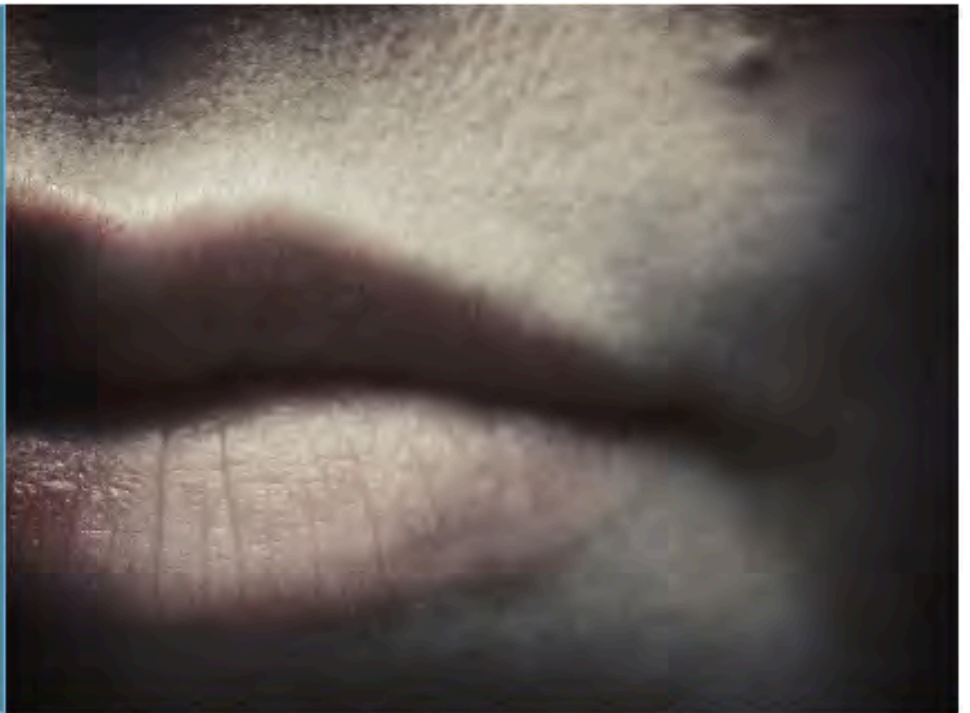


# Speaking Wisely



May 2012

Produced by Redfern Legal Centre

Considerations and strategies for  
managing public comment

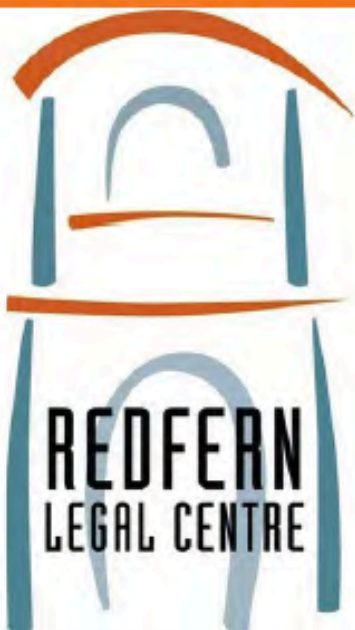


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## Disclaimer

*Any information provided in a publication cannot for instance, address all the subtleties of an individual situation and the publication itself should make that clear. Disclaimers should be of the type illustrated below for this publication.*

At the time of writing there were only a limited number of cases involving social media. Some of the cases used to illustrate potential risk are from overseas jurisdictions. We have yet to see if the same decisions would apply in Australia. They have been included to illustrate scenarios, but are not in themselves a statement of the law in NSW.

The content was current at the time of publication. If you are working from a copied version of these materials you should check our website for a more recently updated version.

The information provided in this publication is for general information only and is not intended to be a substitute for legal advice.

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## PART I: MANAGING PUBLIC COMMENT IN ORGANISATIONS

### Introduction

#### Speaking Wisely: Need and Risk

Advocacy organisations want to promote social justice, achieve outcomes for their clients and/or achieve outcomes such as a sustainable environment. To be effective they will need to have a respected voice that is heard by relevant audiences in the public, government, business and agencies. Their clients and supporters need to be able to find the organisation and the organisation needs to get its views and arguments into the debates and decisions in the community. This inevitably means making public comment in a variety of forums, including the media.

Most organisations will be making public comment in some way already. They might be thinking about doing more but are wondering how to manage the risks that may arise. How do you balance speaking wisely (and boldly) without overstepping the mark and potentially facing embarrassment, loss of reputation, or being sued for defamation, for example? Those outcomes distract and detract from the effectiveness of the organisation.

#### How Speaking Wisely can help

*Speaking Wisely* is a toolkit designed to address those concerns, providing a practical guide on how organisations can use and manage public comment. The information and resources provided in this toolkit are intended to help you develop the organisational policies and procedures your organisation will need to ensure confidence and effectiveness in your day-to-day dealings with the media and public comment.

This toolkit provides an overview of the various ways in which an organisation can engage in public comment and interact with the media including discussing strategies that organisations can use. This toolkit suggests a comprehensive media policy, highlights the key areas of concern in terms of risk management, and provides checklists that can be reproduced and used in your planning and record keeping.

We have outlined the background and case law that the checklists are based on, and have provided some real-life examples where an organisation might face difficulties. Part 3 includes practical how-to guides for organisations wanting to implement public comment and social media platforms and a detachable checklist booklet.

The checklists are by no means comprehensive. They are simply illustrative of the considerations an organisation might consider in each situation. All organisations should determine what their individual interests are and draft their checklists accordingly.

When Redfern Legal Centre first considered publishing this *Speaking Wisely* kit, it was primarily intended to address interactions with the traditional media, such as newspapers, radio and television. However, as we developed the publication, we noted that issues of risk management needed to be extended to all possible forms of public comment. This includes new forms of social media such as Facebook and Twitter.

We happily invite feedback and questions on this publication. Since the checklists we have included in this kit are not comprehensive, we particularly invite suggestions for future checklist categories.

#### Variations of Media

Most organisations are required to interact with the traditional media on a day-to-day basis. This can be through fielding questions from the media itself, or actively seeking to drive media coverage of an event or issue.

Organisations are familiar with traditional forms of media, such as print, radio and television. While these mediums remain influential and should be included in any organisation's media policy, public comment is also required in many other situations. This can be at seminar presentations, submissions to public inquiry, and the publication of letters, promotional pamphlets and training materials.

Newer forms of social media such as Facebook and Twitter have also changed the way in which public comment can be made. With more user-driven content, the balance of power has shifted away from traditional media forms to give organisations more control over media content. With fewer barriers to instant publication, information can be easily communicated to the public or stakeholders.

Targeting information to the right audience will always remain a practical consideration, for instance, some parts of the community do not use social networking sites. The organisation's target audience might not be able to afford computers or internet connections, or may lack education, literacy and technological skills. In these instances, newspapers and the radio can reach a broader audience than Facebook or Twitter.

An organisation should consider using a wide range of media platforms, rather than focusing on just one. In this way, it can engage with a broader audience across all sectors of the community - socially, economically, culturally and by age and gender.

It is up to the organisation to administer its social media sites, keeping them up to date and monitoring and moderating the information. This requires allocation of staff time. Social media considerations should therefore be included in an organisation's media policy in addition to traditional forms of media. The higher degree of possible legal liabilities surrounding social media use is also an important consideration discussed in the following chapters.

## Strategies

### 1. Strategies: Public Comment Policy<sup>1</sup>

To make sure that an organisation maintains its strong profile and speaks accurately and consistently, it should have a policy about who can speak, when, and about what. The organisation should also ensure that any risks have been addressed and that a record of this is kept.

The answers to the questions discussed below can serve as the basis of the organisation's policy. Your organisation might want to work through it as a group discussion or have one of your workers come up with a proposal for consultation and approval.

Some of what is set out below may seem obvious, mundane, repeated or redundant. However, it is included to take the organisation through a thinking process about what is needed to avoid disputes and mistakes into the future. Think of it as a "stitch in time". Discussions around the finalisation of organisational policies will help all involved to reach a common understanding. The written policies will record the common understandings and are useful for reference by future participants. All policies should be revisited and reviewed from time to time.

### Issues to consider

#### *Statement of principle*

An official statement of media principles appropriate to the organisation and known by all staff is a useful reference point for working out what to talk about, where and when. It can send a strong

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<sup>1</sup> This section has been comprised in part using: Sane Australia, 'Working with the media: Media policy' <<http://www.sane.org/sane-media/mental-health-sector/working-with-the-media>>.



message to staff to think positively about using public comment for the purposes of the organisation. The organisation may want to set out its position on the following:

- the potential mediums that the organisation will use in making public comment, for example, the most common mediums used are the print media, television, radio and online media;
- the public perception and the role the organisation has in the community, for example, an organisation may provide legal advice, youth work, or advocacy on environmental issues, or other community related information;
- how a media outlet can be used by an organisation to achieve a desirable outcome. This may be through publicising their work or their clients, campaigning for greater funds, or lobbying the government for changes to the sector in which the organisation belongs;
- the reputation of the organisation within the community and within their industry sector. An organisation may be a leader in its field in the distribution of information or the provision of services, or it may be a newly formed organisation wanting to publicise its existence and services. In the latter situation, a strong statement of principle would be beneficial;
- how the media can be used to enhance and protect the reputation of the organisation;
- considerations as to the rights and duties of the organisation to staff, clients and the general public.

### ***Suggested definitions***

A good policy should include definitions of what your organisation means by the events, types of comment and the responsible staff positions. This will avoid disputes later on. Suggested definitions include:

- media releases;
- radio interviews;
- television interviews;
- delivering a paper in a public forum, for example, at a conference;
- making a comment in a public forum, for example, forming part of a senate inquiry;
- publication submissions, reports, occasional papers, bulletins and newsletters;
- articles submitted to newspapers and journals, such as opinion pieces and letters to the editor;
- web-based publications and any other communication in a public forum or a private forum where a member of the media is involved;
- the responsible officer, the delegate, or other staff terms used.

### ***Policy objectives***

Set out what the policy is meant to achieve, for instance, the organisation may want the policy to:

- be used as a training tool for staff in the organisation, but in particular for staff in a representative role;
- ensure that any material or comment provided to the public reflects the organisation's values;
- avoid public comment damaging the organisation's reputation or the rights and interests of its clients.

## ***The policy itself***

Any policy should contain the following practical elements:

- who has authority to approve or make comment;
- when to comment;
- media releases;
- media monitoring;
- record keeping;
- personal comment.

## ***Who has authority to comment***

Organisations should ask the following questions in deciding who can comment, approve public comment, or handle media interactions:

- *who has the responsibility and authority to make or approve public comment by the organisation? Will this be a shared role or does the organisation want to have one central person who will be responsible for ensuring that a consistent message is conveyed? This does not necessarily mean that this is the only person who speaks on an issue but is the central point for guiding and driving the image of the organisation and building its relationship with key media and other stakeholders. If it is one person then it is likely to be the chief executive officer and/or the chair of the board;*
- *what if the person with overall approval is away, can they delegate and to whom? If the aim is to achieve a consistent message then the authority will usually be delegated to, say, a second in command;*
- *can the person with overall approval delegate at other times and if so in what context? For instance, it may be that the key strategy and message is approved but day to day contact within that approved framework may be left to a particular staff member leading work on that issue;*
- *what would be the reporting requirements for media or public comment carried out under delegated authority? For instance, reporting to the organisation at the earliest possible opportunity would be expected.*

## ***When to comment***

*What would be the scope of the public comment? It might be a good idea to limit public comment on behalf of the organisation to matters relevant to the work of the organisation and within the expertise of the person making the comment.*

*Where should media contacts and requests for public comments be directed, for example, to the senior staff with authority as set out by this policy? Will you have a media contact and/or spokesperson? That person may not be the person with the authority to approve the content of the comment.*

*How do you satisfy the person with authorised or delegated authority that all risk factors have been thought through? Will checklists be used? For example, before contact with the media or making comment, a risk management checklist could be completed. If completion of this checklist is not possible because of urgency, a checklist could be completed after initial media contact.*

*What checklists does the organisation require? In this toolkit, the areas focused on include: protecting the identity of children, *sub judice* contempt of court, defamation, misleading or deceptive conduct, unlawful discrimination, legal professional privilege and copyright and plagiarism. This toolkit contains some other checklists, for instance, for preparing media releases, organising events and for advising clients on the risk to them of making public comment. Additional checklists may be developed and used depending on the needs and practise areas of the organisation.*

*Who is responsible for making sure the information is accurate?* For example, once the person proposing the media contact has completed all the appropriate checklists, they may be required to copy and complete the attached 'head checklist'. This would include any outstanding concerns. A senior staff member responsible for risk management could sign the checklist.

*How will staff be trained with regards to the policy?* You may want to spell out in the policy how and when the staff will be trained. You might want to require more active completion of checklists until staff are very familiar with the issues to keep in mind.

### **Media releases**

Media releases might be made with reference to and reflect the sample *pro forma* media release included in the materials.

*Will the media releases and other public comment be copied, referred to or linked to anywhere else for example on the website of the organisation?* What will be the process for this to occur?

### **Media monitoring**

*Will staff be expected to actively monitor and keep records of relevant media coverage?*

*Should staff members be encouraged to bring in media articles relevant to the organisation's area of expertise?* Monitoring and tweeting about relevant articles will be important if you use Twitter for instance.

*Will the organisation establish a system for managing and monitoring media files?* What process will be required to maintain it?

### **Record keeping**

All employees and heads of the organisation should be encouraged to collect all published comment. Including it on the website of the organisation, for instance, can build a body of opinion and momentum for the issues and concern the organisation is promoting.

How does the organisation keep records of what it has said, ensure that it has been thorough in protecting all relevant interests and has a factual basis for what it is saying? The actual comment and the signed off 'head checklist' could be filed with the person responsible for data or records management.

How long should these files be stored for? It is common for records to be kept for at least 7 years reflecting the 6 year time limit for commencing many types of legal action.

### **Personal comments**

*What is the organisation's policy with regards to public comment?* For example, the organisation may encourage an employee to make public comment and participate in debate on political and social issues.

It could be suggested that staff are allowed to make comments, provided that they are not making any official comment, or representing an official position of the organisation.

*Can staff make a comment on their own personal media pages such as Facebook and Twitter regarding the organisation?* If so, what could be the nature of this comment and how would this affect their employment.

*How will the organisation avoid confusion when a staff member is speaking in both a personal and professional context?* To avoid this confusion, employees and heads of the organisation should avoid making personal comments in the same context as they making public comments on behalf of the organisation.

Where doubt may exist as to whether the person is speaking in their personal or professional capacity, it is suggested that no comment should be made.

## **Privacy and confidentiality**

*What safeguards will be used to avoid a breach of privacy and confidentiality obligations?*

*What policies will govern the release of confidential and privileged information? What are the obligations that apply to the organisation? For instance, community legal centres need to comply with requirements under the *Legal Profession Act 2004*. Other organisations may have obligations in relation to, for instance, health records or privacy legislation or be subject to 'mandatory reporting' of children at risk. Does the organisation have a privacy or confidentiality policy and does it have deeds of agreements with volunteer staff about complying with that policy?*

## **Protecting client's interests**

The experiences of individual people, often your clients, can be a powerful tool in pointing out why change is necessary. In using their stories however you need to remain aware of the private interests and rights of that person, and work with that person to ensure their best interests are not jeopardised by using their story, even with express permission.

Public comment in relation to a client should only be made with the permission of the client.

*What discussions should be had with a client in relation to the media? An employee should raise these issues with a client as early as possible once the situation has been identified as one relevant to a broader systemic issue on which the organisation wants to make public comment. That discussion could result in an in-principle agreement for collaborative media work.*

*What agreements should be made between the client and the organisation when dealing with the media? The organisation should document the discussion and agreement reached with the client and keep with their other records.*

*What guidelines should clients follow in making public comment? For instance, they should not say anything inaccurate, defamatory or in contempt of court. Comments should not breach confidentiality, waive legal privilege, or breach privacy obligations.*

*What should the client be told if they want to make a public comment? The organisation's employee who is acting for the client should advise them of the legal, practical, and other risks of doing so. There is a checklist in the toolkit which addresses these issues.*

## **Application of the policy**

*Who should be covered by the media policy? This policy should apply to all employees (paid and unpaid) and the heads of an organisation.*

## **Responsibility for the policy**

*Who has the overall responsibility for implementing the policy? This usually rests with the heads of the organisation.*

## **Communication of policy and procedure**

*Who will communicate the media policy and procedure? All employees and heads of an organisation must be provided with a copy of the policy and related procedure documents. Training and awareness of the policy to staff should follow.*

## **Monitoring of policy**

*Who will communicate the media policy and procedure? All employees and heads of an organisation must be provided with a copy of the policy and related procedure documents. Training and awareness of the policy to staff should follow.*

## **Review of policy**

*Will there be a review of the policy, and when will this occur?* A review is highly recommended. An organisation might review this policy every three years, with input from staff.

## **Additional issues for consideration regarding media policy**

Other factors that should be considered when creating the policy include:

### **Administration**

*Should the delegate monitor or take note of any issues such as whether the coverage was fair and balanced?* This would influence which media outlets were used for publicity.

*Should each employee be responsible for maintaining their own media monitoring records, or should there be a centralised filing system?* A suggestion is that employees have their own system that is compiled by the nominated media representative.

### **Scope**

*What forms of public comment will be covered by the policy?* Consideration needs to be given to traditional media forms and to new media such as Facebook and Twitter. Will submissions, community training information and so on also be covered?

*Will the policy cover local media coverage or extend to national media publications?* It is suggested that within the constraints of the organisation all publications on a local and national level should be included.

*What will be the scope of coverage in each practice area?* This would depend on the particular workplace and on the current strategic plan.

### **Format**

*What type of media content will be monitored?* All output should be monitored depending on the constraints on the organisation. Content could include news articles, opinion pieces, or both.

Opinion media can often reflect public consciousness. It can indicate past, present, and future trends that are not always apparent from traditional news articles. Opinion tends to focus on an understanding of the broader timeframe and analysis than traditional news.

*Should the files be in electronic format, hard copy, or both?* This would depend on the particular workplace, their subscriptions to online media and also the media itself. A holistic approach should be considered, with a preference for electronic media, or the scanning of hard copy media (within copyright considerations).

### **Follow-up**

*Will action be taken where there is further media coverage?* This would need to be determined on a case-by-case basis and in consultation with clients (where applicable), relevant staff and heads of the organisation.

## 2. Strategies: Head Checklist

The proposed public or media comment has been assessed for compliance with all relevant legal checklists.

Based on this assessment, the proposed public or media comment will not:

- breach or waive the organisation's and/or a client's entitlement to legal professional privilege;
- defame any person or group of persons;
- breach copyright;
- breach anti-discrimination law;
- interfere with the administration of justice, or prejudice contentious issues in a court case in contempt of court;
- mislead or deceive the audience, or involve the author in any misleading or deceptive conduct;
- identify, or otherwise disseminate prohibited information associated with a child or young person involved in legal proceedings.

