within this exception, however this exemption would appear to have a broad application so that pushing the boundaries in the performance of an artistic work may be still considered to be done reasonably and in good faith. A court that considered the scope of the artistic purposes exemption described the performances of a comedian purporting to be an Aboriginal person as "impolite and offensive" to many groups within Australia, however just because the performance of the comedian could be described as offensive or insulting did not mean it was unlawful under the RDA.[1] The court noted the performances were comedic in intention, and were not to be taken literally or seriously and had no overt political context. The court found the performances fell within the term 'artistic work' in s. 18D.

Section 18D also contains exemptions intended to protect the freedom of communication in relation to anything said or done reasonably and in good faith in relation to: publications, discussion or debate for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; fair and accurate reports on matters of public interest; or fair comment on matters of public interest, where the comment is a genuine belief held by the person making the comment. When considering whether an act is done "reasonably", it is necessary to demonstrate proportionality between the communication, when having regard to the degree of harm potentially, which may be inflicted by what is communicated. When considering s. 18C there must be a link between the act reasonably likely to offend and the racial or other characteristics or attributes of the persons reasonably likely to have been offended. A court has described a test for that causal nexus as being whether the act was "plainly calculated to convey a message about" the racial group.[2]

A communication that is intended to be "deliberately provocative" or that is "intending to offend" is likely to be outside the exemption provided by s. 18D.[3] However in respect to a dramatic, comedic or any other "artistic work", there is a margin of tolerance so that threshold of what is unreasonable conduct is not the same as that would be applied to a person engaged in the publication and dissemination of offensive material directed to any ideology that is motived by racial vilification or racial superiority. See AHRC, *At a glance: Racial vilification under sections 18C and 18D of the Racial Discrimination Act 1975 (Cth)*.

3. Classification and censorship

Artists might be required to have their works classified depending on a number of factors, including the medium of the work, its content, and how it is being used. Depending on the medium works are subject to different classification systems: the Classification Board for films, computer games and publications; the Australian Communications and Media Authority (**ACMA**) for television, radio and internet; and the Australian Record Industry Association (**ARIA**) and the Australian Music Retailers' Association (**AMRA**) for voluntary labelling guidelines for audio tapes, records and CDs. For more information, please see our *Classification and Censorship* Information Sheet.

Further limits are imposed on the freedom of expression through state and territory statutes that define child pornography, obscenity and indecency. For more information see Arts Law's information sheet Children in the creative process – Australia.

4. The treason and urging violence offences

The classic definition of sedition is that it is a political crime that punishes certain communications critical of the established order. Sedition crimes have been enshrined in state and territory based Australian laws since before federation and inserted into the *Commonwealth Crimes Act 1914* (Cth) (**Crimes Act**) in 1920. New sedition offences were inserted into the *Criminal Code Act 1995* (Cth) in 2005 in response to the increased risk of terrorism.

In 2006, the Australian Law Reform Commission (**ALRC**) reviewed sedition and the related laws in Australia at the behest of the Federal Government. Based on the ALRC's suggestions, the Federal Parliament enacted the *National Security Legislation Amendment Act 2010* (Cth) (the **Act**), which replaces sedition offences with crimes based on "urging violence" in Part 5.1 of the *Criminal Code Act 1995* (Cth). Various state and territorial anti-terrorism statutes also exist but are beyond the scope of this information sheet. As the anti-terrorism legislation is complex and subject to revision from time to time, be sure

© 2026 Arts Law Centre of Australia

to check if any Commonwealth or state or territory law may be relevant to your creative work.

A summary of the treason and urging violence offences are as follows:

Treason

The following offences are often described as “urging treason and urging treachery”. The 2010 amendments added an additional fault element based on the offender’s intention. The penalty for these offences is imprisonment for life.

Under the Act the person committing the offense must: (a) be an Australian citizen; (b) be a resident of Australia; (c) have voluntarily put himself or herself under the protection of the Commonwealth; or (d) be a body incorporated by or under a law of the Commonwealth or of a State or Territory at the time he or she engages in the treacherous conduct.

