



# Privacy, Photography and the Creative Process

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While there is currently no legal right to privacy in Australia *per se*, the law does impose restrictions on photographers, particularly in relation to the photographing of children, private property and certain public places. According to case law a person in Australia does not have a legal right not to be photographed however, photographers should be mindful of the following legal issues.

## **Taking Photographs On Private Property**

According to common law, when a person enters private land, they are presumed to consent to the requirements imposed upon them by the property owner. Therefore property owners have the right to prohibit photographs being taken on their property. However, it is important to note that there is nothing preventing the taking of photographs outside the border of a privately owned property. Case law stipulates that people who are photographed on their property from a public location have no legal claim if what is captured can be seen from the street.

## **Trespass**

Trespass is committed when there is interference with the land, regardless of whether damage is suffered. Case law indicates that a property owner may take legal action in trespass if it is found that photographs were taken after gaining unauthorised entry onto the property. Reasonable force can be used to remove persons who are found to be trespassing. Trespass is also an offence under the *Summary Offences Act 2005* (Qld). Further, photographers can be liable for trespass to the person if they continuously take photographs of the same person over an extended period of time without consent.

## **Privacy Act 1988 (Cth)**

The Act stipulates that an organisation must not interfere with the privacy of an individual by breaching the *National Privacy Principles* or approved privacy codes in relation to personal information of an individual. 'Organisations' are defined to include unincorporated associations, body corporates, partnerships and individuals. Importantly incorporated associations are not caught by this legislation. 'Personal information' is defined to include information or an opinion, whether recorded in a material form or not, concerning an individual whose identity is apparent, or can reasonably be ascertained from the information or opinion. Recording of personal information extends to the taking of photographs and other pictorial representations (such as drawings etc) of a person.

## **Photographing Children**

It is always prudent to get written parental consent when featuring children in photographs. Photographers should be mindful of the following legislation when photographing children:

### **a) Child Protection Act 1999**

This Act prohibits the publishing of information that identifies or is likely to identify a child or young person in the context of intervention by the Child Safety System without the written consent of the Department of Child Safety's Chief Executive Officer. This applies particularly in relation to photography of children in schools, childcare centres, after school care programs and educational programs because there is no way to know if a children in these areas is

protected by this Act. By taking photographs of children in schools you may inadvertently capture a child who is protected under the Act, which if published could endanger the child. Similarly, it is also an offence to publish information identifying child victims. The maximum penalty for breaching both of these provisions is two years imprisonment.

#### **b) Juvenile Justice Act 1982**

Information that can be used to identify children who have been involved in the Juvenile Justice System is prohibited from being disclosed. However, in some cases child offenders may be subject to a court order that allows them to be photographed, particularly in relation to heinous crimes.

#### **c) Criminal Code 1889 (Qld)**

The *Criminal Code* makes it an indictable offence to take "indecent" photographs of children under the age of sixteen without a legitimate reason. For children who are under the age of twelve, the maximum penalty for a breach of this section is twenty years imprisonment and for children above the age of twelve the maximum penalty is fourteen years imprisonment. It is important to note that even if the child being photographed is your own child, publishing indecent photographs is considered to be an indictable offence and is punishable by a maximum of ten years imprisonment

### **Indecent and Offensive Photographs**

The *Criminal Code* 1889 (Qld) also applies to the taking of prohibited visual recordings of adults. 'Prohibited recordings' are defined to include photographs of a person in a private place, persons engaging in a private act or that is taken in circumstances where a reasonable adult would expect to be afforded privacy (e.g. public toilets and change rooms) The maximum penalty for breaching this Act is two years imprisonment.

### **Photographing People In Public Places**

It is generally accepted that taking photographs of people in public places is permitted. However photographers should have regard to the following common law actions and local laws that may be applicable .

#### **a) Invasion of Privacy**

There is currently no legal action that can be taken for invasion of privacy in Australia. However the High Court has not excluded the possibility that unjustified invasion of privacy could be established in the future.

#### **b) Nuisance**

If photographers interfere with a person's right to use and enjoy the land they may be liable for private or public nuisance. Photographers can also be found liable for public nuisance under the *Summary Offences Act 2005* (Qld).

#### **c) Council By-laws**

Restrictions may also be imposed by Local Councils on premises under their control. For example, the Cairns Regional Council has prohibited commercial filming at the Esplanade Lagoon without a permit. A good idea for photographers would be to check relevant Council websites to see if photography in the public area is prohibited.

### **Publishing Photographs**

#### **a) Passing Off**

This relates to photographs that are used for advertising purposes. If photographers have taken a photo of someone on the street for an advertising campaign and it appears that the person is endorsing the product or service (when in fact they do not), this may be an offence under the common law.

## **b) Defamation**

According to the law, a person that publishes material that causes damage to a person's reputation may be liable for defamation. Unauthorised use of photographs to demean the public's perception of a person portrayed, that exposes the person to hatred, contempt or ridicule, or that causes them to be shunned or avoided may be considered to be defamatory.

## **Photographing National Parks and Reserves**

The *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) restricts the taking and use of photographs for commercial purposes of Commonwealth Reserves (such as Kakadu National Park, Australian National Botanic Gardens, etc) and Reserves. In order for photographs to be taken for commercial purposes in a Commonwealth Reserve, a permit is required. If photographers are found to be in breach of these provisions they may be subjected to a fine and could be required to surrender all copies of the photographs, including the camera used to take them.

## **Contact Details**

For further information of privacy issues please contact MacDonnells Law on (07) 4030 0600.

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