Outstanding Issues:

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Signed (Author):

Signed (risk) manager:

Dated:

## PART II: PUBLIC COMMENT RISK MANAGEMENT

### Defamation

#### 1. Defamation: Risk Management Check List

##### Identification

- Is there a communication?
- Who is the communication directed towards?
  - A particular person?
  - A small group?
  - An organisation?
- What has been said?
- Has the person or entity about whom the statement is made been identified?

##### Defamatory Imputation

- Does the communication contain any material, either expressly or implied, which may:
  - Lower the person's reputation in the eyes of ordinary reasonable members of the community?
  - Lead people to shun, ridicule, avoid or despise the person, even if involving humour?
  - Injure the person's reputation in business, trade or their profession?

If so, it may be a defamatory statement or imputation (intention is irrelevant).

##### Publication

- Will the communication be published, i.e. read/seen/heard by a third person, that is aside from the publisher or the person who is the subject of the comment?

**If NO to one or more of the above 3 criteria: No defamation.**

**If YES to all of the above criteria, consider potential defences:**

- Truth/justification
- Honest opinion/criticism
- Absolute privilege – attaches to the occasion, not the statement or speaker
- Qualified privilege
- Fair comment
- Consent – expressly or impliedly

- Triviality (unlikely to suffer harm)
- Innocent dissemination (applicable to re-publishers/re-distributors)
- Offer of amends

Note: some parties may not be able to sue for defamation, such as a large trading corporation, but an individual related to the corporation may have a claim for defamation of them even if the company cannot take action. Also beware whether the corporation may have a cause of action against you under misleading and deceptive conduct for instance.



## 2. Defamation: Background Information<sup>2</sup>

Defamation is the spreading of negative information about an individual, which could intentionally or unintentionally harm their reputation or their livelihood. It is the area of media law most likely to cause an organisation difficulty.

Defamation is primarily a civil action. It allows a person whose reputation has been harmed through the publication of words or other means to sue those responsible for the publication. It allows a person to obtain some form of remedy for this harm, such as an apology or damages.

Throughout 2005 and 2006, all Australian state and territory legislatures passed the national uniform defamation laws. These are now the principal source of defamation law in Australia (although the common law is still relevant). These laws came into effect on 1 January 2006.

For a person to bring a defamation action, the person must show firstly that material was published. Secondly, the person aggrieved by the publication must have been identified by the publication. This does not need to be by name, but can be by manner or circumstance. Thirdly, the material must be defamatory.

### Identification

*Does the material publicised identify a particular person or small group? A person (or small group) can be identified:*

- explicitly, if specifically named; or
- implicitly, if a reasonable person would take the words to refer to the person identified/allegedly defamed.

### Publication

To be defamatory, the material must be 'published' to at least one person other than the person it's about (the plaintiff). 'Published' means spoken, written or communicated in any form, including through the medium of television, radio, Internet, photograph, facial expression, drawing, letter, book, fax, e-mail or online chat.

All individuals involved in the publication (e.g. writers, publishers, editors, artists) are potentially liable and each, all, or some can be sued.

### Defamatory

A publication is defamatory if it is likely to cause ordinary reasonable members of society to:

- think less of the person, in the sense that it belittles them, or discredits the person;
- shun or avoid the person;
- subject the person to hatred, ridicule or contempt; or
- injure the person's reputation in business, trade or their profession.

A publication is not defamatory merely because it encourages a belief and prejudice that is unfavourable of the person.

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<sup>2</sup> This section has been comprised in part using: University of Technology Sydney, 'Defamation Fact Sheet – updated May 2010', UTS, <<http://www.law.uts.edu.au/comslaw/factsheets/defamation.html>>; Defamation Act 2005 (NSW); Rolph, D., Vitins, M., and Bannister, J., *Media Law: Cases, materials and commentary* (2010) Oxford University Press, Oxford.

The meaning behind the publication may be express or implied. Defamation may arise from the direct meaning of words on their face value, through an innuendo from the statement itself, or from an innuendo based on known facts that are not included in the statement.

Context is important. In determining the meaning communicated by the publication, consideration includes the emphasis and importance given to particular parts of the publication or to the publication generally. Any qualifying material appearing in the same publication cannot be disregarded.

The test is objective: the defamatory nature of an imputation is determined by reference to general community moral or social standards, presumed to be uniform and common to society generally (and not by reference to sectional attitudes, for example, ethical or religious standards).

The person does not need to show actual proof of being harmed; it is sufficient that the false statement could have led to harm.

Whether the publisher intended to make a defamatory statement is irrelevant.

Statements couched as 'allegations' can be defamatory, where the ordinary person is likely to conclude that there is some factual basis to the allegation. The one exception is for criminal proceedings, where stating that a person has been charged with an alleged offence will not be seen as a statement that the accused is guilty. This is because ordinary people are assumed to know that the law presumes innocence until guilt is proven.

### 3. Defamation: Defences

#### Truth (or 'Justification')

Truth is a complete defence to defamation if the defendant can prove that the words published, as well as any meaning a 'reasonable' person might infer from them, were substantially true.

In order to prove this, you will need original documents and/or witnesses who are credible and willing to testify in court.

Minor inaccuracies or mistakes which are unimportant, and which would make no substantial difference to the quality of the defamation can be ignored.

The defendant is no longer required to prove that the publication was for the public benefit or in the public interest.

#### Honest opinion (or 'Fair Comment')

In order to establish this defence, the defendant does not need to prove the truth of the comment.

The defendant must convince the judge or jury that their comments were honestly held opinion and that it was:

- clearly a matter of opinion and not a statement of fact; and
  - the communication was, on the face of it, a comment, i.e. an opinion, criticism, deduction, judgment, remark, observation, or conclusion; and
  - the facts upon which the opinion is based must be stated unless they are widely known. This is required so that the readers/viewers/listeners are able to form their own views on the facts. These facts have to be known to the defendant when the communication is made. It is very important that the comment is clearly distinguishable from the facts upon which it is based;
  - related to a matter of public interest; and
- based on 'proper material' (i.e. substantially true or based on privileged material).

The opinion can be extreme, as long as it is honestly held by the communicator. Therefore, you should very carefully consider your response to an initial complaint. If you say that you 'didn't mean it' this could subsequently make it very difficult to raise the defence of honest opinion.

The defence will fail if the plaintiff (person it's about), can prove that the opinion was not honestly held.

## Qualified Privilege

To establish this defence, the defendant needs to prove the following:

- that the public has an interest or apparent interest in having information on some subject;
- that publication of the information to the recipient occurs in the course of giving to the recipient that information; and
- that the defendant's conduct in publishing the matter was reasonable in the circumstances. This will be informed by a number of factors including:
  - the extent to which the matter published is of public interest;
  - the extent to which the matter published relates to the performance of the public functions or activities of the person;
  - the seriousness of any defamatory imputation carried by the matter published;
  - the extent to which the matter published distinguishes between suspicions, allegations and proven facts;
  - whether it was in the public interest in the circumstances for the matter published to be published expeditiously;
  - the nature of the business environment in which the defendant operates;
  - the sources of the information and the integrity of those sources;
  - whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person;
  - any other steps taken to verify the information in the matter published; and
  - any other circumstances that the court considers relevant.

Proving that the publication was done maliciously can defeat the defence.

There are four varieties of the defence of qualified privilege:

- the defence of common law qualified privilege, which is founded upon the notion of a (reciprocal) duty between the publisher and the audience;
- the defence of statutory qualified privilege under s 30 of the *Defamation Act 2005*, which moves away from this reliance on reciprocal duty and is instead founded by the notion of reasonableness of publication;
- the defence of fair and accurate report of parliamentary and judicial proceedings. The reporter's qualified privilege is defeated by a lack of fairness or accuracy, or by the presence of malice;
- the defence of *Lange* qualified privilege which protects publications about governmental or political matters:

- in *Lange v ABC* (1997) 189 CLR 520, the High Court held that the common law is subject to the Commonwealth Constitution. As a result, the defence of common law qualified privilege must expand to accommodate the implied freedom of political communication;
- the rationale for this defence is that in certain circumstances the advantage of public knowledge is outweighed by any private injury resulting from the publication.

## Fair report

This defence can be used if the defendant can prove that the content published was a fair report of any proceedings of public concern.

Such proceedings are broadly defined and include proceedings of the courts, parliament, matters of adjudication before recreation or sport associations and any public meetings held anywhere in Australia.

This defence will fail if the plaintiff proves that the defamatory material was not published honestly, for the benefit of education, or informing the public.

## Consent

A defamation claim may be defeated if the plaintiff expressly or by implication consented to, assented to, acquiesced in or invited the defamation.

## Offer of amends

If a publisher receives a Concerns Notice (a written notice informing the publisher of alleged defamatory imputations), a publisher can, within 28 days, make a written offer to make amends to the aggrieved person. This can be later relied upon as a defence.

This provides a useful opportunity for the publisher to resolve the issue before any potential claim arises.

## Who cannot sue for defamation

No one can begin or continue a case for defamation of a deceased person whether or not the defamation occurred before or after death.

The *Defamation Act 2005 (NSW)* says a corporation may not sue for defamation unless it is:

- a not-for-profit corporation; or
- has fewer than 10 (full time equivalent) employees, and
  - is not 'related' to another corporation; and
  - is not a local government body or other governmental or public authority.

However an individual associated with the corporation may have an action on their own behalf.

You should be aware, however, that there remains ability for corporations to sue, for instance, for injurious falsehood or under the statutory prohibitions against misleading or deceptive conduct. There are some overlaps between defamation, misleading and deceptive conduct, and injurious falsehood. For example, in the case of *Orion Pet Products v Royal Society for the Prevention of Cruelty to Animals (Vic)* (2002) 120 FCR 191, Weinberg J discussed injurious falsehood and defamation and noted that:

*In some respects, (injurious falsehood) bears a marked resemblance to defamation. Both involve a false and harmful imputation concerning the plaintiff which is made to a third party. They differ, however, in that the law of defamation protects interests in personal reputation while injurious falsehood protects interests in the disposability of a person's property, products or business.*

*Defamation is generally actionable without proof of damage. Falsehood is presumed and liability is strict. In an action for injurious falsehood, the plaintiff must prove that he sustained actual economic loss, that the offending statement was false, and that it was made with intent to cause injury without lawful justification. The requisite state of mind is often described as malice.*

While these might be harder for the corporation to prove, it would be best for you to avoid defamatory publications generally. Even if no legal remedy is pursued, there could be loss of reputation if your public comment is inaccurate or reckless.

For more details regarding defamation, please see the information sheets available on the Arts Law Centre of Australia website.

<http://www.artslaw.com.au/legal-topics/archive/cat/defamation/>

#### 4. Defamation: Illustrative Cases<sup>3</sup>

Note: Some of these cases are based on decisions made in the UK jurisdiction.

##### **Colin Elsbury v Eddie Talbot (2011)**

The first Twitter defamation case in Britain involved a comment made on Twitter by a British politician, Colin Elsbury. It was alleged he made defamatory tweets about his political rival Eddie Talbot. Elsbury claimed in a June 2009 tweet that Talbot had been removed by police from a polling station during a local election in Wales. Talbot's representative argued that the tweet was untrue and defamatory and left his client open to ridicule. The case settled and Elsbury agreed to pay 3,000 pounds in damages, the legal fees of the applicant and to publish an apology on Twitter to Talbot. Elsbury had 30 followers on Twitter.

##### **Cairns v Modi [2010] EWHC 2859 (QB) and [2012] EWHC 756 (QB)**

Chris Cairns, a famous cricketer, brought an action against Lalit Modi in respect of two publications dated 5 January 2010. These publications included allegations on Twitter by Lalit Modi of match fixing. Cairns argued that the tweet was libellous.

The case was complicated when the comments were repeated by online cricket magazine Cricinfo UK, which resulted in another claim. Cricinfo paid Cairns unspecified damages. The original tweet was removed 16 hours later, but a cricketing blog uploaded a screen shot of the tweets.

The High Court was asked to address whether a 'tweet' could be published and if so, how its circulation could be calculated. It was decided that the actual number of direct followers was irrelevant given the sensational nature of the allegation within the tweet, and the risk that these allegations might be further published elsewhere. The Court found in favour of Cairns and awarded 90,000 pounds in damages and costs of around 1.5 million pounds.

##### **Twitter as a publisher [2012]**

In early February 2012, legal proceedings were commenced against Twitter, for defamation for the first time under Australian law. Marieke Hardy published on her Twitter site the author of a hate blog dedicated to her, mistakenly identified to be Joshua Meggitt. At the time of the published tweet, Hardy had over 60,000 followers.

<sup>3</sup> This section has been comprised in part using: *Cairns v Modi [2010] EWHC 2859 (QB)* (10 November 2010); *Mardas v New York Times Company & Anor [2008], EWHC 3135 (QB)*; *Trosch v. Layshock* <<http://www.citmedialaw.org/threats/trosch-v-layshock>>; Butler, D., and Rodrick, S., *Australian Media Law, Second Edition* (2004) Lawbook Co, Riverwood.

Mr Meggitt's lawyer is arguing that Twitter, being a publisher, is liable for the original tweet and further "re-tweets" made. The action is also based on application of the reasoning in *Dow Jones and Company Inc v Gutnick* [2002] HCA 56, where it was considered that action could be taken against a foreign-based company for defamation in Australia.

***Mardas v NY Times Company & Anor* [2008] EWHC 3135 (QB)**

This case concerned an action in defamation by a former associate of the Beatles against the *New York Times* and the *International Herald Tribune*. The material in question was an article published that described him as a "charlatan" who may have resulted in the band's breakup. There were 200 hard copies of the article that were published and approximately 30 hits of the story online.

It was concluded that the determination of 'substantial publication' in the context of online defamation cases did not depend on a certain number of copies. It was held that a few dozen copies were enough to find a cause of action.

***Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574**

The programme, 'The Today Show' was broadcast live to air from the studios of Channel 9 in Sydney. The programme was received by microwave link at Channel 7's transmitting site in the Australian Capital Territory.

The programme in question included a live interview with a young woman, during which, it was alleged that her stepfather had committed incest with her and had fathered her child. The stepfather sued Channel 7. Channel 7 pleaded, *inter alia*, the defence of innocent dissemination, which failed because it was "not available in respect of relayed television transmissions".

***Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153**

The defendant's programme, 'A Current Affair', intended to broadcast a story that repeated allegations made in the Melbourne based *Truth* newspaper. These allegations stated that Chappell, the then Australian cricket captain, had committed adultery. He sought to restrain the publication on the basis that it was defamatory. An interlocutory injunction was granted.

***Dow Jones and Company Inc v Gutnick* [2002] HCA 56**

This case dealt with the jurisdiction that applied to Internet content. The Court found that defamation laws in the state of Victoria applied to material that was posted on the internet by a server based in America. It was held that those who publish defamatory material on the internet are answerable before the courts of any nation where the damage to reputation has occurred. The case affirmed the application of the domestic jurisdiction to internet content created overseas.

## 5. Defamation: Hypothetical Scenarios to Consider

*John is a new employee working at an organisation. He is responsible for updating the Twitter feed for the organisation. He has heard a rumour from his next-door neighbour that Penny, an employee from another centre, is laundering money. John thinks that it would be a good idea to post this rumour on the Twitter live-feed. The next day Penny calls John to tell him that she is going to sue the organisation for defamation.*

The statements that John made on the organisation's Twitter page were defamatory, and the centre could be sued for damages. The comment he made was unprofessional and unrelated to the work of the centre. His comment was based on rumour and he had no evidence to substantiate the claim. John should not have made this comment.

*Tabitha is a volunteer at an organisation. She is asked to speak to an online student magazine about volunteering in this capacity and her work at the centre. In doing so, Tabitha makes several comments she has heard around the office over the time she has been there and about the landlord of a local block of units that has difficulty with tenants. She comments to the journalist that the landlord is racist and takes advantage of the elderly. Soon after the interview is published, the landlord contacts the centre to ask for a retraction and an apology, or else he will sue for defamation.*

The comments Tabitha made were defamatory and could make the community centre liable for breach and subsequent damages. She should contact her supervisor about what steps may need to be taken. They will need to consider the centre's policy, notifying the centre's insurer and whether any defences apply. A retraction and apology may need to be published.

## Copyright and Plagiarism

### 1. Copyright and Plagiarism: Risk Management Checklist<sup>4</sup>

The following issues should be considered in instances of potential copyright infringement:

- Is this an original work?
- Is information used in a category not protected by copyright law:
  - ideas
  - concepts
  - styles
  - methods
  - information
- Is the subject matter in a category protected by copyright law:
  - literary works
  - dramatic works
  - musical works
  - artistic works
  - films
  - sound recordings
  - broadcast
  - published edition
- Who owns the copyright?
- If owned when was the copyright published and has it expired?
- Does your use fall within fair dealing or other allowed use?
- If you need permission to use the material, do you have it? Is that permission in writing?
- Have you considered the moral rights of the author in your use of the material and attributed the author?
- If a volunteer working with your organisation produced the publication, do you have a deed of agreement with the volunteer as to the ownership of produced materials and works?

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<sup>4</sup> This section has been comprised in part using:  
Law And Justice Foundation of NSW, 'Publishing - Factsheet 7 Copyright'  
< <http://www.lawfoundation.net.au/ljf/app/1991AA69984F7E63CA2577BC0002299B.html>>,  
Australian Copyright Council, 'An Introduction to Copyright in Australia', March 2007  
<<http://www.copyright.org.au/find-an-answer/>>.



## 2. Copyright and Plagiarism: Background Information<sup>5</sup>

### What is copyright?

Copyright is a bundle of economic rights that gives the owner exclusive use of the object these rights protect.

### What categories do copyright laws protect?

- Original literary, dramatic, musical and artistic works – see 10(1) of the *Copyright Act 1968 (Cth)* (Copyright Act) for more detailed definitions.
- Subject matters other than works – including sound recording, films, television, and published editions.

Works that fall outside of these categories will not be protected by copyright. This includes ideas, information, styles or techniques, names, titles or slogans.

### How do you gain copyright protection?

For works to gain protection under the Copyright Act, works must be:

- original, a work or subject matter must have a level of original work comprising of labour, skill, judgement involved in the expression of the idea;
- created or 'made', a work must be put down in writing or in some other material form;
- by a 'qualified' person, protection under the Copyright Act requires an Australian connection – this can be an Australian, an Australian protected person, a person residing in Australia creating the work or subject matter. It can also be where works or subject matter other than works have been published or made in Australia.

### What exclusive rights does copyright give me?

Owners of copyright have exclusive rights to reproduce, publish, perform, communicate and adapt the works they hold copyright in. Sections 31 and 85–88 of the Copyright Act define the rights a copyright holder has over a work or subject matter other than works.

Owners can assign or license their copyright to third parties.

### When does copyright apply?

Copyright protection applies automatically when a work is created and no other registration is needed. The symbol © is used to notify that a work is protected by copyright, but is not required for protection.