4.1. Assisting enemies at war with the Commonwealth

A person commits an offence if: (a) the person engages in conduct; and (b) the person intends the conduct to materially assist, by any means whatever, an enemy to engage in war with the Commonwealth; and (c) the enemy is: (i) at war with the Commonwealth, whether or not the existence of a state of war has been declared; and (ii) specified by Proclamation to be an enemy at war with the Commonwealth. The conduct must also assist the enemy to engage in war with the Commonwealth.

4.2. Assisting countries etc. engaged in armed hostilities against the Australian Defence Force (ADF)

A person commits an offence if: (a) the person engages in conduct; and (b) the person intends the conduct to materially assist, by any means whatever, an organisation or country; and (c) the organisation or country is engaged in armed hostilities against the Australian Defence Force. The conduct must also assist the organisation or country to engage in armed hostilities with the Commonwealth.

To give an example of an application of the above provisions, a person who urged Australian soldiers and their allies to lay down their arms and refuse to fight, would be urging persons to engage in conduct that: (i) would assist a country at war with Australia, and (ii) assist a country engaged in armed hostilities with the Australian Defence Force. This pacifist would possibly be committing an offence under the Act.

Urging Violence

The additional element of “recklessness” applies to the “urging violence” offences. Recklessness under the criminal legislation requires that the person consciously consider the risks involved and nevertheless proceed with the conduct. The Act further requires the person intend that force or violence will occur. The penalty generally for the following offences is imprisonment for 7 years.

4.3. Urging the overthrow of the Constitution or Government by force or violence

A person commits an offence if the person intentionally urges another person to overthrow by force or violence: (a) the Constitution; (b) the Government of the Commonwealth, a State or a Territory; or (c) the lawful authority of the Government of the Commonwealth, and the first person does so intending that force or violence will occur.

4.4. Urging interference in parliamentary elections or constitutional referenda by force or violence

A person commits an offence if the person intentionally urges another person to interfere, by force or violence, with lawful processes for (a) an election of a member or members of a House of the Parliament; or (b) a referendum, and the first person does so intending that force or violence will occur.

© 2026 Arts Law Centre of Australia

4.5. Urging violence against groups

A person commits an offence if: (a) the person intentionally urges another person or a group to use force or violence against another group (whether distinguished by race, religion, nationality, national or ethnic origin or political opinion); (b) the first person does so intending that force or violence will occur; and (c) the use of force or violence would threaten the peace, order and good government of the Commonwealth.

If the offender's conduct does not threaten the peace, order, and good government of the Commonwealth, the penalty is reduced to imprisonment for 5 years. A person arguably falls foul of this provision if, for example, the person is a member of a racial minority group that is the victim of violence by white supremacists and urges members of their group to forcefully resist the white supremacists.

4.6. Urging violence against members of groups

A person commits an offence if: (a) the person urges another person or a group to use force or violence against a person because of his or her belief that the targeted person is a member of a certain group (whether distinguished by race, religion, nationality, national or ethnic origin or political opinion); (b) the first person does so intending that force or violence will occur; and (c) the use of force or violence would threaten the peace, order and good government of the Commonwealth.

If the offender's conduct does not threaten the peace, order, and good government of the Commonwealth, the penalty is reduced to imprisonment for 5 years.

5. Defences to treason and urging violence offences

The 'good faith' defences provided for in the Act may apply when the offending material points out mistakes of political leaders or errors in governments, the Constitution, legislation and courts with a view of reforming these errors, or is expression that points out issues causing hostility between groups. The defences also protect lawful attempts to change the law, any speech in connection with an industrial matter and the publication of a report or commentary on a matter of public interest.

Other matters for which a court may have regard when considering a good faith defence, include whether acts were done: (a) in the development, performance, exhibition or distribution of an artistic work; (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose, or any other genuine purpose in the public interest; or (c) in the dissemination of news or current affairs. The Act reiterates here the importance of the offender's intention and specifically highlights its relevance in determining liability. The fault element of intention is essential to the clarity and understanding of the operation of the treason and urging violence offences.

6. Debate surrounding the legislation and specific ramifications for the Arts

The reforms were met with a wave of criticism for a number of reasons. The Australian Law Reform Commission stated that the offences attempt to shift the focus away from mere speech towards "urging" other people to use "force or violence" in a number of specific contexts. One of the key concerns identified was that there is no definition of "urging". It will be the role of the courts to give greater clarity to its definition and limits.

Some individuals and organisations argued that when artists are faced with the prospect of breaching the law, particularly if it carries the threat of imprisonment, they may err on the side of caution and self-censor. Arguably the most insidious thing about self-censorship is that it is impossible to measure or quantify because it is an act of restraint. Even if these laws have not yet been used against artists, the fact that they may be, has an effect on the artistic output of many arts professionals. The change may not be immediately recognisable, but the cumulative effect will be reflected in the content and diversity of

© 2026 Arts Law Centre of Australia

artistic expression available to the public.

7. Disclosure of sensitive government information

The *National Security Amendment Act (No 1) 2014* imposes heavy penalties with regard to the disclosure of sensitive government information including five years imprisonment for disclosing information on covert intelligence operations, and up to ten years if that disclosure endangers lives and/or names an ASIO officer.

Section 35P (Schedule 3 of the Act), bans disclosure of any information that relates to a 'Special Intelligence Operation' by any person. There was public discussion over the scope of s. 35P; while the Attorney-General proposed that there are limitations as to the circumstances in which s. 35P would be applied; however the drafting of the Act mean that journalists, bloggers, whistleblowers and social media users are potentially at risk of prosecution under s. 35P. This is relevant if you wish to incorporate material or interview people involved in the disclosure of sensitive government information in a film or other artistic work. Crucially, there is no public interest defence for disclosing this kind of information. For a further discussion of these issues – see Keiran Hardy and George Williams, *Terrorist, Trader, or Whistleblower? Offences and Protections in Australia for Disclosing National Security Information* (2014).

8. Whistleblowing and disclosures in the public interest

Whistleblowing refers to the disclosure of otherwise private information by someone who feels it is important for the public to know. Whistleblowing usually involves disclosures by members or former members of an organisation that sheds light on corruption or wrongdoing on the part of their employers and are made to people who may be able to affect change like government watchdogs or the media. An example might be where an employee discloses to a journalist that its employer, a public art gallery, is taking bribes for an arts prize.

Whistleblowing is generally considered to be in the public interest because it is a check on the misuse of power by corporations and governments. However it is important to note that there are limits to the protection offered by the law to whistle-blowers and there are penalties related to the disclosure of confidential information. The whistleblowing / public interest disclosure legislation that has been enacted by Commonwealth and the states and territories is focused on disclosures by public officials or disclosures related to public bodies – they do not protect disclosures about the activities of corporations and other private sector entities. The protection may be limited in that the protection extends to disclosure to official authorities and regulators and the protection may not extend to disclosure to the media. The protection may not extend to immunity in respect to offences related to how the information is obtained. For example, the information that is disclosed was obtained through the unauthorised access to a computer.

It is worth noting that several states have recently conducted reviews of relevant whistleblowing legislation due to the connection that these laws appear to have had on dissuading people not to come forward. It is reasonable to expect that the scope of laws protecting whistleblowers at least at a state and territory level may be extended in future.

Commonwealth legislation

Currently at a national level whistle-blowers are protected by:

Public Interest Disclosure Act 2013 (Cth)

This Act protects current or former public officials (this includes not only public servants but defence force personnel and others) who make disclosures about misconduct in the Commonwealth public sector.

The disclosure must be made to an authorised officer or to the person's supervisor. The person disclosing the information is protected from civil and criminal liability as well as disciplinary action.

© 2026 Arts Law Centre of Australia

Disclosures concerning wrongdoing by politicians or ASIO is not covered by this Act.

Corporations Act 2001 (Cth)

This Act protects officers and employees of a company who disclose information of illegal practices, fraud or misappropriation of funds to company auditors. It is an offence under the Act for a person to be penalized (victimised, sacked, changes made to their working conditions) for such disclosures.

This protection extends only to the act of disclosure itself. A person who makes a disclosure will not be granted immunity for any illegal act or wrongdoing in which they were involved.

State and Territory Whistleblowing Legislation

Additionally in each state and territory, public servants are protected from disciplinary or other action in respect of certain specified disclosures (i.e. whistleblowing) in particular circumstances.