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<sup>5</sup> This section has been comprised in part using: Australian Copyright Council, 'An Introduction to Copyright in Australia', March 2007 <<http://www.copyright.org.au/find-an-answer/>>; Australian Government: Attorney-General's Department, 'Copyright Law in Australia: A short guide', June 2005 <[www.ag.gov.au/Copyright/](http://www.ag.gov.au/Copyright/)>; Macmillan, F. (ed), *New directions in copyright law* (2007) Edward Elgar Publishing, Cheltenham.

Law and Justice Foundation of NSW ' Copyright: Publishing Toolkit', August 2010

<http://www.lawfoundation.net.au/ljf/app/1991AA69984F7E63CA2577BC0002299B.html>

Price, D, 2012, *Intellectual Property: commentary and materials*, 5<sup>th</sup> edn, Thomas Reuters Australia, Pyrmont NSW.

## Duration

Copyright for 'works' last for the life of the creator plus 70 years after the death of the creator. Where copyright exists for subject-matters other than works, the copyright duration will vary depending on the nature of the subject-matter:

- 70 years from the publication of a sound recording or film;
- 50 years from the broadcast of television or sound broadcast;
- 25 years from the year of publication of published edition of a work.

## Who owns copyright?

The author of a work or the maker or the publisher of subject matters other than works will own copyright.

There can be joint ownership of copyright where two authors contribution in a work is inseparable, or there can be a number of owners of copyright in the one material. The authors of a film for example include the filming of the movie, the music used in the film owned by another person and the book the film is based on owned by another person again. In trying to get permission you will need to carefully look at who owns the particular rights.

The following exceptions apply to the ownership rule:

- where work is created under a contract of service in the course of employment, an employer, rather than employee will own copyright in the work created;
- where the author has assigned copyright by contract.

## What about volunteers and contractors?

If the author is a contractor, freelancer or volunteer, this exception will not apply. Volunteers of an organisation must enter into a written agreement to assign any copyright to the organisation in materials they create while volunteering.

If the organisation is entering into a contract with someone who is a freelancer or contractor you should include provisions in that contract about who owns copyright. This is to avoid any uncertainty.

## When is copyright infringed?

Copyright is infringed if you use copyright material without the owner's consent when:

- a substantial part of the work is used without consent of the owner; or
- an exception does not apply.

## Defences to copyright use

Fair dealing exceptions in the Copyright Act allow for a person to use copyright material without the owner's permission when the purpose is for:

- research or study;
- criticism or review;
- parody or satire; or
- reporting the news.

Exceptions also apply where copyright material is incidental to film and television broadcast.

## Moral rights

Moral rights give personal rights to authors, performers or artists which can be in addition to any other rights they may have in respect of a work or subject matter. Moral rights provide credit to an author as the rightful author of a work, regardless of whether the author owns copyright of the work. These rights arise automatically. These rights include:

- the right of an author, performer or artist to be attributed to his or her works; and
- the right of an author, performer or artist to not have their works treated in a derogatory way that would be prejudicial to their honour or reputation.

Unlike copyright, moral rights cannot be sold or given away; however, an author can consent to having these rights waived. Moral rights can also be waived where it is not reasonable to identify the original author. For example, where an employee of an organisation writes internal publications.

## Creative commons

Creative commons allow copyright owners to grant and retain certain rights through licenses that govern how the copyrighted object can be copied and distributed in the public domain by others. These licenses are irrevocable for the term of the copyright.

For a more detailed discussion of copyright please see the Law and Justice Foundation website: <http://www.lawfoundation.net.au/ljf/app/1991AA69984F7E63CA2577BC0002299B.html>

## 3. Copyright and Plagiarism: Illustrative Cases<sup>6</sup>

### ***Commonwealth Director of Public Prosecutions v Ng, Tran and Le (Unreported) (2003)***

In 2003, Sydney students Tommy Le, Peter Tran and Charles Ng pleaded guilty to supplying and distributing unlawful copies of copyrighted music via the MP3 WMA Land site. It was alleged that the site resulted in potential music losses in excess of \$60 million, with files on the site including several hundred commercially available albums and individual recordings. These belonged to Universal Music, Sony, Warner, BMG, EMI and Festival Mushroom Records.

Le, Ng and Tran were each sentenced to 18 months imprisonment that was suspended for three years, and given a \$1000 good behaviour bond. Tran was fined \$5,000. Ng, who lacked Tran's medical certificate, was sentenced to 200 hours community service. The judge cited lack of monetary gain by the defendants, the youthfulness of the accused, and the early plea of guilty as factors in suspending the custodial sentence.

### ***Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd [2010] 188 FCR 321***

In 2009, Larrikin Music who held the copyright in an Australian song "Kookaburra sits in the Old Gum Tree" took action against the musical group Men at Work for reproducing two bars of the song in another musical composition "Down Under".

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<sup>6</sup> This section has been comprised in part using: *Commonwealth Director of Public Prosecutions v Ng, Tran and Le* (Unreported, Sydney Central Local Court, Henson DCM, 18 November 2003); *Meskenas v ACP Publishing Pty (No. 2) [2006] FMCA 1461*; *Re Brian Kelvin De Garis and Matthew Moore v Neville Jeffress Pidler Pty Limited [1990] 37 FCR 99*.

Justice Jacobson concluded, based on his own aural and visual analysis of melody, tempo and structure and expert evidence, that there was a “sufficient degree of object similarity” between the bars from “Kookaburra” and “Down Under”.

***Cooper v Universal Music Australia Pty Ltd [2006] FCAFC 187***

Stephen Cooper (MP3s4free.net) and Camperdown-based ISP E-Talk Communications (trading as ComCen Internet Services) were found guilty in 2005 of copyright infringement by the Federal Court. The defendants created hyperlinks to sites that contained infringed sound recordings. The ruling by Justice Tamberlin in this case that ComCen was liable through hosting the MP3s4free.net website was the first decision of its kind in Australia.

The recording industry accused the ISP of being "directly involved in music piracy by allowing its infrastructure to be used for file-trading activities". ComCen unsuccessfully claimed it was not liable because it didn't host any MP3 recordings on their servers.

The full Federal Court in this case held that not only website operators but also internet service providers can be liable for authorising copyright infringement.

***Meskenas v ACP Publishing Pty Ltd (No. 1) [2006] FMCA 1136 and (No. 2) [2006] FMCA 1461***

A portrait of Victor Chang by 89 year old artist Vlasdas Meskenas was incorrectly attributed to painter Jiawei Shen when reproduced in ACP's *Woman's Day* magazine. It was noted that "no apology was provided, notwithstanding that Eugene Meskenas made approximately 90 telephone calls in total to the magazine". The Magistrate awarded \$9100 in damages for the infringement of Meskenas' moral right, and \$10,000 in costs.

***Re Brian Kelvin De Garis and Matthew Moore v Neville Jeffress Pidler Pty Limited [1990] 37 FCR 99***

The Federal Court held that a news-clipping agency could not rely on the defence of fair dealing for research or study when supplying photocopied articles to clients. This was because the company itself was not engaged in research or study and the dealing was purely commercial.

## 4. Copyright and Plagiarism: Hypothetical Scenarios to Consider

*Karen works for a local organisation and is responsible for uploading news to the centre's Facebook page. She finds an interesting article on changes to rental law that she thinks might be relevant to potential clients of the centre. Karen copies this article in its entirety to the centre Facebook page, without linking to the original website, identifying the author or otherwise stating where the article came from.*

Karen breached the copyright of the article when she re-published it. Karen should have created a hyperlink on the Facebook page to the original texts, with a short description as to why the centre thought it was interesting. This would then acknowledge the source and ensure she would not be breaching copyright.

*John finds an interesting photograph in the newspaper of an anti-discrimination protest that was held in the same suburb as the organisation he works at. John thinks that this would be something to brighten the website*

*he has created. John scans the photograph and uploads it to the centre's website. Many people comment on this photo. Some time later, John receives a letter from a man claiming to be the creator of the photograph in question, stating that he has copyright over the image.*

John has breached the copyright of the photograph by re-posting it on his organisation's website without authorisation from the copyright owner. John should either get the permission of the photographer to re-produce the photograph and then cite him as the author of the work, or he should take it down and apologise to the photographer, as well as offering to print an acknowledgment on the site.

*Stephanie asks Brian, an intern at her local organisation, to create a video advertising the services of the centre that will be put on to a DVD and distributed to local media outlets. Brian does this, but uses popular music that he obtained from his private CD collection as the backing to the short piece. He has failed to ask the copyright holder of the music for permission.*

Brian has breached the copyright of the music he has used. He should have asked the copyright holder for permission and then if granted, he should acknowledge the copyright holder in the jacket of the CD. Otherwise, the centre needs to contact the media outlets to which it was distributed and ask for the return of the CD.

## Unlawful Discrimination

### 1. Unlawful Discrimination: Risk management Checklist

Note: Public comments themselves could be labelled discriminatory but they could also unintentionally reflect discriminatory policies or workings of an organisation.

#### Vilification, offensive behaviour, harassment

These are the most likely unlawful discrimination issues to be of concern in making public comments.

- Is there a 'public act' or is the act done 'otherwise than in private'?
- Is the comment likely, in all circumstances, to offend, insult, humiliate or intimidate another person or a group of people?
- Is there knowledge that the matter would promote or express hatred towards, serious contempt for, or serious ridicule of, a person or group of persons?
- Is the comment made about a person's race/transgender status, homosexuality or HIV/AIDS status or was it made due to a person's race, colour, national or ethnic origin?
- Is incitement involved? See Case Law test of the 'reasonable person' test.
- Is the comment unlawful? (*Harou-Sourdon v TCN Channel Nine* (1994) EOC 92-604)
- Is the comment a 'serious vilification'?
- Do any exceptions apply?
- Is there vicarious liability?
- Does the comment constitute harassment?

#### Discrimination (more generally)

There are also unlawful discrimination issues of concern in the provision of goods and services.

Does the communication/access to goods and services:

- Treat an individual differently or sets requirements difficult for them to meet, due to their:
  - age
  - impairment or disability
  - race
  - religious belief or activity
  - sexuality
  - HIV/AIDS status
  - transgender status
  - gender, pregnancy, marital status
- Reflect a decision based on stereotyped views or prejudices about people of different genders, races, ages etc, as opposed to their individual skills, abilities and talents?
- Ask an individual irrelevant personal questions relating to age, religion, sexuality, race or age?
- Make it harder for certain people to use or access the services because of a requirement that is not reasonable in the circumstances?

## 2. Unlawful Discrimination: Background information<sup>7</sup>

### Discrimination and public comment

An organisation makes public comment in order to engage in public debate on issues of community concern. This sometimes results in the organisation being required to speak on issues people feel very strongly about, and where there might be heated and divergent views in the community.

In instances where the community is provided with an opportunity to contribute to public comment through mediums such as online forums, those divergent and heated community views may become part of the organisation's publication. An organisation therefore needs to be aware of how that published debate might breach anti-vilification laws that protect particular groups within the community.

It is also important that organisations are aware of their obligations in the provision of the goods and services they provide, and where it may infringe on anti-discrimination legislation.

### The Law

In New South Wales the relevant anti-vilification and discrimination laws are contained in the *Anti-Discrimination Act 1977* (NSW)(ADA), the *Racial Discrimination Act 1975* (Cth) (RDA), the *Sex Discrimination Act 1984* (Cth) (SDA), *Disability Discrimination Act 1992* (Cth)(DDA) and the *Age Discrimination Act 2004* (Cth). The following discussion looks primarily at the provisions in relation to vilification, as public comments are most likely to infringe the vilification provisions of the RDA and ADA. Unlawful harassment, particularly that relating to disability and gender should also be considered in the context of interactive online media.

### Vilification, offensive behaviour and harassment

The purpose of the laws against vilification in anti-discrimination legislation is to recognise the way certain public acts and discussion can reinforce stereotypes, prejudice and hatred. In this way, comments or actions can be divisive, rather than encouraging an inclusive society. As a result of comments, damage and hurt is done to both the aggrieved individuals and also society as a whole. For organisations running public forums that invite discussion, it is important to avoid infringements of these anti-discrimination laws.

The laws against vilification included in the ADA are intended to prevent the publication of materials or acts done in public that incite hatred towards, or are in serious contempt or ridicule of a person because of their:

- race, colour, descent, nationality, ethnic, ethno-religious or national origin;
- homosexuality;
- HIV/AIDS; or
- transgender status.

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<sup>7</sup> This section has been comprised in part using: Centre for Cultural Diversity in Aging, 'Risk Management' <<http://www.culturaldiversity.com.au/guides/risk-management>>; Oxford English Language Dictionary; Rees, N., Lindsay, K., and Rice, S., *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008) Federation Press, Leichhardt; Victorian Equal Opportunity & Human Rights Commission, 'Direct and indirect discrimination – simplified' <[http://www.humanrightscommission.vic.gov.au/index.php?option=com\\_k2&view=item&layout=item&id=1125&Itemid=567](http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&layout=item&id=1125&Itemid=567)>; Human Rights and Equal Opportunities Commission (HREOC) – 'Federal and State Anti-Discrimination Law' <[http://www.hreoc.gov.au/info\\_for\\_employers/law/index.html#summary](http://www.hreoc.gov.au/info_for_employers/law/index.html#summary)>; Ronalds, C., *Discrimination Law and Practice* (2008) Federation Press, Leichhardt.

If an act involves both an expression of hatred, and a threat or incitement to others of physical harm to persons or their property, it may constitute 'serious vilification'. In this case, the matter may be referred to the Attorney General to be considered by the Director of Public Prosecutions.

Harassment also applies where a person is seeking to access goods and services provided by the organisation. The provision of publications and the ability to take part in on-line forums amounts to providing goods and services. It is unlawful to sexually harass someone or harass them in relation to their disability in the provision of goods and services. Harassment is when a person is made to feel intimidated, insulted or humiliated because of their sex or disability. Organisations should take care not to create a hostile environment online that may constitute the unlawful harassment of individuals.

## Public

'Public acts' and 'otherwise than in public' includes any form of communication to the public or conduct observable in public. It can also include an act done in the sight or hearing of people who are in a public place. This could include publications by media outlets such as:

- radio (especially talkback radio);
- television;
- internet (Facebook/Twitter);
- publications by individuals such as:
  - graffiti;
  - speeches;
  - printing;
  - displaying notices;
  - broadcasting;
  - telecasting;
  - playing tapes or other recorded material;
  - statements in written publications such as newspapers and journals;
  - public posters;
- behaviour by individuals (in schools/streets/pubs/streets/shops/workplaces/public transport/sporting areas/parks);
- actions and gestures (such as Youtube videos, photos); and
- wearing or displaying clothes, signs, flags, emblems and insignia.

## Incitement

Merely conveying hatred or expressing serious contempt or ridicule is not necessarily unlawful unless there is also incitement involved. The test for incitement is an objective one, that is, whether an ordinary, reasonable person, not immune from susceptibility to incitement, or holding racially prejudiced views, would be incited (*Harou-Sourdon v TCN Channel Nine*). An act that would incite someone who already held extreme racist or anti-gay views might not necessarily be seen as incitement.



## Case Law considerations (Harou-Sourdon v TCN Channel Nine)

When concluding whether a statement is unlawful, the court will give consideration to the:

- length of the vilifying statements in relation to the rest of the comments;
- whether the comments could be regarded as humorous;
- whether the language was ordinary; and
- whether the statements were repeated.

## Exceptions to the rule

General exceptions to the rule include:

- a fair report of a public act;
- a communication or the distribution or dissemination of any matter, on an occasion that would be subject to a defence of absolute privilege, in proceedings for defamation;
- a public act done reasonably and in good faith for academic, artistic, scientific or research purposes or for other purposes in the public interest. This includes discussion or debate about any act or matter;
- a fair comment on any event or matter of public interest, if the comment is an expression of a genuine belief held by the person making the comment;
- material that is privileged, such as statements made in Parliament, or made by a public authority in the course of undertaking a statutory duty, such as the Ombudsman.

## Vicarious liability

Where an organisation's employee or agent does an act unlawful under the RDA, the organisation will be held to be vicariously liable. This act must be in connection with his or her duties as an employee. To avoid liability, the organisation has to show that it has taken reasonable steps to prevent the employee or agent from doing the act. This is another reason why the organisation needs to have clear policies and procedures including training and education of staff.

## Access to Goods and Services

An organisation should already have policies in place for meeting obligations for fair and non-discriminatory access to its goods and services. This includes all of its online content, such as its website forums, Facebook pages and Twitter accounts. Anti-discrimination provisions may be infringed where an organisation allows or provides unequal access to goods and services.

Risks for an organisation include:

- excluding unfairly, for instance, where in moderating the content on social media sites, the organisation excludes a particular group either deliberately or as a result of administrative strategies. Excluding or including contributors could give rise to excluding an individual on a discriminatory basis (whether intentional or not). An organisation should consider these issues prior to publication and look to general risk management policies to avoid these situations;
- content inaccessible, for example, the materials might not be in an accessible format for sight-impaired people;
- for employees where they may be adversely affected by the organisation's activities online and those of contributors.

This is not intended to be a full description of discrimination law as it applies to all situations, groups and individuals. The following therefore is just a brief outline of some core concepts to be kept in mind. If you are concerned about a particular situation then you should get more detailed advice.

## Discrimination generally

Discrimination more generally is the unjust or prejudicial treatment of different categories of people, primarily on the basis of:

- age;
- impairment or disability;
- race;
- religious belief or activity;
- sexuality ;
- HIV/AIDS status;
- transgender status;
- gender, pregnancy, marital status; or
- carer responsibilities.

Anti-discrimination law is based on the identification of particular groups within society, such as women, those of minority races, individuals with disabilities etc, which suffer disadvantage or detriment because of their membership to a particular group.

The RDA for instance makes it unlawful to distinguish, exclude, restrict or prefer another person or a group of people on the grounds of race, colour, descent or national or ethnic origin.

Determining who fits within a protected group is a complex matter. For instance, if there is a person without a disability but about whom a disability is imputed and they are treated less favourably because of that assumption, they are still considered to be within the group of disability.

## Direct and Indirect Discrimination

Broadly speaking, direct discrimination is treating a person less favourably on the grounds of their group characteristics. This raises complex issues of comparators. However, for the purposes of this discussion, an organisation would not want to simply exclude people from a discussion forum on the basis of a person having a mental illness, for example.

Indirect discrimination occurs when a person is required to comply with rules, which are unnecessary or unreasonable. The person cannot comply or finds it harder to comply because of their particular group attributes. As a result the person suffers, or is likely to suffer, disadvantage.

Both of these instances should be avoided by organisations in the provision of their goods and services online.

It should be noted that anti-discrimination laws require service providers to make reasonable adjustments to achieve commensurate access for people with a disability.