Australian Capital Territory

Public Interest Disclosure Act 2012 (ACT): In the ACT protection applies to public interest disclosures, where the person making the disclosure believes on reasonable grounds that the information shows that another person has, had or will be engaged in conduct like wasting public resources or endangering the health or safety of the public. Such information may be disclosed to any government agency to which the information relates.

New South Wales

Protected Disclosures Act 1994 (NSW): Whistleblower protection in NSW applies to public officials for disclosure to journalists, investigatory authorities or members of parliament about public officials or authorities engaged in corruption, misconduct or maladministration.

For a disclosure to be protected public officials (including independent contractors) must have an ‘honest belief’ on ‘reasonable grounds’ that the information they have disclosed shows conduct of the relevant type (e.g. serious and substantial waste of resources)**.**

It is a matter for internal disciplinary action or even a criminal offence to take detrimental action (e.g. sack, demote or alter duties) against a person ‘substantially in reprisal for the other person making a protected disclosure’.

Northern Territory

Public Interest Disclosures Act 2008 (NT): In the Northern Territory any person, not just public servants, may make disclosures about the improper conduct of public officers and public bodies. Disclosures are made to the Commissioner for Public Interest Disclosures and can be made through a public body.

A false or misleading disclosure is a criminal offence. It is also a criminal offence to take reprisal action against someone who makes a disclosure.

Reporting improper conduct to the media is not protected.

Queensland

Public Interest Disclosure Act 2010 (Qld): Public officials are protected if they take a public interest disclosure (i.e. about official misconduct) to a journalist, provided they have first taken it to an official authority and that authority has:

© 2026 Arts Law Centre of Australia

1. Decided not to investigate or deal with the disclosure; OR
2. Investigated the disclosure but not recommended the taking of any action; OR
3. Failed to notify the person, within six months of the disclosure, whether or not the disclosure is being investigated or dealt with.

South Australia

Whistleblowers Protection Act 1993 (SA): The Act is designed to protect people who make 'appropriate' disclosures of public interest information in both private and public sectors. Anyone who victimises a whistleblower may be dealt with as a tort or under the *Equal Opportunity Act 1984* (SA).

Tasmania

Public Interest Disclosures Act 2002 (Tas): The Act provides statutory protections and procedures for people making public interest disclosures in the Tasmanian public sector about serious or significant improper conduct.

Victoria

Protected Disclosure Act 2012 (Vic): Under the Victorian protected disclosure regime, any person may make a disclosure about improper conduct by public bodies and public officers, orally or in writing. Disclosures may also be made anonymously. Disclosures can be made about a range of bodies (plus their officers and employees) including government departments, universities, TAFEs and public hospitals.

Complaints can be made about improper conduct in the public sector without a person suffering detrimental action in reprisal with the protection from detrimental action extending not only to the person making the disclosure but including witnesses and persons the subject of an investigation.

Western Australia

Public Interest Disclosures Act 2003 (WA): In WA any person may make a disclosure of public interest information. A public interest disclosure is made when a person discloses to a proper authority information that tends to show past, present or proposed future improper conduct by a public body in the exercise of public functions. There is no time limit in which to make a disclosure. Disclosures to journalists, the media or other persons who are not specified as proper authorities are not protected by the Act.

9. Disclosures of confidential information in the public interest

It is tempting to believe that disclosures of confidential information are immune from the law because the disclosure of the information is in the public interest; however as recent high profile cases have indicated this is not entirely accurate.

On a daily basis we disclose information to others, with the intention that it can only be used for particular purposes. Courts will prevent the unauthorised use of such information either by the original recipient or anyone along the grapevine, by upholding actions for 'breach of confidence'.

There are two broad classes of actions for breach of confidence either:

a.an express or implied contractual obligation not to use specified information; or

b. .

© 2026 Arts Law Centre of Australia

An equitable obligation not to disclose confidential information will depend on the circumstances in which the information was obtained or communicated. For more information on the law of confidentiality see Arts Law's information sheet Protecting your ideas.

Certain relationships of trust and confidence, automatically give rise to obligations of confidence, such as:

1. between employers and employees;
2. between people in domestic relationships or professional relationships (such as doctor and patient; lawyer and client);
3. in matters of security;
4. in matters involving defence; or
5. the workings of government.