## 3. Unlawful Discrimination: Illustrative Cases<sup>8</sup>

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<sup>8</sup> This section has been comprised in part using Anti-Discrimination Board, 'Understanding vilification laws – Equal Time, November 2004' (2004) <[http://www.lawlink.nsw.gov.au/lawlink/adb/ll\\_adb.nsf/pages/adb\\_et62](http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_et62)>;

**Kimble and Souris v Orr [2003] NSWADT 49**

A real estate agent made a number of remarks from the balcony of a unit in an apartment complex to the complainants standing below. This included calling one of the complainants a “black bastard” and a “coon.” The Administrative Decisions Tribunal (ADT) considered whether this constituted a public act. They also considered the distance the other balconies in the complex were from the one on which the respondent was standing, and the volume at which he was speaking. It was decided that individuals on other balconies would have been able to hear the respondent. His behaviour therefore did constitute a public act, which was capable of inciting persons who heard the words to feel hatred towards or serious contempt for or severe ridicule of the complainant.

**Harou-Sourdon v TCN Channel Nine Pty Ltd (1994) EOC 92-604**

In this case, a complaint was made alleging that a television reporter had made comments that constituted racial vilification of persons of French origin in a television programme.

The Equal Opportunity Tribunal (EOT) adopted an objective test to determine whether an utterance was considered an offence. The test was whether the utterance would incite an ordinary, reasonable person not immune from susceptibility to incitement or holding racially prejudiced views, to hatred, serious contempt or severe ridicule. The context of the statement was then taken into account in determining the incitement potential, including such factors as the length of the vilifying utterance compared with other utterances, and the tone of the discussion and whether repetition of the vilification occurred.

It was held that the complaint be dismissed on the basis that it was misconceived and lacking in substance.

**Waters v Public Transport Corporation [1991] HCA 49**

The High Court in this instance found unlawful discrimination occurs where one person is treated in a different manner (less favourably) from the manner in which another is or would be treated in comparable circumstances.

**Hall v A & A Sheiban Pty Ltd (1989) 85 ALR 503**

There does not need to be a continuous or repeated course of conduct.

**Burns v Radio 2UE Sydney Pty Ltd and ors [2004] NSWADT 267 and Burns v Radio 2UE Sydney Pty Ltd (No 2) [2005] NSWADT 24**

Radio 2UE was found to have vilified homosexuals, after a discussion on radio 2UE about a gay couple on the television program ‘The Block’. On air, radio presenter Steve Price referred to the two men as “young poofs” and said that on the “uncut” version of ‘The Block’, “they could do all sorts of grubby things at 11 o’clock at night”. John Laws, the other radio presenter, also referred to them as “a couple of young poofs” and said, “I don’t know what’s happened to Kerry (Packer)’s taste”.

The remarks were clearly made in public. The ADT found that the remarks did not amount to severe ridicule themselves, but it found them to have been capable of inciting severe ridicule in others.

The ADT found that as Burns did not hear much of the broadcast, damages were not an appropriate remedy. The parties were invited to make submissions on the form and content of an apology and/or retraction, plus any other order that should be made.

***Jones v Toben [2002] FCA 1150***

This was the first Australian case to apply the RDA to the Internet. The Federal Court found that a website that denied the Holocaust and vilified Jewish people was unlawful under RDA. The material posted on the Internet by Dr. Fredrick Toben cast doubt on the Holocaust, suggested that the gas chambers at Auschwitz were unlikely, and that Jewish people had exaggerated the number of Jewish people killed during World War II.

It was held that the material would engender in Jewish Australians a sense of being treated contemptuously, disrespectfully and offensively. The respondent was ordered to remove the offensive material from the Internet.

***Kazak v John Fairfax Publications Limited [2000] NSWADT 77 and John Fairfax Publications Pty Ltd v Kazak (EOD) [2002] NSWADTAP 35***

This case concerned a complaint of racial vilification brought by the respondent arising out of an article published by the appellant in the *Australian Financial Review*. The respondent argued that to impose sanctions for expression of opinion in a daily newspaper was contrary to the implied right in the Australian Constitution to freedom of political communication. However, the ADT rejected this argument, relying on the test by the High Court in *Lange* to say that the NSW vilification provisions are not an inappropriate encroachment on the constitutional right to freedom of political communication. Ultimately, on appeal to the ADT, the complaint was dismissed on grounds of merit pursuant to the ADA.

***Dow Jones and Company Inc v Gutnick [2002] HCA 56***

This case dealt with the jurisdiction that applied to internet content and had significant implications for internet law in Australia. The High Court found that defamation laws in Victoria applied to material that was posted on the internet by a server based in America. It was held that it was where the person downloaded the material that damage was done. *Gutnick* has since been cited internationally in Canada and the United Kingdom.

## 4. Unlawful Discrimination: Hypothetical Scenarios to Consider

*One evening, there is an incident at an organisation. A man comes into the centre wielding a knife, in search of an employee he was angry with. The suspect is charged and arrested. In the hours after the attack, Ellen, one of the workers who had witnessed this, comments on the ethnicity of the assailant and voices her belief that all people of that particular ethnicity were violent and this attack was evidence of that.*

*Ellen is also responsible for updating the organisation's Facebook feed. She decides to comment on the news of the attack as her latest status update, but also comments on the assailant's ethnicity and her belief that people of that group significantly contributed to violence in the community. In the hours following this, 40 people "disliked" her latest news update.*

Firstly, Ellen should not have commented on what may be a pending criminal case, in a public forum such as Facebook. Secondly, practically speaking, it is not news that is related to the work of the organisation. Finally, Ellen should not have commented on the ethnicity of the suspect, or her belief that people of that ethnicity were violent.

*A particular organisation has set up a Facebook group to advertise their services. Discussion on all relevant issues is encouraged by the administrator and is not censored. During one heated discussion, one poster disagrees with another and says: "Have you taken your pills today?"*

Comments should be monitored for discriminatory content. In allowing this comment to be posted on the organisation's Facebook site, the organisation is opening itself up to allegations of disability discrimination and harassment in the provision of goods and services.

*In another online discussion on the organisation's forum page that is attached to their website, there is a discussion on sexual assault. One contributor makes the comment that sexual assault does not exist, as women are: "always up for it" and "ask for it." Several women who work in the organisation are offended by these comments and complain to the site's administrator.*

These comments could be classed as sexual harassment and should be taken down by the site's administrator. Any website where the general public can make comments should also contain a disclaimer that harassment in online content will not be tolerated.

*The organisation decides to use its website as the only way to distribute information. It puts its material on the website in a way it thinks looks good but is in a format which is not able to be used by screen reading software.*

In attempting to create a visually pleasing document, the organisation is possibly discriminating in the provision of goods and services.

*John is responsible for managing the Twitter feed for the organisation. He feels particularly strongly about events overseas where there is ethnic conflict. He has genuine concerns about gross abuses of human rights by one side. Trying to give emphasis to the horror he says: "They should all be shot and killed."*

John could be guilty of trying to incite violence in the community against the particular ethnic group whose actions he is critical of.

## Sub Judice – Contempt of Court by Publication

### 1. Sub Judice – Contempt of Court by Publication: Risk Management Checklist

The offence of sub judice contempt is a common law offence. As such, this area of law contains very extensive case law. This document references the main principles extracted from the relevant decisions. However, it is largely based on secondary material. If you are uncertain as to whether this offence applies to your situation, you may have to look at more specific decisions.

For a more detailed overview of this area of law see NSW Law Reform Commission Discussion Paper 43 (2000) – Contempt by Publication

<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/dp43toc>

#### Publication

- Will the statement be made in a public forum; or
- Will the statement be made to a particular individual in a media interview?

#### Current or pending legal proceedings

- Does the statement relate to current or pending legal proceedings?
  - Both civil and criminal proceedings are 'sub judice' and attract protection from contempt.
  - In criminal proceedings, the sub judice period commences from the moment someone is arrested until the moment charges are withdrawn, the accused is acquitted, or all options of appeal have been used.
  - In civil proceedings, the sub judice period commences as soon as an initiating court process is issued and ends upon entry of judgment.

#### Prejudice

- Will the statement likely interfere with the due administration of justice in a particular case?
  - Does the statement refer to the criminal history of an accused?
  - Does the statement suggest the accused has confessed to the crime?
  - Does the statement go to the guilt or innocence of the accused, or suggest how the jury should decide the case?
  - Does the statement encourage sympathy or antipathy for the accused?
  - Does the statement go to the credibility of witnesses?
  - Does the publication include a photograph of the accused?
- Does the statement presume unclear issues in a particular case?

**IF NO to the above questions, then the publication will not constitute sub judice contempt.**

**IF YES to any of the above questions, then this statement may constitute sub judice contempt of court unless one the following exceptions applies:**

### Accurate report of court proceedings

- Is the statement merely a fair and accurate report of open court proceedings?

### Public interest

- Does the statement concern a matter of public interest, which outweighs the prejudice to the administration of justice?

### Public safety

- Does the statement facilitate the arrest of a person, aid in the investigation of an offence, or protect public safety?

**IF YES to any of the above two questions, then the statement may not constitute sub judice contempt.**

## 2. Sub judge – Contempt of Court by Publication: Background Information

### Elements of the offence

#### *Overview*

Sub judge contempt is a common law offence. A person or organisation breaches the sub judge rule and is liable for contempt where:

- material is ‘published’;
- the publication has a real and definite tendency, as a matter of practical reality, to interfere with the due administration of justice in particular legal proceedings or the publication prejudices the issues to be decided in those proceedings;
- the person or organisation charged with contempt is responsible for the publication;
- at the time of publication, the relevant legal proceedings were current or pending;
- the possible prejudice to the administration of justice is not outweighed by the public interest in freedom of discussion;
- the publication is not a fair and accurate report of proceedings in open court; and
- liability turns on the potential effect of a publication on legal proceedings, rather than the actual effect.

#### Intention

It is not necessary to prove that a person actually intended to interfere with the administration of justice. All that is needed to establish liability is an intention to publish the material in question. Therefore, a person may be liable for sub judge contempt even if they are unsure of the outcome of a proceeding.

The individual will be liable for any contemptuous statements made in an interview with the media if the media is likely to publish the material, even if they ultimately elect not to do so.

#### When is material ‘published’?

There is no clear definition of ‘publication’ in the context of sub judge contempt. Newsletters, pamphlets, press releases, websites, television and radio advertisements and even public speeches may all constitute ‘publications’ attracting a charge of contempt.

#### When are proceedings ‘sub judge’?

The sub judge rule only restricts the publication of information relating to proceedings that are ‘current’ or ‘pending.’ In civil proceedings, the sub judge period begins when a writ, statement of claim, or other initiating form is issued. The sub judge period ends upon the conclusion of current or pending proceedings, or when judgment is given. In criminal proceedings, the sub judge period expires, when either: charges are withdrawn, the accused is acquitted or sentenced, or all avenues of appeal are exhausted or have expired.

#### What is a contemptuous publication?

There is no established definition of what constitutes a contemptuous publication. However, certain types of material that are considered to be in contempt include:



- suggestions that the accused has previous criminal convictions, been previously charged and/or acquitted for committing an offence, or been involved in other criminal activity;
- suggestions that the accused has confessed to the crime in question;
- suggestions that the accused is guilty or innocent of the crime for which he or she is charged, or that the jury should convict or acquit the accused;
- comments which encourage sympathy or antipathy for the accused and/or which criticise the prosecution;
- comments that make favourable or unfavourable references to the character or credibility of the accused or a witness;
- a photograph of the accused, if, at the time of the publication, it was likely that the identity of the offender would be an issue at trial.

## Influencing the decision-maker

Jury trials are vulnerable to media influence. More caution should be exercised in cases involving, or likely to involve, a jury. A publication will not generally be considered to pose a risk of prejudice by influencing a judge.

## Influencing parties to proceedings

A publication that might unfairly encourage a person involved in litigation to discontinue or compromise proceedings may be considered contempt.

## Influencing witnesses

A publication may be in contempt where it tends to influence a witness. The following publications have been found to be in contempt:

- personal criticism of a witness;
- criticism of a party to the proceedings;
- an interview with a witness on matters to which that or another witness will later testify in court; and
- a publication containing material that may influence the testimony of a witness due to give an eyewitness account of a material incident.

## Exceptions/defences

### ***Reporting the bare facts***

A publication will not be contemptuous if it fairly and accurately reports proceedings in an open court, even if prejudicial to a case. For example, a fair and accurate report of bail proceedings may not be contemptuous if information such as previous convictions is revealed in the bail proceedings.

For this exception to apply a number of conditions must be met:

- the report must relate to proceedings in an open court;
- the report must not contain material under a suppression order, or not permitted to be reported;
- the report must not reveal matters discussed in court when the jury was absent;

- the report must not reveal any material that the trial judge has refused to put to the jury;
- the report must relate to 'proceedings.' This includes events in the vicinity of the hearing, arising out of it, and directly connected with it;
- the report must plainly recognise that it is a report of judicial proceedings;
- the report must be fair and accurate; and
- the report must be published in good faith.

### ***Publication relates to a matter of public interest***

A person may not be liable for a contemptuous publication if the public interest in open discussion outweighs the public interest in the administration of justice. For example, a publication regarding paedophilia may interfere with particular criminal proceedings against a person accused of committing child sexual offences.

However, if there is an ongoing public debate about the dangers of paedophilia in the community, the public interest in the matter may outweigh the detriment to any particular criminal proceedings. This exemption applies both to publications being part of a general, ongoing public discussion and also to publications relating to specific legal proceedings. Nevertheless, the public interest principle may be more difficult to establish in relation to specific legal proceedings.

### ***Publication relates to a matter of public safety***

Publications which are reasonably necessary or desirable to facilitate the arrest of a person, or aid in the investigation of an offence or protect public safety, may be immune from application of the sub judice rule, even if they would otherwise be in contempt, under a broad application of the public interest principle.

## **3. Sub Judice – Contempt of Court by Publication: Illustrative Cases**

### ***Attorney General (NSW) v Radio 2UE Sydney Pty Ltd [1997] NSWCA 30***

On the third day of a murder trial, John Laws broadcast a program on radio in which he discussed the evidence at trial, insisting that the accused was guilty and criticised the prosecution's handling of the case. These publications were found to be a contempt of court. John Laws and Radio 2UE were both ordered to pay costs and substantial fines.<sup>9</sup>

### ***Hinch v Attorney General (Vic) [1987] HCA 56***

Radio presenter Derryn Hinch and the radio station that broadcast his program were found guilty of contempt. The defendant made several broadcasts regarding a man accused of child sexual assault. The defendant expressed anger that the accused remained involved in a youth foundation while on bail. He also referred to the previous convictions and acquittals from charges involving child sex offences.

The defendant argued that the publications were not contemptuous because they related to a question of public interest, which outweighed any prejudice to the proceedings. The High Court acknowledged that the public interest principle might apply to publications detailing particular legal proceedings.

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<sup>9</sup> This section has been comprised in part using: Judicial Commission of New South Wales, 'Contempt in the face of the court', <[http://www.judcom.nsw.gov.au/publications/benchbks/criminal/contempt\\_in\\_the\\_face\\_of\\_the\\_court.html](http://www.judcom.nsw.gov.au/publications/benchbks/criminal/contempt_in_the_face_of_the_court.html)>; *Hinch v Attorney General (Vic)*

The Court also accepted that there was a legitimate public interest in revealing that a person with the accused's criminal history held office in a children's organisation. However, the Court held that the public interest principle did not exonerate the defendant.

The Court particularly objected to the defendant publicly disclosing the accused's previous convictions and charges and to the suggestion that the accused had committed other offences, which had never been discovered or investigated.

***R v The Age Co Ltd [2006] VSC 479***

*The Age* published an article detailing the accused's driving antecedents during committal proceedings for alleged dangerous driving offences. A long period of time was expected to lapse between publication of the material and jury trial.

However, the Court did not accept that as a basis for exoneration because the details of prior convictions and custodial history were unlikely to be forgotten when published in a graphic and tragic context. The respondent was convicted of contempt.

***Attorney-General (NSW) v TCN Channel Nine Pty Ltd (1990) 20 NSWLR 368***

On 29 July 1989, Mason surrendered to police and confessed to the brutal murders of three people and an attempted murder of a fourth person at Geary's Gap and Pambula. Mason was arrested and interviewed at the Queanbeyan police station. He was charged with the murders and signed records of interview confessing his guilt. Mason returned to the scenes of the crimes and made further confessional statements. Representatives of the media accompanied police and filmed Mason as he spoke, which was shown on Channel Nine's news broadcast. The NSW Court of Appeal held that the published material conveyed information that Mason had confessed to the crimes and that this was prejudicial. Channel Nine was found guilty of contempt and fined \$75,000 in the penalties hearing that followed.

***Attorney-General (NSW) v Willesee [1980] 2 NSWLR 143***

Schneidas, a prisoner serving a sentence, was charged with the murder of a prison warder, which triggered a strike of the prison warders and the prisoners were therefore confined to their cells. The current affairs program, "Willesee at Seven", televised a segment which dealt with the consequences of the prisoners being on lockdown. An interview with one of the prisoners was aired, which contained his belief that Schneidas had two previous convictions for assaulting officers. In contempt proceedings, it was argued that the statements were prejudicial to the fair trial of Schneidas. It was held that the publishing of this interview and the opinions it contained regarding the prior convictions was contempt because to publicise an accused person's previous convictions is contempt of court.

#### 4. Sub Judice – Contempt of Court by Publication: Hypothetical Scenarios to Consider

*During a criminal trial, Emma, who works for an organisation, posts comments on her organisation's Facebook page. These comments are about the previous convictions of a person in a current criminal case. Emma notes that by virtue of this history, this person is likely to be continuing his criminal behaviour. She believes this will help a client of the centre who was allegedly a victim of the accused.*

These comments could be seen as a contempt of court. Emma should not have made any references or comments to the case, particularly not relating to the previous convictions of an accused.

*There is a current child abuse case that has become a talking point in the media. A particular organisation is not involved in the case, but has been following it closely. Ben, who is responsible for updating the organisation's Twitter page, makes a comment about previous allegations that the accused has committed similar crimes in the past.*

Comments such as these could negatively impact on the case and are therefore seen as contempt by publication. Ben should not have published such comments. Even though the comments were posted on a social media site, it is still considered to be an act of publication to make comments.

*Valerie has attended a closed court session of a particular trial on behalf of her client. She later goes on to give a radio interview and accidentally reveals information from the case.*

This is a contempt of court by publication. Valerie should not have given the interview and should not have commented on a closed court session.

## Misleading or Deceptive Conduct

### 1. Misleading or Deceptive Conduct: Risk Management Checklist

#### Primary liability

- Are you providing advice or otherwise acting in trade or commerce?
- Are you acting or communicating in a manner likely to mislead or deceive your audience?
- Are you deliberately withholding material information?
- Are you withholding information, or failing to act, in circumstances where there is a reasonable expectation of disclosure?
  - You must tell the whole story: don't leave out material facts.
  - If any past statements later become inaccurate, correct them.
  - Don't imply that facts don't exist when they do.
- Are you making a representation as to the future?
  - Make sure you have reasonable grounds to make this prediction.
- Are you conveying an opinion?
  - Only convey opinions you truly hold.
  - Use the language of opinion.

#### Accessorial liability

- Is your client acting in the course of trade or commerce?
- Is your client engaging in misleading or deceptive conduct?
- Are you participating in that conduct?
  - Don't endorse a client's statement that you know to be false.
  - Correct any false statements your client makes.

#### Confidentiality

- Are you revealing anything subject to your duty of confidentiality to your client?

## 2. Misleading or Deceptive Conduct: Background Information

**The Competition and Consumer Act 2010 (Cth)** (the CCA), which commenced on 1 January 2011, has replaced the federal *Trade Practices Act 1974* (Cth) (the TPA). The CCA also replaced much of the state-based fair trading regime. In particular, the state and federal provisions regarding misleading and deceptive conduct have now been consolidated into one provision. Under s 18 of the Australian Consumer Law (the ACL), which is Schedule 2 to the CCA, a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.

Note: It is anticipated that the existing jurisprudence on s 52 of the TPA and its state and territory equivalents remains applicable to s 18 of the ACL.

### Primary liability

It is prohibited for a person to engage in deceptive or misleading conduct.

Misleading or deceptive conduct is only prohibited where it occurs in trade or commerce. 'Trade or commerce' is defined to include any business or professional activity, whether or not carried on for profit.<sup>10</sup>

### Aiding, Abetting or otherwise involved

A professional advisor may also incur personal liability as an accessory to misleading conduct. To incur liability on this basis, a person must intentionally participate in the contravention. Examples might be:

- where a solicitor makes or endorses a client's statement knowing it to be false then the solicitor may be liable as an accessory to misleading conduct.
- where a professional advisor fails to correct a false statement made by their client during discussions with another party, the professional advisor may be liable as an accessory to misleading conduct.

### What is misleading or deceptive conduct?

#### Positive conduct

The test of whether conduct is misleading is objective, and does not require proof of a subjective intention to mislead. Therefore, it covers conduct made by anyone in trade or commerce that is either deliberately misleading or which, though honest, is blundering or careless.

- 'Conduct' includes actions and statements such as advertisements, promotions, quotations, statements and any representation made by a person.
- 'Mere puffery', that is, wildly fanciful, exaggerated or vague claims for a product or service which nobody could reasonably be misled by, are not misleading and not prohibited by the CCA.
- Lawyers and other professional advocates, who may relay false information provided by a client, can only escape liability for misleading conduct if they make it clear that the information is provided by the client and disclaim any belief in its truth or falsity.

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<sup>10</sup> See section 4 of the *Fair Trading Act 1987*, and the case of *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594.

## Mere silence

Mere silence cannot, of itself, constitute misleading and deceptive conduct. Silence is assessed as a circumstance, that is, whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive, or is likely to mislead or deceive. Case law has established that silence will constitute misleading conduct where the nature of the relationship between the parties is such that there arises a duty to reveal relevant facts; or in all the circumstances, a party had a 'reasonable expectation' that information known to the other party would be disclosed.<sup>11</sup>

Mere silence will constitute misleading conduct only where the failure to disclose information is deliberate. Therefore, if the advocate or organisation is silent on a certain matter because they inadvertently fail to disclose information, this will not amount to misleading conduct.

## Silence accompanied by other conduct

Silence accompanied by other conduct will be misleading if, in all the circumstances, there was a 'reasonable expectation' that certain matters would be disclosed. A reasonable expectation will only arise where the undisclosed information is material to the particular audience.

Misleading silence may take the form of:

- a half-truth, where something is said or done which, although true on its face, communicates only part of the whole picture;
- a failure to correct a previous representation that was correct when made, but later becomes inaccurate;
- a deliberate concealment of facts leading the audience to draw an erroneous conclusion;
- an implication that a key detail or issue is non-existent.

## Predictions

If a person makes a representation with respect to any future matter without reasonable grounds for making the representation, this may constitute misleading conduct. For example, an organisation may publish representations about the predicted dangerous outcomes of actions being taken by a company. The prediction is misleading if made without reasonable grounds and the onus is on the organisation to prove that the grounds were reasonable.

## Opinions

Ordinarily, merely providing an opinion, rather than making a factual or future representation, will not be misleading. However, if the person who makes the representation does not in fact hold the represented opinion, this would be a misleading representation of fact.

Legal advocacy organisations might note that solicitors do not ordinarily warrant that the opinion is correct, only that reasonable professional care and skill has been employed in forming and expressing the opinion. For example, a solicitor might express an opinion about the advantages and disadvantages involved in following different proposed courses of action or about which of several different proposed courses of action is more in the client's interests.

## Duty of confidentiality

In some circumstances, legal professional privilege and client confidentiality may conflict with the obligation not to engage in misleading or deceptive conduct. However, the existence of the duty of confidentiality makes it much more difficult to establish that silence was misleading. The courts

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<sup>11</sup> See the case of *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31.

generally consider that confidentiality indicates that another person would not expect the information to be disclosed.<sup>12</sup>

### 3. Misleading or Deceptive Conduct: Illustrative Cases<sup>13</sup>

#### **Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic) [2002] FCA 860**

In this case, the overlap between defamation, misleading and deceptive conduct and injurious falsehood was considered, with regards to the implications for non-profit and community organisations. The RSPCA made representation about Orion's products (electronic dog collars) in publications, some of which were untrue. Orion alleged that the RSPCA had breached sections 52 and 53 of the Trade Practices Act 1974 (Cth) (TPA), were defamatory and had caused injurious falsehood. The Court decided that there was defamation, however, that there was no injurious falsehood and while some of the statements were misleading and deceptive, they were not in 'trade or commerce'. Justice Weinberg held that: 'The RSPCA is, as I have found, a trading corporation. However, many of its functions have a non-trading or commercial character. Dr Wirth's radio broadcasts combine educational and political objectives. They may provide a benefit to the RSPCA from greater public exposure of its intellectual property, including its name and logo. However, any such benefit is purely incidental.'

#### **Craftsman Homes Australia Pty Ltd v TCN Channel Nine Pty Ltd [2006] NSWSC 519**

Section 52 of the TPA may be invoked where an interview has been obtained on false pretences. In this case, TCN Channel Nine decided to run a segment on A Current Affairs (ACA) which was critical of the building work and conduct of Craftsman Homes, a construction company. Upon unsuccessful attempts to arrange an interview with representatives of Craftsman Homes, Channel Nine decided to engage its own reporter and employee to act as a couple interested in building a home, and insistent on meeting with Mr Cox, the principal. Channel Nine's representatives successfully arranged for an appointment at Mr Cox's residence, and only revealed their true identity after entering his premises. This conduct was held to be misleading and deceptive.

#### **Hearn v O'Rourke (2003) 129 FCR 64**

Section 18 of the Australian Consumer Law may apply where misleading representations have been made about the subject matter of an interview. O'Rourke, a filmmaker, produced a documentary, "Cunnamulla" focusing on life in a town in central Queensland. In doing so, he sought the permission of two girls aged 13 and 15. In the interview he asked questions about their sexual activities contrary to previous representations he had made to the parents. The case did not proceed to trial, but the preliminary decision suggests that the then TPA section 52 prohibition on misleading and deceptive conduct may be used where media questioning strays.

#### **Davies v London & Provincial Marine Insurance Co (1878) 8 Ch D 469**

In this case the Court held that if someone tells the truth, but subsequent events make that statement no longer true, then there is a duty to correct.

<sup>12</sup> See the case of *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31.

<sup>13</sup> This section has been comprised in part using: *Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic)* (2000) 120 FCR 191; Rolph, D., Vitins, M., and Bannister J., *Media Law: cases, materials and commentary* (2010) Oxford University Press, Oxford.



**Australian Competition and Consumer Commission (ACCC) v Allergy Pathway Pty Ltd (No 2) [2011] FCA 74**

Allergy Pathway operates clinics for diagnosis and treatment of allergies and has its own Facebook 'fan' and Twitter pages. Certain third parties posted statements on the company's Facebook and Twitter which were held to be misleading and deceptive publications.

The statements posted on Allergy Pathway's Facebook "fan" and Twitter pages by third parties were held to be publications by the company. Allergy Pathway was found to be in contempt because the publications had breached the undertakings previously provided to the Federal Court to not engage in misleading and deceptive conduct. Allergy Pathway was ordered to publish corrective advertising, and pay fines of \$7500.

**Annand and Thompson Pty Ltd v TPC (1979) 25 ALR 91**

In this case the held that courts will look at the person providing the information and the person receiving the information, and will judge whether it was misleading in the particular context.

**Redgrave v Hurd (1881) 20 Ch D 1**

In this case it was held that if a person has the opportunity to check what they have been told, but they do not, this does not prevent an action in misrepresentation if the statement was false.

#### 4. Misleading or Deceptive Conduct: Hypothetical Scenarios to Consider

*An organisation replies to Tweets relevant to one of their campaigns. Jane is the person responsible for making the responses. One day she notes that some Tweets make statements about forestry practices by a company, which she and the organisation know are not really true. Jane decides to adopt the Tweets and run with them to show a licence to harvest trees should not be granted.*

There are questions about whether the organisation is in trade or commerce but Jane runs the risk she will be making a representation that affirms the original false accusations. Jane knows these to be untrue. There may be some concerns about an injurious falsehood action if the company can prove she knew and that they lost business as a result.

*John asks several previous clients of an organisation if they would participate in an interview with him that he intends to publish on the organisation's website. He tells the clients that the interview and article will be focused on women taking the initiative to seek legal help. When the interview is published, the focus is on women as victims of domestic violence. The women involved are shocked and angry that they were misled prior to the interview, as they would not have been involved had they known the genuine theme of the interview.*

This could be construed as misleading and deceptive conduct but may not have been in trade or commerce. John should have been honest with the clients about the true nature of the interview, as they would not have been a part of the article had they known the true focus of the story. In this way John's actions were misleading.

## Protecting the Identity of Children

### 1. Protecting the Identity of Children: Risk Management Checklist

#### Children in criminal proceedings

- Does the information relate to a person's pending, ongoing or past involvement in criminal proceedings?
- Do the criminal proceedings relate to events that occurred when the person was a child of less than 18 years of age?
- Does the information name, or could it otherwise identify, the person?
- Will the information be published or broadcast?

**If YES to all of the above questions, then disseminating this information is an offence unless:**

- the court consents; or
- the child is over 16 and consents;
- the child is deceased and their next of kin or the court consents; or
- it is a traffic offence not heard in the Children's Court.

#### Proceedings in the Children's Court

- Does the information relate to a person's pending, ongoing or past involvement in proceedings in the Children's Court?
- Was the person less than 18 years of age when so involved?
- Is the person still living?
- Is the person currently less than 25 years of age?
- Does the information name, or could it otherwise identify, the child?
  - Could the general public identify the child using the information?
  - Could persons known to the child identify the child based on the information?
- Will the information be published or broadcast to the public or a section of the public?

**If YES to all of the above questions, then disseminating this information is an offence unless:**

- the court consents.
- the young person between 16 and 18 years of age consents.
- the Director-General consents on behalf of a child or young person under ministerial responsibility.
- the child or young person has died.

## AVO proceedings

- Does the information relate to the pending or ongoing involvement of a child in AVO proceedings?
- Does the information name, or could it otherwise identify, the child?
- Will the information be published?

**If YES to all of the above questions, then disseminating this information is an offence unless:**

- the court consents;
- the child consents.

## Sexual offence proceedings

- Is the information likely to identify a complainant in sexual offence proceedings?
- Will the information be published?

**If YES to the above questions, then disseminating this information is an offence unless:**

- authorised by the presiding judge;
- the complainant consents, and is more than 14 years old;
- the court consents, in the case of a child less than 16 years old;
- the complainant is deceased.

## 2. Protecting the Identity of Children: Background Information

### Children in criminal proceedings<sup>14</sup>

#### ***What information cannot be published?***

It is an offence to publish the name, or other identifying material such as photographs, of a child less than 18 years of age involved in criminal proceedings.

For guidance on what constitutes 'identifying material' see 'proceedings in the Children's Court' below.

Identifying material cannot be publicised in a way that connects the person with criminal proceedings if the:

- proceedings relate to a person who was a child when the offence concerned was committed;
- person is a witness in the proceedings and was a child when the offence concerned was committed;
- person is mentioned in the proceedings in relation to something that occurred when the person was a child;
- person is otherwise involved in the proceedings and was a child when so involved; or
- person is a brother or sister of a victim of the relevant offence and that person and the victim were both children when the offence was committed.

#### ***What types of publications are prohibited?***

It is an offence to disseminate material identifying a child involved in criminal proceedings by any means including: newspapers, periodical publications, radio, television or the internet.

It is also an offence to publish the name of a child involved in criminal proceedings to a website that allows the information to be disseminated to the public or a section of the public, regardless of whether such dissemination actually occurs.

#### ***When is the prohibition operative?***

It is an offence to publicly identify a child involved in criminal proceedings both before and after the proceedings end. The prohibition continues even if the person is no longer a child, or is deceased, at the time of the publication.

#### ***What information can be published?***

Material identifying a child involved in criminal proceedings can be published:

- if it is contained in an official report of court proceedings;
- where the court authorises the naming of a child convicted of a serious children's indictable offence;
- in the case of a child under 16 years of age, where the court consents and the child agrees;
- in the case of a child of or above 16 years of age, where the child consents in the presence of a legal practitioner of their choosing;

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<sup>14</sup> See Division 3A, Part 2 of the *Children (Criminal Proceedings) Act 1987*.

- where the child is deceased and either the child's senior next of kin consents or, if there is no such person, the court consents;
- in criminal proceedings for a traffic offence, heard by a court other than a Children's Court.

## Proceedings in the Children's Court<sup>15</sup>

### **What information cannot be published?**

It is an offence to publish the name, or other identifying material such as photographs, of a child or young person less than 18 years of age involved in proceedings in the Children's Court (the prohibition).

The prohibition operates in respect of a child or young person who is, or is likely to be:

- a witness in the Children's Court;
- involved in any capacity in any non-court proceedings;
- the subject of proceedings in the Children's Court;
- mentioned or otherwise involved in proceedings in the Children's Court or any non-court proceedings;
- the subject of certain reports made under the *Children and Young Person (Care and Protection) Act 1998*.

### **What is 'identifying material'?**

What is prohibited 'identifying material' depends on the facts of each case. It seems that material that would allow an ordinary reasonable viewer to identify the child is included.

However, you might also breach this provision by giving out particulars that would enable those who know a child (such as their school friends or neighbours) to identify the child as being involved in the court proceedings, even though a general reader would not.

For a case about 'identifying material' see *XX v Nationwide News Pty Ltd* [2010] NSWDC 147. In this case *The Australian* identified a child involved in proceedings in the Children's Court in breach of s 105 of the *Children and Young Person (Care and Protection) Act 1998*. *The Australian* had published articles detailing the racial background, country of origin, cultural practices and family situation of the child.

### **What is a 'publication' for the purposes of the prohibition?**

If you publish prohibited material to the public at large or a section of it; usually, but not necessarily, by the news media, you are likely to commit the offence.

A communication between individuals, with no public aspect about it, is unlikely to offend.

There is a discussion of publication in the case of *Kf v Parramatta Children's Court and 3 Ors* [2008] NSWSC 1131. This case decided that providing identifying material to an expert for the purpose of proceedings in the Children's Court is not a breach of s 105.

### **When and where does the prohibition operate?**

The prohibition extends to any publication that may be accessible by a person in NSW.

The prohibition operates before proceedings commence, during proceedings and after proceedings conclude.

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<sup>15</sup> See section 105 of the *Children and Young Person (Care and Protection) Act 1998*.

The prohibition applies until either the person attains the age of 25 years or dies, whichever occurs first.

### ***What information can be published?***

The name and other material identifying the child or young person can be published:

- in an official report of Children's Court proceedings;
- in the case of a person under 16 years, with the consent of the Children's Court;
- in the case of a person aged between 16 and 18 years, with their consent;
- in the case of a child or young person under the parental responsibility of the Minister<sup>16</sup>, if the Director-General approves; or
- if the child or young person has died.

### **Apprehended violence order proceedings<sup>17</sup>**

#### ***What information cannot be published?***

It is an offence to publish the name, or material likely to identify, a child involved in AVO proceedings. Specifically, identifying material cannot be publicly distributed if:

- the AVO is sought for the benefit of, or against, the child;
- the child is likely to appear as a witness in AVO proceedings; or
- the child is likely to be mentioned or otherwise involved in AVO proceedings.

The court also has discretion to prohibit the public identification of other persons involved in AVO proceedings.

#### ***When it cannot be published***

Prohibited identifying material cannot be published before proceedings commence or while they are ongoing.

#### ***What information can be published?***

Identifying material can be published:

- in an official report of court proceedings; or
- if the court or the relevant person consents.

### **Sexual offence proceedings<sup>18</sup>**

#### ***What information cannot be published?***

It is an offence to publish material, including pictures, likely to identify the complainant in "prescribed sexual offence"<sup>19</sup> proceedings.

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<sup>16</sup> Minister responsible for administering the *Children and Young person (Care and Protection) Act 1998*.

<sup>17</sup> See section 45 of the *Crimes (Domestic and Personal Violence) Act 2007*.

<sup>18</sup> See section 578A of the *Crimes Act 1900*.

<sup>19</sup> As defined in section 3 of the *Criminal Procedure Act 1986*.

Most offences in the nature of sexual assault or indecency constitute prescribed sexual offences.

Prescribed sexual offences also includes any commission of, or attempt, conspiracy or incitement to commit, a prescribed offence.

'Publish' includes broadcast by radio or television or dissemination by any electronic means such as the internet.

See, for example, *R v Jeffrey John Hillsley* (2006) 164 A Crim R 252. In that case the defendant murdered a man and sexually assaulted the stepdaughter of the deceased. It was prohibited to publish the name of the deceased, the name of the child victim, the name of the child's mother, or any other details likely to identify the child victim.

### ***When it cannot be published***

Identifying material cannot be published even after the proceedings have concluded.

### ***What information can be published?***

Identifying material can be published:

- where authorised by the presiding judge;
- in the case of a complainant over 14 years of age at the time of publication – with their consent;
- in the case of a complainant under 16 years of age, with the Court's consent and the child's concurrence;
- in an official report or publication of the court proceedings;
- in transcripts supplied to persons genuinely interested in, or conducting research relevant to, those proceedings;
- after the complainant dies.

## **3. Protecting the Identity of Children: Illustrative Cases<sup>20</sup>**

### **Application by John Fairfax Publishing Pty Limited re MSK, MAK, MMK, and MRK [2006] NSWCCA 386**

In this case, John Fairfax Pty Ltd (publishers of the *Sydney Morning Herald* and *The Age*) made an unsuccessful appeal court application in NSW to have a name suppression order removed on two juveniles and their co-offending adult siblings. The appeal was resolved on jurisdictional grounds, that is, because applications of this type to lift suppression of names should occur at the time of sentencing. However, because of its high-profile nature, the case led to a reference by the NSW Attorney-General to the multi-party Law and Justice Standing Committee of the NSW Legislative

<sup>20</sup> This section has been comprised in part using: BBC, 'Man sentenced to lying over James Bulger killer' <[http://news.bbc.co.uk/2/hi/europe/isle\\_of\\_man/8641162.stm](http://news.bbc.co.uk/2/hi/europe/isle_of_man/8641162.stm)>; Chappell, D., and Lincoln, R., 'Abandoning Identity Protection for Juvenile Offenders' (March 2007) *Current Issues in Crime and Criminal Justice*, 18(3), 481-487; Human Rights Law Centre, 'UK Court of Appeal Considers Balance between Media Freedom of Expression and Protection of Children's Privacy' <[www.hrlrc.org.au/files/TCSSFIGK09/Trinity%20Mirror.pdf](http://www.hrlrc.org.au/files/TCSSFIGK09/Trinity%20Mirror.pdf)>.