A variety of civil and criminal offences may apply to people who make disclosures which fall outside public interest protections including offences related to unauthorised access to or modification of restricted data held in computers. While there is some authority to suggest that equitable obligations regarding confidential information may be overridden where there is serious misconduct, it remains unsettled whether Australian law recognises a 'public interest defence' to an action for breach of confidence. The High Court has commented that in Australia a public interest defence should be limited to information which revealed serious misconduct (i.e. a crime). Courts have also distinguished between the concept of the public interest and what the public may be interested in.

Therefore for a public interest defence to succeed it will likely depend on balancing two sets of public interest:

1. the public interest in maintaining the confidence; and
2. public interest in knowing the truth.

The person making the disclosure must have some reasonable ground for making the allegation of wrongdoing. The disclosure must be more than a suggestion meaning there must be facts you can point to which have led you to disclose confidential information.

If a public interest defence fails, whistleblowers may avoid liability for breach of confidence in other ways:

1. by challenging whether the obligation of confidence exists at all.
2. arguing that the claimed confidential information lacks the necessary quality of confidential information in any event.
3. using the equitable defence of unclean hands which means that a wrongdoer (the party about whom the confidential information was disclosed) cannot claim relief because they have not come to the Court innocent.

Where the person in control of the secret information publishes it on a non-confidential basis, it cannot be treated as confidential. When published the information is described as being in the 'public domain'. For example, while the concept for a film or television project can be argued to be confidential information when the creator pitches the project to potential financiers in meetings, however the disclosure of the concept on a crowdfunding website will mean the concept ceases to be confidential. A further example is the posting of personal information on posting on Facebook even if it was limited to friends, can be argued to be making the information public as those friends are able to forward the posting on to whomsoever they wished.

Courts of equity will also intervene to protect privacy in a number of situations, for example the publication of diaries, the identification of sources who have been assured confidentiality or personal information that arose in marriage or de facto relationships often of a sexual nature.

When considering whether or not information is confidential, ask yourself whether:

© 2026 Arts Law Centre of Australia

- the plaintiff (the relevant employer/ organisation etc) would be able to identify with specificity, that which is said to be the information in question, and be able to show that;
- the information has the necessary quality of confidentiality (e.g. not common or public knowledge);
- the information was received by you in such circumstances as to import an obligation of confidence.

An employee has a duty of confidence in relation to the confidential information they learn during the course of their employment. However it can be argued that some types of information, because of its trivial character or easy accessibility from public sources cannot be regarded by reasonable persons or by the law as confidential. Therefore an employee can be to free to disclose such information or continue to use the information that has become part of the employee's own knowledge and experience.

11. Contempt of court and non-publication or suppression orders

It is a basic principle of the common law that all proceedings must be held in public unless there is there is legislation or a court order to the contrary; this is the principle of open justice. Courts must take the public interest in open justice into account before granting a suppression or non-publication order courts. To 'publish' means to disseminate or otherwise provide access to the public of information whether it is in writing, by radio or television, exhibition or via the internet. It includes publishing 'pictures' broadly defined to include drawings, photographs and paintings. A person who contravenes suppression or non-publication orders is at risk of punishment as it is a contempt of court.

Legal liability will exist with respect to breaches of non-publication or suppression orders made by courts under their inherent powers to control legal proceedings or under statutes that balance the principle of open justice with the need, in some circumstances, to control the disclosure of information.[4] In relation to 'national security' issues the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), allows for non-disclosure orders where information that may be disclosed in criminal or civil proceedings relates to Australia's defence, security, international relations or law enforcement interests. It may also be unlawful to disclose the identity of victims of sexual offences;[5] and any children involved in legal proceedings in the criminal courts and the family court. Indeed in most parts of Australia there are laws that prevent people publishing information which might identify a child involved in court proceedings.[6] The aim is to protect victims, their families, witnesses and any children involved in the proceedings from stigma or other harm. Note, in Queensland, courts may allow publication of the name of a juvenile offender convicted of a serious offence, while in the Northern Territory it is only in exceptional circumstances that a court can make an order that a juvenile offender cannot be identified.[7]

Courts may make orders to close or clear the court where the presence of the public would frustrate or render impracticable the administration of justice. This occurs in particularly sensitive matters for example sexual offences or where the alleged offender is or was at the time of the offence, under the age of eighteen. Non-publication orders are in place where publication of evidence, usually by the media would interfere with justice being done usually by prejudicing the jury. Courts have a wide power to forbid publication of all or any part of evidence in the proceedings or of any report or account of that evidence. This limitation can extend both to the name of the victim or young person and to information that can reasonably identify the person. Therefore the prohibition of identifying the victim or young person can extend to naming other members of their family or any other information that can identify the person.