Council to inquire into the 'prohibition on the publication or broadcasting of the names of young people who are involved in criminal proceedings'.<sup>21</sup>

***McKerry v Teesdale and Wear Valley Justices [2001] E.M.L.R.5***

In this case the British Court of Appeal criticised the listing of reporting restrictions in respect of a fifteen-year old persistent offender charged with theft.

***Kyle and Jackie O Show***

This incident did not result in an actual case, but much controversy and public disapproval. A controversial broadcast occurred on 29 July 2009, when a teenage girl revealed on air on the "Kyle and Jackie O Show" that she had been raped when she was 12 years old.

Following the broadcast, the segment was criticised both domestically and internationally by health professionals, rape experts, media commentators, and the general public. A group of high profile psychologists, academics and child advocates wrote to the Age calling for the show to be cancelled, arguing that the show had been a venue for child abuse and a gross violation of human rights.

Following the incident, the show continued to air, despite calls for it to be taken off the air, with Kyle Sandilands offering a public apology. The radio show was then taken off air for a review and Kyle Sandilands was fired from his job on Australian Idol. Valuable advertisers withdrew their advertising from the 2Day FM morning show the week after the incident. After an internal review, the show was back on air on 18 August 2009.

***Trinity Mirror & Ors, R (on the application of) v Croydon Crown Court [2008] EWCA Crim 50***

The UK Court of Appeal held that the right to freedom of expression and the media's right to disclose the identities of convicted persons and report in the public interest may outweigh the interests of children of convicted persons and their right to privacy.

## 4. Protecting the Identity of Children: Hypothetical Scenarios to Consider

*John is representing a 45-year-old male client accused of assault in a criminal case. The accused's 10 year old daughter allegedly witnessed the crime. Sally works at an organisation and is responsible for posting interesting cases to the organisation's Facebook page. She finds this case very interesting due to the psychological impact of children giving evidence. Sally drafts a post to the organisation's Facebook page outlining the details of this case and posting a photograph of the child who is due to give evidence. Sally's motivation was to attract sympathy for the child.*

It is an offence to publish the name, photograph or contact details of a child witness in the media. Sally should have referred to the child more generally and should not have given details of her name or posted her photograph. Even if the details had been previously publically available for whatever reason, it does not mean that the earlier publication was previously lawful.

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<sup>21</sup> D. Chappell & R. Lincoln 'Shhh, we can't tell you: an update on the naming prohibition of young offenders' (2009) 20 (3) Current Issues in Criminal Justice 476-484.



*A local organisation is protesting about the lack of affordable housing in the area. Speaking at the rally, Kate points to a family and says 'and they are desperate to get safer housing, their 12-year-old daughter has been sexually assaulted...'*

Kate should not have identified the girl or her family in this context. She could have instead given a general speech at the rally about the need for affordable and safer housing in the community.

*Lawyer, Danielle is giving an interview on a local radio station about increasing violence amongst young males in the area. Danielle is asked about any relevant cases she has worked on in regards to this issue. In explaining a certain case, Danielle is careful to avoid giving out the name of a particular child accused, but unintentionally gives out numerous other identifying details about the child.*

Even though Danielle has avoided communicating the name of the child accused, in publishing the identifiable details of the child, she has in effect identified him, which is an offence. Danielle should have spoken more generally and avoided using these details.

## Legal Professional Privilege (NSW)

### 1. Legal Professional Privilege (NSW): Risk Management Checklist

Legal professional privilege (LPP) protects the disclosure of certain communications between a lawyer and a client. These communications must be for the dominant purpose of seeking or providing legal advice, or for use in existing or anticipated legal proceedings.

- Is this a confidential communication or document?
- Was the communication made between a lawyer and client; or by the lawyer or client to a third party?
- Was the communication made:
  - In order to provide or receive legal advice? or,
  - Regarding actual or anticipated proceedings?
- Was this the dominant purpose of the communication or document?
- Does a court or other administrative or investigative body require the client to disclose this communication or document?

**If YES to all of the above questions, the client may claim the benefit of legal professional privilege to protect this material from disclosure unless:**

- the material was made in continuance of an illegal object.
- the material was made to frustrate the purpose of the law.
- a statutory provision overrides the privilege:
  - a statutory provision may repeal the common law privilege; or
  - if privilege is claimed to rebut a demand to adduce evidence, then certain exemptions apply under the *Evidence Act 1995* (Evidence Act).
- the client can waive the privilege in the following ways, but usually should avoid doing so:
  - A client who acts in a manner inconsistent with non-disclosure of the material can waive the privilege;
  - A client can agree to waive privilege and take the risk of not being able to keep their frank discussions with their legal advisor confidential.
  - The lawyer has no authority to waive privilege on behalf of the client and should be careful to avoid accidentally releasing information in a way that waives privilege.

## 2. Legal Professional Privilege (NSW): Background Information

### Source

Privilege exists to encourage full and frank disclosure by clients to lawyers. It is a common law right that now also arises under the Commonwealth, State and Territory evidence legislation.

### Evidence Acts

- The *Evidence Act* applies to all NSW court proceedings.
- The *Uniform Civil Procedure Rules 2005* NSW extends this to all pre-trial procedures (i.e. discovery).
- Where neither the Act, nor the Rules apply, the common law steps in (e.g. quasi judicial proceedings, AAT proceedings, investigations by the ATO or ASIC).

### Definition

Privilege extends to protect confidential communications between client and lawyer, or between the lawyer or the client and third parties:

- made for the dominant purpose of a lawyer providing legal advice or providing legal services relating to actual or contemplated litigation;
- and litigation can be reasonably anticipated when there is a reasonable probability or likelihood that such proceedings will be commenced. See section 119 of the Evidence Act;
- where advice is given. There is no requirement for the confidential communication to be made in the course of, or in anticipation of, litigation. See s 118 of the Evidence Act; and
- although the High Court has not explicitly endorsed the below "but for" test, commentators suggest the Court's reasoning in *Esso Australia v Commissioner of Taxation* [1999] HCA 67 supports these criteria in determining whether privilege exists:
  - Would the communication have been made or the document prepared even if the suggested dominant purpose had not existed?
    - If the answer is "yes" the test is not satisfied.
    - If the answer is "no" the test will be satisfied notwithstanding that some ancillary use or purpose was also contemplated.

### Elements of privilege

Some key elements of privilege are that:

- it applies to both communications and documents (i.e. "record of information").
- subject to one exception regarding unrepresented parties, privilege requires a lawyer-client relationship.
- the communication must be confidential within the context of the lawyer-client relationship. Communications made in public will usually undermine a claim to confidentiality – as does a communication with a person opposed to the client's interest (subject, of course, to "without prejudice" privilege).

## Loss and waiver of privilege

### *Under the Evidence Act*

The Evidence Act sets out some of the circumstances in which legal professional privilege will be lost or waived:

- where, if the evidence in question is not cited in court, it could reasonably be expected that the court would be prevented from enforcing an order of an Australian court (see s. 121). i.e. where the evidence relates to the location of a child taken in breach of a custody order.
- where the client or party has acted in a way that is inconsistent with the client or party objecting to the evidence being used in court. (see s. 122(2)).
- without limiting s. 122(2), s.122(3) adds that a client or party will be taken to have acted in such a way if:
  - he/she "knowingly and voluntarily disclosed the substance of the evidence to another person"; or
  - the "substance of the evidence has been disclosed with the express or implied consent of the client or party"; or
  - where a related document or communication "is reasonably necessary to enable a proper understanding" of the source, or original, communication or document (see s.126).
- privilege is lost where the client expressly or impliedly consents to the evidence being used in court (see s. 122(1) in determining whether there has been express or implied consent.)
- common law concepts still apply.

### *Common law waiver*

Common law is the law that has developed over time and is found in the precedent of previous judgements.

At common law, waiver may occur through implied or imputed waiver.

According to the High Court in *Mann v Carnell* (1999) 201 CLR 1, the relevant test is whether a client's conduct is inconsistent with the protecting the confidentiality.

The common law also incorporates the concept of fairness. This is not included in the Evidence Act, but for deliberate waivers (whether intentional or not), the concept of fairness may be relevant.

### *In practice:*

The following suggestions are useful to remember:

- Clients should avoid stating that they have 'obtained legal advice which says ...' or my lawyer says 'I have a good case'.
- 'Less is often more' in writing letters and statements . Clients often add detail or discussion, which they see as adding truthfulness or explanations but in doing so they often make admissions or accidentally waive privilege. Put aside and review, edit and, if in any doubt, check with your legal advisor.
- Avoid references to advice given or related privileged documents when corresponding with other parties.

- Keep separate and secure from other documents, any advice you provide or any potentially privileged documents.
- As an advocate it is possible for you to waive privilege, provided you have actual or apparent authority.
- If you waive privilege without authority, it could result in a claim in negligence against you.
- Be careful during discovery or when responding to a subpoena – be sure to claim privilege over relevant documents, as a failure to do so may result in waiver.
- Be careful with email – it can easily be forwarded and lose privilege.
- Avoid putting the substance of advice in issue.
- Consider risk management techniques.

### 3. Legal Professional Privilege (NSW): Illustrative Cases

A number of cases have considered whether privilege is lost where there is a voluntary disclosure of the 'gist' or 'bottom line' of legal advice, even if a client does not intend to waive privilege.

#### ***Bennett v CEO of Australian Customs Service* [2004] FCAFC 237**

In this case a client had disclosed the conclusions, but not the reasoning of legal advice. This was in order to emphasise the strength of its position and force settlement. The Court found that revealing the substance or effect of legal advice for forensic or commercial purposes is inconsistent with the privilege between client and solicitor. Further, to seek to maintain it would have been "inconsistent and unfair".

#### ***Switchcorp Pty Ltd v Multimedia Ltd* [2005] VSC 425**

In this case a company had released a statement to the ASX regarding litigation stating: "The Board's lawyers have been instructed to vigorously defend the claim and have advised that the plaintiff's claim will not succeed." As it was a clear and deliberate disclosure of the "gist" of the advice, and "to the world at large", privilege was waived.

#### ***Nine Films and Television Pty Ltd v Ninox Television Ltd* [2005] FCA 356**

In an intellectual property case concerning "The Block", one of the parties stated to the media: 'We've engaged Stuart Littlemore QC and he has reviewed everything in great detail and we're moving forward based on his recommendations.' This was the common practice at the time - stating that advice exists, not stating what it is, but then saying the company holds a particular opinion, i.e. that the action will not succeed. The Court found this wasn't a waiver, but noted that if there was a clear link between the statement and subsequent action taken, it could be argued there had been.

#### ***Rich v Harrington* [2007] FCA 1987**

The following statement was made by lawyers for a company involved in a sexual harassment dispute: '... as to complaints made ... our client has acted at all times with the benefit of external advice and does not believe there has been any victimisation or other conduct for which compensation could properly be sought.'

The Court found that, implicit in pointing to the external legal advice, was the claim that it supported the conduct of the company. As the gist of the external advice had therefore been disclosed, privilege was waived.

***Osland v Secretary of the Department of Justice [2008] HCA 37***

After she was convicted of the murder of her husband, Osland petitioned the Victorian Attorney-General for mercy. This was not granted. In a press release the Attorney General stated that he had reached a decision after carefully considering the recommendations in advice from three Senior Counsel. Osland applied for access to, amongst other things, the advice. The Department of Justice refused on the grounds of LPP.

The High Court held this was not a waiver of legal professional privilege. It found the press release was not inconsistent with the maintenance of confidentiality. The Attorney General had sought to give as much information about the decision making process as possible, without giving full reasons for the decision. However, Osland was nonetheless granted access to the documents on a different basis - that powerful reasons existed for making the conclusions of the advice available to the public.

#### 4. Legal Professional Privilege (NSW): Hypothetical Scenarios to Consider

John is involved with an activist group about environmental and health risks arising from particular industry activities. In seeking legal advice about what options they might have to challenge a particular development, his group attempts to get formal reports from relevant experts about the impact of the industry activities. The initial report comes back not in favour of the points the group is advocating. They seek a report from someone they consider more alert to the costs to the environment and local population. At the end of a media interview, John has a casual chat with the interviewer not realising the microphone is still on. He mentions that they have been delayed because the earlier report was not as favourable to their position as they wanted. The interviewer runs the comment.

The original report was privileged as it was obtained for the purposes of the legal advice. However in speaking of it publicly he has potentially waived the privilege, thus allowing the other side to require its production in any proceedings and being able to use it against the group's claim.

Kate is about to file proceedings in a case, which she believes will be important to establish unfair practices by a large corporation. She and the client give a press conference. At the press conference, the client states that their barrister's advice says that they have a good chance of winning.

Organisations/individuals often state in the media that legal advice exists, without saying what that advice is. This is followed by a comment that the entity holds an opinion, such as that the action against the company will be successful. This however may lead to privilege being waived. An entity can refer to the existence of the legal advice, but not the substance or conclusion of the advice. Similarly, where the existence of legal advice is used to emphasise the strength of a case, there may be a waiver of privilege.

## Speaking Personally

### 1. Speaking Personally: Checklist

In situations where an organisation or its clients are involved in public comment in the context of conflict, legal proceedings or the potential for legal proceedings, then there are legal consequences and practical risks. There may be a good legal argument and an important issue of public interest, but the media may choose to dig up other information about an organisation or client, or choose to take a contrary position. The increased public exposure of a person can also be overwhelming or may provide opportunity for other unconnected harassment.

An organisation may itself be involved in being the subject of the media contact, being the client of legal advice or be a legal service providing legal advice. Put the organisation in the position of the client and advise them appropriately. Think carefully about what is likely to arise in any media contact or interview.

The client, be it an organisation or a client of the organisation's services intending to make media or public comment, should be advised of the legal, practical and other risks in doing so. In these circumstances a checklist such as the one below may be useful.

#### The client needs to be aware of the legal risks involved in communicating with the media

- Waiving the right to legal professional privilege**
  - A client loses the protection of privilege where they expressly or impliedly waive that right.
  - A client who acts in a manner inconsistent with non-disclosure waives their privilege.
  - A client should be careful about referring to legal advice, identifying their legal advisor, revealing the contents of legal advice, disclosing information in order to disadvantage another party, providing any documents to the media and otherwise disclosing any evidence.
  - If the client waives their right to privilege, confidential communications between the client and their lawyer may be disclosed in court and other forums. This may disadvantage the client.
- Breaching a suppression order or non-publication order, sub judice contempt of court or publishing the contents of affidavit or discovered materials not yet in evidence.**
  - The client should be informed what information is likely to arise in interviews but must not be disclosed under any relevant order, law or rule of court and how to avoid doing so.
  - The client should be aware of the legal and practical consequence of breaching an order. Contravening an order is an offence that may attract a fine, imprisonment or prosecution for contempt of court.
  - For more information see *Court Suppression and Non-Publication Orders Act 2010* (NSW). See also s 72 *Civil Procedure Act 2005*, s 62 *Criminal Assets Recovery Act 1990*, ss 292 and 302 *Criminal Procedure Act 1986*.
- Making admissions**
  - A client should not make any admissions to the media.
  - Consider carefully how to avoid making any overt admissions, or saying or doing anything that may be construed as an admission and making any false statements about innocence or guilt.

- Explain to the client the consequences of making an express or implied admission. This evidence may be used against them in court.

**Identifying children involved in proceedings**

- It is generally prohibited to identify children less than 18 years old who are involved in legal proceedings.
- Avoid naming, or revealing any information that could otherwise identify a child involved in legal proceedings, or an adult involved in legal proceedings relating to events, which occurred when they were children.
- The consequence of identifying a child involved in legal proceedings is an offence that may attract a fine or imprisonment.

## Warn the client of any practical issues associated with media coverage

**Media coverage may attract negative attention:**

- If you inadvertently make an error in communicating with the media, this may damage your reputation and credibility.
- If your story is not likely to garner public sympathy, you should refrain from public comment.
- The media may present you in a negative light.

**You may jeopardise your privacy:**

- You may be constantly scrutinised and / or hounded by the media, if the case is of particular public or popular interest.

**You will lose control over the story:**

- The media might edit an interview with you, or take quotes out of context. You should prepare yourself for this.

**Delaying proceedings**

- A court may delay proceedings where pre-trial publicity jeopardises a fair trial.



## PART III: HOW-TO GUIDES

### How-to Guides

#### 1. How-to Guides: Dealing with the Media<sup>22</sup>

##### Communicating strategically

An organisation works best when it is able to communicate its most important messages to the community. This is achieved through the use of a concise series of phrases that can be repeated in any public comment and advertising relating to the organisation. Over time these will become identifiable with the organisation. It is important not to use technical words or professional or industry jargon, as the general public needs to be able to easily understand the communication.

Having a clear statement about the central aim of the organisation and its values need to be part of the organisations communication to make the organisation and it relevance identifiable. For example, an organisation may have as its central theme, the provision of free legal advice to disadvantaged people. It may have as a secondary theme, the desire to educate people about their rights and responsibilities within the law.

##### Who is your target audience?

In engaging with the media, an organisation should first identify its target audience. This is done so that media interaction can be specific and therefore more effective. A target audience may not just be the particular clients that an organisation represents. It could also include other key figures that may be central to issues such as obtaining funding or gaining government approval. In choosing the type of media to communicate this message, an organisation needs to keep in mind that different sectors of society use the media for different purposes, based on interest, access and skill.

An organisation should utilise the type of media their target audience both trusts and prefers to use, or else utilise a broad range of strategies if there is not one preferred method. Some community members may only use hard copy forms of the media, such as broadsheet newspapers and have no access to online sources. Others may rely entirely on social media, trusting it in place of more traditional media forms.

##### What is the purpose of the communication?

An organisation should then identify the purpose for which they want to reach their target audience. This is most commonly to attract clients, provide advice, disseminate information, raise awareness about issues, stimulate discussion, and persuade so as to influence decisions, change, and outcomes.

##### What variations of media should I use?

Generally speaking, broadsheets such as the *Sydney Morning Herald* tend to attract academics, intellectuals, and the politically inclined. Therefore issues directed to those groups such as political debates, policy change, and funding issues might be best directed to newspapers. It is also a medium that the public trusts. Therefore, more serious issues might be addressed through this medium.

Radio is perhaps the most broadly reaching media, because of its low cost and ability to reach a wide audience. With its interactive quality, particularly on talkback radio stations, using this form of media

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<sup>22</sup> This section has been comprised in part using: Kampen, J., 'Dealing with the Media: A Practical Guide' (EC/UNFPA Initiative for Reproductive Health in Asia) <[http://ec.europa.eu/research/water-initiative/pdf/iwrm\\_scicom/b/bI\\_en.pdf](http://ec.europa.eu/research/water-initiative/pdf/iwrm_scicom/b/bI_en.pdf)>; World Health Communication Associates (WHCA), 'Working With The Media' (WHCA Action Guide) <[http://www.mediawise.org.uk/www.mediawise.org.uk/display\\_pageb3ec.html?id=86](http://www.mediawise.org.uk/www.mediawise.org.uk/display_pageb3ec.html?id=86)>

raises discussion in the community about current issues. As a different medium, television can be used for informative purposes through news programs, panel debates, and current affairs programming.

In all of these forms, both the local and national media should be utilised. In terms of organisations, national media is more useful in bringing to light issues relating to funding and larger policy concerns. In contrast, local media is useful in highlighting the work of the organisation to the community and advertising for clients. However, both the national and the local media outlets tend to be interconnected.

## How do I deal with a controversy?

Where the organisation is involved in controversial work (for example, relating to divorce or child custody), it is important to control the direction of discussion relating to this work. The organisation should publically acknowledge the actions of the centre, and invite a response from the public. There should be a plan about how to deal with difficult questions that may be raised in that response. Strategic actions, such as publishing an interview in the newspaper, on the radio, or on TV would be beneficial. It is important not to downplay or deny the organisation's involvement in an issue.

## How should I manage media contacts?

It is important for organisations to develop and maintain a good working relationship with the media generally and with particular journalists. Suggestions for dealing with the media include providing concise, quality information when necessary, and developing a factsheet that highlights the most important issues.

To aid interaction with the media, organisations should answer media enquiries immediately. This is because journalists tend to have tight deadlines and if those are not met, the story will be dropped. In this way, responding promptly to media enquiries is essential to ensure that journalists contact the centre when a relevant issue arises. Frame your issues in a way that will convince the editor that the story is important. For example, try linking the story to an ongoing public debate or high profile issue.

In terms of communication, an organisation should always be direct and honest in their dealings with the media, explain them thoroughly and avoid assuming prior knowledge. Journalists deal with multiple issues and may not have an intimate understanding of the specialist area of the organisation's work. Therefore, it is best not to assume anything and to avoid the use of professional jargon and acronyms.

## Press releases

A press release needs to inform, but also catch the interest of the media. For this reason, they must be brief, relevant and comprehensive. Some different types of press releases are:

- **Advisory or Calling Notices** forewarn the media of an important upcoming event and should be followed up with a more detailed news release.
- **News Releases** provide basic information (who, what, why, when, where) about an event.
- **Photo-Calls** announce and provide basic details about an upcoming photo opportunity associated with a story. This information could also be included in a calling notice or news release.
- **Press Statements** give the organisation's immediate response to a recent news event or announcement. This is the appropriate medium for contributing to public debate by outlining the centre's stance on particular issues. Provide evidence to support the point of view expressed.
- **Press Briefings** are more substantial documents providing background information on an issue or event. They are designed to help the journalist understand and contextualise the event and explain it to the public.

- **Embargoed Press Releases** are issued well in advance of the official publication of a report or launch of a campaign. They are designed to allow journalists to conduct research and prepare their coverage before the actual event. Always specify the exact date and time at which the embargo ends.

## 2. How-to Guides: Practical Guidelines for Media Interaction<sup>23</sup>

### Media interviews

Before agreeing to participate in an interview, determine:

- What is the purpose of the interview?
- Who else are they planning to interview?
- Who is their anticipated audience?

In preparing your materials:

- Take a moment to reflect. If it is a phone interview, suggest returning their call, but do so promptly.
- Check your facts, figures and source material.
- Write down two or three key points you want to make. Use every opportunity to express these points, in different ways, throughout the interview.
- Think of brief anecdotes, preferably based on your own experience, that illustrate the points you wish to make. 'Human interest' stories stick in people's minds.

Negotiate the scope of the interview before it starts:

- Agree on what topics will be covered.
- Explain the message you want to get across.
- Ask what the first question will be.
- Arrange for the interview to take place in an appropriate environment.
  - The location should be private, quiet, and comfortable.
  - Avoid any unnecessary interruptions or distractions.
  - Include visual cues such as campaign posters.

### Pre-recorded interviews

- Don't be afraid to ask for a chance to repeat your response, especially if you made a mistake.
- Avoid one-word answers.
- Include the question in your answer, to allow for easy editing and quoting.
  - E.g. if the interviewer asks 'how many cases do you take on each year?' don't just say 'a few hundred', but instead say 'we normally take on a few hundred cases each year.'

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<sup>23</sup> This section has been comprised in part using: Kampen, J., 'Dealing with the Media: A Practical Guide' (EC/UNFPA Initiative for Reproductive Health in Asia) <[http://ec.europa.eu/research/water-initiative/pdf/iwrm\\_scicom/b/bl\\_en.pdf](http://ec.europa.eu/research/water-initiative/pdf/iwrm_scicom/b/bl_en.pdf)>; World Health Communication Associates (WHCA), 'Working With The Media' (WHCA Action Guide) <[http://www.mediawise.org.uk/www.mediawise.org.uk/display\\_pageb3ec.html?id=86](http://www.mediawise.org.uk/www.mediawise.org.uk/display_pageb3ec.html?id=86)>

### **Radio broadcast interviews**

- Be friendly in your replies – you are trying to engage with the listeners, not lecture them.
- Keep your message simple and try not to confuse the listeners, who may know little or nothing about the topic of discussion.
- Avoid jargon and abbreviations.
- Do not talk too quickly.
- Do not speak for too long in response to one question. Try to keep answers below two minutes each.
- Don't be afraid to acknowledge that you do not know the answer.
- Don't be afraid to correct your own mistakes.
- If the interviewer gets something wrong, correct them politely.
- If the program goes well, contact the organisation to provide positive feedback.
- If you have genuine grievances about the finished product, tell the broadcaster about those complaints in a rational manner.

### **TV interviews**

- Smart casual is the best dress code.
- If you need to have documents with you, don't fiddle with them.
- Have a pen and notepad handy to jot down notes.
- If visual aids (such as charts or pictures) form part of your communication, let the producer know in advance so that they can arrange to display them properly.
- Interact with the interviewer and / or other studio guests. Do not watch the monitors.
- Do not 'lose your cool'.
- If there is a studio audience, acknowledge them appropriately.

### **Phone-ins**

- If you have advance notice that an interactive broadcast will provide an opportunity to get your message across, or that might deal with issues relevant to the organisation or its work, prepare yourself to take part. Inform other relevant organisations and suggest that they also contribute to the discussion.
- If you are invited on as a guest, remember that the callers are the important people – let them have their say, and be respectful in how you respond to them.

### 3. How-to Guides: Media Release kit<sup>24</sup>

A press release needs to inform, but also grab the interest of the media. They should be brief, relevant, and comprehensive.

#### Writing a press release

- Use headed notepaper.
- Make sure it incorporates all the organisations's contact details including address, telephone, fax, e-mail and website details.
- Make sure it is recognisable as an organisation's publication: incorporate the logo.
- Use neat, easy to read formatting.
- Design the release so that it can be distributed by e-mail or in hard copy.
- Include the date of issue, a reference code, and the name or title of its intended recipient.
- Give it a short, simple headline that catches attention and try to include all the information in a single page.
- Try to answer the essential questions in the first paragraph – Who? What? When? Where? Why?
- In the rest of the release, provide more detailed information that explains the significance of the subject matter. A footnote with 'notes for the editor' is a good way of adding background details or references.
- Include a 'quotable quote' that contains your key message, with the name and status of the speaker.
- Always give a contact name and telephone number.
- If you can provide journalists with images to illustrate the message of the story, mention this in a short footnote and suggest a time and place for a photo opportunity.
- If you want to communicate with a local audience, use the local media.
- Write the press release so that your intended audience will understand it. Only send highly technical material to specialist publications that will understand its significance.

#### Things to avoid when writing a press release

- Assuming the reader already knows about your concerns.
- Obscuring your key message by indulging in complex or figurative prose or irrelevant details.
- Using double-sided printing – the second page may be overlooked.
- Using repetition, clichés, jargon, acronyms or abbreviations.
- Exaggerating or making claims you cannot prove.
- Including defamatory, misleading or contemptuous statements.

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<sup>24</sup> This section has been comprised in part using: Sane Australia, 'Working with the media: How to write a media release' <<http://www.sane.org/sane-media/mental-health-sector/working-with-the-media>>.

- Including any confidential information.
- Sending anything out until a colleague has proof read the text.
- Ignoring media interest generated by your press release –you have sought their attention so return their calls promptly.
- Using irony – it may be misinterpreted.
- Assuming your press release has been received or read. Follow it up with a phone call to the appropriate person at the organisation in which you are most interested.

## 4. How-to Guides: Pro-forma Media Release

### **Media Release**

[Our Ref No.]

[Recipient. E.g. 'For general release']

[Date / Date embargo lifts]

**[Headline / Key Message. Maximum of one or two lines. Grab the reader's attention. Appropriate format: title case. E.g. 'High cost of pay-day lending for the poor']**

[Synopsis. Briefly summarise the press release.]

[Lead paragraph. Incorporate the most important information in the first paragraph. Answer all the essential questions – Who? What? When? Where? Why?]

[Text body. In the remainder of the media release, expound on the information introduced in the lead paragraph. If possible, incorporate at least one 'quotable quote' that captures your key message. Use simple, pithy sentences and short paragraphs.]

[Final paragraph. Restate your key points. Summarise the significance of the subject matter.]

### **[Contact Details:**

Primary Contact Person: Name, Position (e.g. 'employee') – Tel: Office and / or Mobile, Email:

Alternate Contact Person: Name, Position – Tel: Office and / or Mobile, Email:

This [report] is available from [date] on [website details]

**NB:** Up to this point, the media release should be no more than 1 page long.



Background to [Subject Matter eg High cost of pay-day loans]

**[Heading. Format: title case. E.g. '[name of report] – summary of key findings']**

In this part of the media release provide background information which contextualises and / or expands on issues discussed in the main body of text.

## 5. How-to Guides: Event Risk Management Checklist

### Think about the following well in advance of the event

- What is the aim of the event?
- What is the message you are trying to get across?
- Who is the target audience?
- What media if any is needed?
- What is the timeframe for organising and preparing for the event?
- What resources will be needed to hold the event?
- What implications do the above factors have for who is invited and where the event takes place?

### Key preparatory tasks

*If launching a publication:*

- Prepare the final version of the document: draft, edit, check, proof read, determine layout, print, note delivery time, proof read printing.
- Prepare a web version and upload to website.

### Organisation

- Appropriate venue*
  - Ensure the venue has adequate accessibility – consider public transport, persons with disabilities, parking.
  - Ensure the venue has the capacity to cater for the number of people anticipated.
  - Assess the cost.
  - Book the venue well in advance and confirm the booking closer to the event date.
- Guest speakers*
  - Invite appropriate persons to speak or make a presentation.
  - Confirm the topics they will cover and what their main message will be, to avoid overlap and / or embarrassment.
  - Confirm their attendance closer to the event date.
  - Ask the speakers to provide a written version of their address. If you anticipate publishing the text of the address, first obtain the express consent of the speaker.
  - Arrange flowers and / or small gifts for the speakers, to be presented on the day.
- Chairperson*
  - Arrange for somebody to chair / preside over the event.
  - This person should be a good public speaker and familiar with the topic and the other speakers.

*Guests*

- Compile an invitation list.
- Design and print invitations.
- Send out invitations once you know the key details (theme, time, place, keynote speakers).
- Follow up RSVPs.
- Prepare nametags and place settings.

*Catering*

- Determine whether you just require refreshments or more substantial catering.
- Find an appropriate catering company and place an order for food, drinks and utensils if necessary.
- Consider: number of attendees, culturally appropriate food, allergy-friendly food, and vegetarian options.

*Program*

- Determine the order of events on the day.
- Allocate set time slots to particular speakers and/or activities.
- Draft and print copies of the program. Make sure there is at least one per guest.

*Resources*

- Compile a list of the equipment you require, Consider: microphone, lectern, projector, audio and visual recording equipment, tables and chairs.
- Allocate set time slots to particular speakers and/or activities.
- Draft and print copies of the program. Make sure there is at least one per guest.

## Media engagement

*Prepare a media release providing all the essential details of the event (time, date, theme, key speakers).*

*Access*

- Hold the event at a venue that is accessible and easy to locate.
- Ensure that your key speakers will be available to participate in interviews and / or photo opportunities before or after the event.
- If possible, arrange a separate room where private interviews can take place.

## On the day

*Have copies of all key materials available:*

- Consider: media releases, reports, leaflets, stickers etc.

- Test all technical equipment before the event starts.*
  
- Make sure you have enough people to staff the event:*
  - You will need people to arrange seating, set out materials, lay out nametags and place cards, greet speakers and guests, liaise with the media and register attendees.
  
- Make sure the speakers' platform is properly arranged:*
  - All speakers need access to water.
  - Ensure that any branding (such as a poster with the organisation's insignia or a key message or slogan) is positioned so as to appear in any photograph or video of the event.

## 6. How-to Guides: Social Media – Facebook and Twitter<sup>25</sup>

### Social media

The following is a brief overview of Facebook and Twitter, the two social media forums that will most likely be utilised by organisations. This section may provide some practical information in the instance that organisations may wish to use social media for community discussion and promotion.

### Facebook

#### *What is a Facebook page?*

Facebook is a social networking website with over 600 million users. An official representative of an organisation or group can create an associated Facebook page. A Facebook page is a public profile through which an organisation, group, individual or other identity can maintain contact with individual Facebook users. The page consists of content posted by the particular page's administrators, who usually come from within the organisation or group itself, or are outsourced on behalf of the group. The page serves as a method for advertising the identity of the organisation, disseminating information, and providing a forum for discussion related to the identity.

Facebook users can "like" or become "fans" of the page, follow "news feeds" of information, mark that they like or dislike the content and suggest the page to other persons they are Facebook friends with. A Facebook page differs from normal Facebook user profiles in that they have an advertising aspect.

When the page is "private", it is restricted to people associated with, or known to, the organisation. Otherwise an unlimited number of users can become fans of the page, which is then advertised on their own user profile. This can prompt other users to similarly support the page if the blurb interests them.

If a page is not private, users can support a page without confirmation or authorisation from the administrators. Certain fans may be deleted if they create controversy on the page or make obscene comments. In this sense, the page is somewhat administered. Finally, a page administrator can message all their fans simultaneously, which offers ease of communication and dissemination of information to those interested.

#### *How do I add and remove administrators?*

Only page administrators are able to manage and control the page. Administrators can post notices, create events, update the page information, post photos, and participate in discussions. Administrators are also able to delete inappropriate posts and ban unwanted members. Administrators also have exclusive access to the page's 'insights': details about the popularity of the page.

It would be desirable for an organisation to have more than one administrator in case the person responsible for administering the page resigns or is otherwise unable to perform this role.

#### *How do I administer the page and deal with inappropriate comments?*

Administrators can delete anything written on the wall of the page by clicking 'delete' on any wall post. The wall is on the front page and acts as a public forum where comments and links to content can be added by both the administrator and any other users. The administrator may also permanently block any user who repeatedly writes inappropriate or offensive comments on your wall.

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<sup>25</sup> This section has been comprised in part using: Facebook, 'Facebook Pages: The Insider's Guide', April 2008.

<[http://www.facebook.com/note.php?note\\_id=12261944821](http://www.facebook.com/note.php?note_id=12261944821)>;

Tommasi, M., 'Promote your business on Facebook using RSS'

<<http://thesocialmediaguide.com.au/2011/02/20/promote-your-business-on-facebook-using-rss/>>.

Furthermore, if the user has violated Facebook's terms of use by writing something obscene, racist or offensive, people can report the user by clicking 'report.' An organisation will need to develop a comprehensive policy on monitoring the Facebook page. In doing so, they will need to consider the following matters.

### ***How do I monitor the page?***

How often will the page be monitored? The regularity with which the organisation monitors the page may change as the page becomes increasingly active. Initially, when the page has few users, it may only be necessary to monitor the content weekly. If the page becomes very active, with users posting content daily, it may be necessary to monitor that content daily, so as to avoid any embarrassment, offence or liability.

Who will be responsible for monitoring contributions from the public? The page may have more than one administrator. That is, there may be more than one person responsible for uploading content and interacting with other users. All, or some of these administrators, may take responsibility for monitoring content posted by other users. The organisation should determine whether all administrators should remove inappropriate content on an ad hoc basis or whether to delegate this responsibility to one particular administrator.

### ***How do I ban content or users?***

What content will and will not be tolerated? The organisation will need to strike a balance between allowing constructive debate, and removing offensive or inappropriate content. It may be appropriate to remove all content that is purely promotional, irrelevant, discriminatory, defamatory, disrespectful of someone's privacy, false, misleading, or that encourages aggression or infringes copyright laws.

It may not be necessary to remove content that is: a legitimate personal opinion, controversial, contrary to or critical of the organisation's views or values, provocative, or otherwise part of a constructive debate. The organisation also needs to determine how it will respond to unacceptable contributions. For example, a comment might be edited to remove an offensive section or may be removed altogether. Editing other people's comments may provoke anger if the final version misrepresents the person's views.

When will the organisation ban a user? Administrators have the power to block particular users. The organisation should determine what conduct will attract this penalty. For example, is one instance of offensive conduct sufficient reason to block a user? Alternatively, should the organisation only block users who engage in repeated and sustained offensive conduct?

### ***Acceptable use policy***

Should the organisation's page include an 'acceptable use policy'? If so, what should be its terms? Some organisations include an 'acceptable use policy' on their Facebook page so that potential users understand the basis on which they may contribute content to the page. Such a policy informs prospective users of the basis on which they may contribute to the page, reduces the instances of inappropriate contributions and minimises the need to remove content. The organisation needs to determine whether to incorporate a long or a short policy. A comprehensive policy is more informative but may discourage users. A summary policy is less intimidating, but provides less guidance. At a minimum, the policy should reveal: the purpose of the page, what contributions are encouraged, what contributions are discouraged, and what action will be taken if unacceptable content is published.

### ***Examples of acceptable use policies from organisations using Facebook***

The Green Bay Area Public School District:

*The Green Bay Area Public School District East High School Fan page is meant to share information and encourage conversation. We would love nothing more than for you to share your memories, celebrations, and school experiences via comments, photos, videos, and links here. Please keep in mind that we are a school district, and students and staff have access to this information. With that in mind, we review content posted here and will remove anything inappropriate, offensive, not*

*pertaining directly to the district or beneficial to student learning.*

Australia's Business.gov.au:

*Business.gov.au welcomes comments on this Page. Please apply common sense when making comments. If it is something that you would not say or show it at work or school, then we recommend you don't post it on this Page. Comments, links, photos and videos deemed inappropriate will be deleted. We are committed to maintaining your privacy and ask that you respect the privacy of others when posting on our Facebook Page. Inflammatory, defamatory, commercial, spam, overtly party political and comments encouraging activities illegal in Australia or that are detected as transgressing copyright or intellectual property laws will be deleted.*

However, some acceptable use policies provide more detailed guidance about what comprises appropriate use.