Generally, evidence not involving children and given in open court may be published except where courts have made orders prohibiting the publication of that evidence.

For more detailed information – see Katherine Giles, *Contempt: an artistic spin* (Arts Law, 2002)

11. Activism and the communication of surreptitiously obtained video and photographs

© 2026 Arts Law Centre of Australia

Environmental, animal protection and other altruistically minded advocates are known to employ surveillance methods to monitor the activities of corporations and their private facilities. While there is at present no general right to privacy, under the current law activists risk criminal prosecution for trespass to private property; as well as being exposed to civil legal action for trespass and nuisance. (Note additional national security laws apply with respect to photographing government buildings including defence force bases).

While new technologies allow the use of a camera on a remote controlled aircraft, however the use the pilotless aircraft to film private property can be argued to be an actionable nuisance if it interferes with someone's right to use and enjoy their land. (See the section on 'Photographing people on private property' in the Arts Law information sheet: *Street photographer's rights*). The Civil Aviation Safety Authority (CASA) regulates the use of remote piloted aircraft (RPA), which are also known as drones, unmanned aerial vehicle (UAV) or an unmanned aircraft system (UAS).[8] CASA publishes the *various resources*, which summarise the current regulations over the operation of RPA/UAV/UAS.

Surreptitious filming may give rise to issues under state and territory legislation concerning surveillance and listening devices intended to protect peoples' private activities and conversations; however there are differences between the statutes and some only cover listening devices and not optical surveillance devices (cameras).[9] It can be argued that the sound recording facility of a film or video camera (including on a mobile recording or filming device such as a mobile phone), qualifies as a listening device. The legislation may restrict publishing or communicating unauthorised recordings obtained by using a surveillance device.

The High Court of Australia in *ABC v Lenah Game Meats* (2001)[10] considered, but did not decide, whether there is a tort of invasion of privacy. This case involved the secret filming of possum slaughtering at a meat processing plant. The decision is significant as it recognised that according to contemporary standards, certain kinds of activities are meant to be unobserved and any disclosure or observation would be highly offensive to a reasonable person. However the High Court did not decide whether the activities at the processing plant were 'private'; or if a tort of invasion of privacy does exist, whether corporations should be entitled to protection of their activities under a tort of privacy. Other cases have decided that the surreptitious filming or taking photographs results in a misuse of confidential information. In terms of publishing materials that are known to have been unlawfully obtained, there remains uncertainty as to the circumstances in which injunctions can be obtained to stop the communication of material that is obtained by surreptitious filming. Material that has been obtained through improper or illegal activities may still be used in both civil and criminal proceedings.[11]Activists who break into factory farms and other facilities in New South Wales to secretly film animal cruelty may become exposed to prosecution under proposed changes to the law that are claimed to be in the interests of biosecurity. People who illegally enter farms and expose livestock to diseases could face up to three years in jail or a $1.1m fine under the *Biosecurity Bill 2014 (NSW)*, which will be re-considered by NSW Parliament in mid-2015. Readers are encouraged to check the status of this legislation.

Further information

For information about developments in the law of privacy, please refer to Arts Law's information sheets:

- Privacy and the private sector.
- Filming in public places.
- Street photographer's rights.

For further information about the freedom of speech in Australia – see the Attorney-General's Department information on the *Right to freedom of opinion and expression*.

Need more help?

© 2026 Arts Law Centre of Australia

Contact Arts Law if you have questions about any of the topics discussed above

Telephone: (02) 9356 2566 or toll-free outside Sydney 1800 221 457

Also visit the Arts Law website (www.artslaw.com.au) for more articles and information sheets

Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (**Arts Law**) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

While Arts Law tries to ensure that the content of this information sheet is accurate, adequate or complete, it does not represent or warrant its accuracy, adequacy or completeness. Arts Law is not responsible for any loss suffered as a result of or in relation to the use of this information sheet. To the extent permitted by law, Arts Law excludes any liability, including any liability for negligence, for any loss, including indirect or consequential damages arising from or in relation to the use of this information sheet.

Arts Law Centre of Australia © 2013 & 2014

[1] *Kelly-Country v Beers* [2004] FMCA 336 (21 May 2004).

[2] *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) [18]. The court determined that "I have not been satisfied that the offensive conduct that I have found occurred, is exempted from unlawfulness by section 18D. The reasons for that conclusion have to do with the manner in which the articles were written, including that they contained errors of fact, distortions of the truth and inflammatory and provocative language." [23].

[3] *Kelly-Country v Beers* [2004] FMCA 336 (21 May 2004).

[4] For example: *Court Suppression and Non Publication Orders Act 2010* (NSW); *Open Courts Act 2013* (Vic); 69A of the *Evidence Act* 1929 (SA).

[5] s. 194K of the *Evidence Act 2001* (Tas); *s. 4 Judicial Proceedings Reports Act 1958* (Vic); s. 578A *Crimes Act 1900* (NSW); s. 40 *Evidence (Miscellaneous Provisions) Act 1991* (ACT); s. 6 *Criminal Law (Sexual Offences) Act 1978* (Qld); s. 71A(4) *Evidence Act 1929* (SA); s. 6 *Sexual Offences (Evidence and Procedure) Act 1983* (NT); s. 36C *Evidence Act 1906* (WA).

[6] ss.13(1), 36C *Young Offenders Act 1993* (SA); s. 71A(4) *Evidence Act 1929* (SA); s. 15A *Children (Criminal Proceedings) Act 1987* (NSW); *Court Suppression and Non-Publication Orders Act 2010* (NSW); ss. 140P, 534 *Children, Youth and Families Act 2005* (Vic); s. 22 *Youth Justice Act 1997* (Tas); s. 50 *Youth Justice Act* (NT); s. 712A *Criminal Code 2002* (ACT), s. 193 *Child Protection Act 1999* (Qld); ss. 234, 301, 361*Young Offenders Act* (Qld); ss. 40, 190 *Young Offenders Act 1994* (WA); s. 36 *Childrens Court of Western Australia Act 1988* (WA).

[7] s. 191C *Juvenile Justice Amendment Act 2002* (Qld); s. 50 *Youth Justice Act* (NT).

[8] Civil Aviation Safety Regulation [CASR] Part 101 is the current regulation for the operation of a RPA/UVA/UAS. CASA is reviewing CASR Part 101, and will modernise it into CASR Part 102.

[9] *Surveillance Devices Act 2007* (NSW); *Surveillance Devices Act 1999* (Vic); *Listening Devices Act 1992* (ACT); *Listening Devices Act 1991* (Tas); *Surveillance Devices Act 1998* (WA); *Surveillance Devices Act* (NT); *Listening and Surveillance Devices Act 1972* (SA); s.227A-227C of the *Criminal Code* (Qld) was inserted in 2005 to regulate observations or visual recordings of a "person in circumstances where a reasonable adult would expect to be afforded privacy"

[10] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63; 208 CLR 199.

[11] s. 138(1) *Evidence Act 1995* (Cth) gives the court the discretion to allow the admission of improperly or illegally obtained evidence.

Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (Arts Law) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

While Arts Law tries to ensure that the content of this information sheet is accurate, adequate or complete, it does not represent or warrant its accuracy, adequacy or completeness. Arts Law is not responsible for any loss suffered as a result of or in relation to the use of this information sheet. To the extent permitted by law, Arts Law excludes any liability, including any liability for negligence, for any loss, including indirect or consequential damages arising from or in relation to the use of this information sheet.

© Arts Law Centre of Australia

You may photocopy this information sheet for a non-profit purpose, provided you copy all of it, and you do not alter it in any way. Check you have the most recent version by contacting us on (02) 9356 2566 or tollfree outside Sydney on 1800 221 457.

The Arts Law Centre of Australia has been assisted by the Commonwealth Government through the Australia Council, its arts funding and advisory body.