The Australian Human Right's Commission Facebook Page:

*The intent of the Australian Human Rights Commission's Acceptable Use Policy is to create a positive space where people are able to publicly contribute their views to this page, without fear of abuse, harassment or exposure to offensive or inappropriate content.*

*When contributing your views, please ensure that you:*

- Protect your personal privacy and that of others by not including personal information about yourself or about others in your posts, (such as names, email addresses, private addresses, phone numbers or other identifying information).*
- Represent your own views and not impersonate or falsely represent any other person.*
- Do not abuse, harass or threaten others.*
- Do not post anything which: racially or religiously vilifies others, incites, induces, aids, assists, promotes, causes, instructs or permits violence, discrimination, harassment, victimisation or hatred towards others, or is likely to offend, insult, humiliate or intimidate others, particularly on the basis of their sex, gender identity, race, colour, descent, national origin, religion, ethnicity, age, sexuality or any disability.*
- Do not make defamatory or libellous comments.*
- Do not use insulting, provocative, hateful, obscene or offensive language.*
- Do not post material that infringes the intellectual property rights of others.*
- Do not post multiple versions of the same view.*
- Do not promote commercial interests in your posts.*

*Posts that do not comply (or do not appear to comply) with the above points will be moderated or may be removed. Posts may be edited by the moderator for length or to remove unacceptable parts of contributions.*

## **Benefits**

An organisation needs to determine the purpose of the Facebook page. In particular, the organisation should decide how the page complements the overall media strategy, what the target audience is, and what type of communications the organisation wants to focus on. This will allow the organisation to post the right information on the page and deter administrators from posting irrelevant or excessive information. This is important because if updates are too numerous, users become annoyed and abandon the page.

## **Functionality**

It is important to regularly update content on the page to maintain interest. It is equally important to publish diverse content. Administrators should use wall posts and status updates to regularly communicate interesting or important information to users. However, administrators should not just post text-heavy content.

For example, the page should incorporate photos, which should be updated regularly. Vibrant, candid photos provide interest and communicate the human element of the organisation: employees, special events, the community etc. Administrators should have the consent of all persons in a photo they want to post.

Administrators should use the 'events' function to inform users about upcoming events in which the organisation is involved. Fans, in turn, can RSVP to the event and share the details with their friends. The organisation might also make use of the 'notes' function, which is a Facebook blog. This feature is useful for informing users about recent press mentions, awards or new programs being launched.

## **Tone**

Facebook is an informal medium. Administrators should use more casual language than that used on the official websites of the respective organisations.

## **Interaction**

If an organisation is going to have a Facebook page, it is important to interact with users who have demonstrated an interest in the organisation, otherwise they will lose interest and the page will become redundant. This may be done by posting comments to the "walls" of other organisations, commenting on their status updates and any content (photos/links/videos) they have posted. Administrators should respond to substantial contributions as often as possible. If resources do not permit regular interaction then the page should clearly state how often users could expect a response.

## **Twitter**

### **Overview**

Twitter is a social networking and micro-blogging website. Millions of entities, ranging from people, to groups, organisations, and businesses use it to discover and share new information. Twitter users can read, write and share messages of up to 140 characters in length and these messages are displayed and recorded on the user's profile page.

Tweets are public and available to anyone interested in them by default; however, senders can restrict message delivery to just their followers. Users may subscribe to other users' messages by following their account. Followers receive every message in their timeline; a feed of all the accounts they subscribe to.

### **Using a Twitter account**

Account holders can communicate with other users in a number of ways. Firstly, users can 'mention' other accounts in their own tweets. Secondly, users can 're-tweet' other user's comments, forwarding them to their own followers. Thirdly, users can send a 'direct message' to a follower. Finally, users can join or establish a conversation thread by using a 'HashTag', which denotes the theme of the tweet.

### **Benefit to organisations**

An organisation can use Twitter to share information such as news or event details, provide commentary about particular issues, and build relationships with other individuals and organisations. The organisation may also use Twitter to follow conversations directly or indirectly related to the organisation.



## ***Advantages and disadvantages***

Twitter is simple, streamlined, and straightforward. These features both contribute to and detract from Twitter's usability.

### ***Ease of use***

Tweets are restricted to 140 characters, which means that Tweets are easy to read and quick to write. In addition, there is no temptation to provide excessive information or irrelevant details. However, Twitter's simplicity also prevents people from gaining a detailed understanding of the organisation. For this reason, other media should complement a Twitter account.

### ***Twitter is an open forum***

You can follow anyone on Twitter and anyone can follow you. There is no filter process for accepting followers, although it is possible to block particular followers. This feature allows you to passively accumulate followers.

### ***You cannot control or edit what other users say about you***

Once an organisation creates a Twitter account, followers and/or complete strangers may discuss and comment on the organisation. Unlike Facebook, it is not within the power of the organisation's administrator to edit or delete these comments. However, it is possible to monitor comments relating to the organisation.

### ***Preliminary issues***

Before creating a Twitter account, an organisation will need to resolve some preliminary administrative and substantive issues, including:

#### ***Administrative control***

There may be only one person responsible for the organisation's Twitter account. Centralising this role will ensure the account is streamlined, tightly controlled and avoid any repetition. However, to fully utilise the account, it would be necessary for other staff and volunteers of the organisation to tell the Twitter administrator about relevant news or events in their area of practice – this will necessarily result in delay, undermining the 'real time' advantage of Twitter. Alternately, each staff member may be responsible for using the organisation's Twitter account to discuss his or her particular area of practice.

#### ***Public profile***

- The organisation needs to establish a unique voice to represent itself on Twitter. To this end, they need to define the appropriate scope of Twitter communications.
- The organisation might provide information about upcoming events, new legal education programs, important decisions in courts or tribunals, new publications, recent changes to the law etc.
- The organisation might also use the account to encourage debate by asking relevant, open-ended questions.
- The organisation could use the account to demonstrate leadership and expertise in its sector. For example, messages could include reference to articles and links about broader academic, scientific and community matters relevant to the work of the organisation.
- The organisation should also determine whether the account would communicate information alone or whether it will also be used to provide comment, opinion and analysis.

### ***Following and followers***

The organisation should identify and “follow” other Twitter users in the community sector and legal community. By following such users, the organisation will increase its profile on Twitter and establish deeper and broader relationships with other users.

The organisation might consider following these users for example:

- PIACnews (PIAC)
- LawyersWeekly (Lawyers Weekly)
- Rightsagenda (HRLRC)
- Redfern Legal Centre (RLC\_CEO)
- Environmental Defender’s Office (EDONSW)
- Human Rights Watch (hrw)
- Tenants Union of NSW (TUNSW)

### ***Customising the account***

The account should easily identify organisation’s purpose, such as being that of providing legal service. This will allow the organisation to establish connections with associated organisations and encourage interested users to follow the organisation’s account.

To this end, the organisation’s profile should briefly describe the organisation, the purpose of the account and incorporate a link to the organisation’s website. The background should incorporate an image, such as the logo, which effectively represents the organisation.

For example, the PIAC biography reads: ‘News from the Public Interest Advocacy Centre (PIAC), a non-profit law and policy organisation that works for a fair and democratic society ... <http://www.piac.asn.au>.’

### ***Engage with your audience***

The organisation should post relevant and interesting messages as often as possible in order to engage existing followers and attract new followers. Twitter is about information sharing. Therefore, users will likely comment on and ask questions about material shared by the entity. The organisation should attempt to respond promptly to all considered communications.

### ***Utilise HashTags***

HashTags allow users to contribute to and follow conversations across various accounts. The organisation should utilise relevant HashTags to contribute to broader topics of debate and establish a presence in the Twitter community.

### ***Blogs***

- A place on your website or a free blog host (like [www.blogger.com](http://www.blogger.com), [www.blogspot.com](http://www.blogspot.com), [wordpress.com](http://wordpress.com)) where you put longer stories.
- More like opinion pieces, with photos and links to other news articles / websites.
- Blog software organises it into a timeline with archives.
- Can become part of a blog link or circle so people can browse blogs on similar topics.
- Can allow public to leave comments.

- Examples in the legal world are 'The Brown Couch' by Tenants' Union NSW ([tunswblog.blogspot.com](http://tunswblog.blogspot.com)) or ALRC (links to various Blogs at [www.alrc.gov.au/talk-us](http://www.alrc.gov.au/talk-us))
- There are many professional bloggers who blog for newspapers – see *Sydney Morning Herald* bloggers such as John Birmingham and Sarah Hanson-Young at [www.smh.com.au/opinion](http://www.smh.com.au/opinion) (mirrored at *Brisbane Times*, the *Age* and elsewhere).
- Examples of the more traditional formats of blogs (with links, archiving, keyword searches and other recommended blogs) can be seen at [www.thefinderskeepers.com/blog](http://www.thefinderskeepers.com/blog) and [lifeinapinkfibro.blogspot.com](http://lifeinapinkfibro.blogspot.com). (Click on 'next blog' at top for random blogs).

## What is RSS?

RSS is a format for delivering regularly changing web content. An Internet user interested in a particular website can subscribe to the site's RSS feed and have notifications of all new content delivered to their browser when it becomes available. An RSS document includes full or summarised text and other details such as publishing date and authorship.

RSS benefits readers by automatically providing timely, centralised updates from all favoured websites. Readers avoid the delay and time associated with manually inspecting all of the websites in which they are interested.

Web feeds also benefit publishers by letting them syndicate content automatically and establishes ongoing communication with current and prospective readers. Many news sites, blogs and other web-based publications offer RSS feeds of their content to whoever wishes to subscribe to them.

## Syndicating Facebook pages and websites using RSS

RSS can also establish links between an organisation's disparate online media. In particular, RSS allows an organisation (with a website) to syndicate all content published on that website to the organisation's Facebook page. This function would benefit fans and followers of the organisation's Facebook page; informing them of any new content published on their website.

This feature is accessible through the Facebook application 'RSS Graffiti.' This application periodically checks specified RSS feeds (in this case, from the organisation's website) and posts any new entries it finds to the specified Facebook walls (in this case the organisation's Facebook page).

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NB you can also view over 80 organisations' social media policies (including charities) at <http://socialmediagovernance.com/policies.php>.

We encourage readers to communicate to us any further websites or information sources you find on this matter that we can include in further publications.

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## Detachable Checklists

### Strategies: Head Checklist

The proposed public or media comment has been assessed for compliance with all relevant legal checklists.

Based on this assessment, the proposed public or media comment will not:

- breach or waive the organisation's and/or a client's entitlement to legal professional privilege;
- defame any person or group of persons;
- breach copyright;
- breach anti-discrimination law;
- interfere with the administration of justice, or prejudge contentious issues in a court case in contempt of court;
- mislead or deceive the audience, or involve the author in any misleading or deceptive conduct;
- identify, or otherwise disseminate prohibited information associated with a child or young person involved in legal proceedings.

Outstanding Issues:

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Signed (Author):

Signed (risk) manager:

Dated:

## Defamation: Risk Management Check List

### Identification

- Is there a communication?
- Who is the communication directed towards?
  - A particular person?
  - A small group?
  - An organisation?
- What has been said?
- Has the person or entity about whom the statement is made been identified?

### Defamatory imputation

- Does the communication contain any material, either expressly or implied, which may:
  - Lower the person's reputation in the eyes of ordinary reasonable members of the community?
  - Lead people to shun, ridicule, avoid or despise the person, even if involving humour?
  - Injure the person's reputation in business, trade or their profession?

If so, it may be a defamatory statement or imputation (intention is irrelevant).

### Publication

- Will the communication be published, i.e. read/seen/heard by a third person, that is aside from the publisher or the person who is the subject of the comment?

**If NO to one or more of the above 3 criteria: No defamation.**

**If YES to all of the above questions, consider potential defences:**

- Truth/justification
- Honest opinion/criticism
- Absolute privilege – attaches to the occasion, not the statement or speaker
- Qualified privilege
- Fair comment
- Consent – expressly or impliedly
- Triviality (unlikely to suffer harm)
- Innocent dissemination (applicable to re-publishers/re-distributors)
- Offer of amends

Note: some parties may not be able to sue for defamation, such as a large trading corporation, but an individual related to the corporation may have a claim for defamation of them even if the company cannot take action. Also beware whether the corporation may have a cause of action against you under misleading and deceptive conduct for instance.

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## Copyright and Plagiarism: Risk Management Checklist<sup>26</sup>

The following issues should be considered in instances of potential copyright infringement:

- Is this an original work?
- Is information used in a category not protected by copyright law:
  - ideas
  - concepts
  - styles
  - methods
  - information
- Is the subject matter in a category protected by copyright law:
  - literary works
  - dramatic works
  - musical works
  - artistic works
  - films
  - sound recordings
  - broadcast
  - published edition
- Who owns the copyright?
- If owned when was the copyright published and has it expired?
- Does your use fall within fair dealing or other allowed use?
- If you need permission to use the material, do you have it? Is that permission in writing?
- Have you considered the moral rights of the author in your use of the material and attributed the author?
- If a volunteer working with your organisation produced the publication, do you have a deed of agreement with the volunteer as to the ownership of produced materials and works?

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<sup>26</sup> This section has been comprised in part using:  
Law And Justice Foundation of NSW, 'Publishing - Factsheet 7 Copyright'  
< <http://www.lawfoundation.net.au/ljf/app/1991AA69984F7E63CA2577BC0002299B.html>>,  
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## Unlawful Discrimination: Risk Management Checklist

Note: Public comments themselves could be labelled discriminatory but they could also unintentionally reflect discriminatory policies or workings of an organisation.

### Vilification, offensive behaviour, harassment

These are the most likely unlawful discrimination issues to be of concern in making public comments.

- Is there a 'public act' or is the act done 'otherwise than in private'?
- Is the comment likely, in all circumstances, to offend, insult, humiliate or intimidate another person or a group of people?
- Is there knowledge that the matter would promote or express hatred towards, serious contempt for, or serious ridicule of, a person or group of persons?
- Is the comment made about a person's race/transgender status, homosexuality or HIV/AIDS status or was it made due to a person's race, colour, national or ethnic origin?
- Is incitement involved? See Case Law test of the 'reasonable person' test.
- Is the comment unlawful? (*Harou-Sourdon v TCN Channel Nine* (1994) EOC 92-604)
- Is the comment a 'serious vilification'?
- Do any exceptions apply?
- Is there vicarious liability?
- Does the comment constitute harassment?

### Discrimination (more generally)

There are also unlawful discrimination issues of concern in the provision of goods and services.

Does the communication/access to goods and services:

- Treat an individual differently or sets requirements difficult for them to meet, due to their:
  - age
  - impairment or disability
  - race
  - religious belief or activity
  - sexuality
  - HIV/AIDS status
  - transgender status
  - gender, pregnancy, marital status
- Reflect a decision based on stereotyped views or prejudices about people of different genders, races, ages etc, as opposed to their individual skills, abilities and talents?
- Ask an individual irrelevant personal questions relating to age, religion, sexuality, race or age?
- Make it harder for certain people to use or access the services because of a requirement that is not reasonable in the circumstances?

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## Sub Judice – Contempt of Court by Publication: Risk Management Checklist

The offence of sub judice contempt is a common law offence. As such, this area of law contains very extensive case law. This document references the main principles extracted from the relevant decisions. However, it is largely based on secondary material. If you are uncertain as to whether this offence applies to your situation, you may have to look at more specific decisions.

For a more detailed overview of this area of law see NSW Law Reform Commission Discussion Paper 43 (2000) – Contempt by Publication

<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/dp43toc>

### Publication

- Will the statement be made in a public forum; or
- Will the statement be made to a particular individual in a media interview?

### Current or pending legal proceedings

- Does the statement relate to current or pending legal proceedings?
  - Both civil and criminal proceedings are 'sub judice' and attract protection from contempt.
  - In criminal proceedings, the sub judice period commences from the moment someone is arrested until the moment charges are withdrawn, the accused is acquitted, or all options of appeal have been used.
  - In civil proceedings, the sub judice period commences as soon as an initiating court process is issued and ends upon entry of judgment.

### Prejudice

- Will the statement likely interfere with the due administration of justice in a particular case?
  - Does the statement refer to the criminal history of an accused?
  - Does the statement suggest the accused has confessed to the crime?
  - Does the statement go to the guilt or innocence of the accused, or suggest how the jury should decide the case?
  - Does the statement encourage sympathy or antipathy for the accused?
  - Does the statement go to the credibility of witnesses?
  - Does the publication include a photograph of the accused?
- Does the statement presume unclear issues in a particular case?

**IF NO to the above questions, then the publication will not constitute sub judice contempt.**

**IF YES to any of the above questions, then this statement may constitute sub judice contempt of court unless one the following exceptions applies:**

## Accurate report of court proceedings

- Is the statement merely a fair and accurate report of open court proceedings?

## Public interest

- Does the statement concern a matter of public interest, which outweighs the prejudice to the administration of justice?

## Public safety

- Does the statement facilitate the arrest of a person, aid in the investigation of an offence, or protect public safety?

**IF YES to any of the above two questions, then the statement may not constitute sub judice contempt.**

## Misleading or Deceptive Conduct: Risk Management Checklist

### Primary liability

- Are you providing advice or otherwise acting in trade or commerce?
- Are you acting or communicating in a manner likely to mislead or deceive your audience?
- Are you deliberately withholding material information?
- Are you withholding information, or failing to act, in circumstances where there is a reasonable expectation of disclosure?
  - You must tell the whole story: don't leave out material facts.
  - If any past statements later become inaccurate, correct them.
  - Don't imply that facts don't exist when they do.
- Are you making a representation as to the future?
  - Make sure you have reasonable grounds to make this prediction.
- Are you conveying an opinion?
  - Only convey opinions you truly hold.
  - Use the language of opinion.

### Accessorial liability

- Is your client acting in the course of trade or commerce?
- Is your client engaging in misleading or deceptive conduct?
- Are you participating in that conduct?
  - Don't endorse a client's statement that you know to be false.
  - Correct any false statements your client makes.

### Confidentiality

- Are you revealing anything subject to your duty of confidentiality to your client?

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## Protecting the Identity of Children: Risk Management Checklist

### Children in criminal proceedings

- Does the information relate to a person's pending, ongoing or past involvement in criminal proceedings?
- Do the criminal proceedings relate to events that occurred when the person was a child of less than 18 years of age?
- Does the information name, or could it otherwise identify, the person?
- Will the information be published or broadcast?

**If YES to all of the above questions, then disseminating this information is an offence unless:**

- the court consents; or
- the child is over 16 and consents;
- the child is deceased and their next of kin or the court consents; or
- it is a traffic offence not heard in the Children's Court.

### Proceedings in the Children's Court

- Does the information relate to a person's pending, ongoing or past involvement in proceedings in the Children's Court?
- Was the person less than 18 years of age when so involved?
- Is the person still living?
- Is the person currently less than 25 years of age?
- Does the information name, or could it otherwise identify, the child?
  - Could the general public identify the child using the information?
  - Could persons known to the child identify the child based on the information?
- Will the information be published or broadcast to the public or a section of the public?

**If YES to all of the above questions, then disseminating this information is an offence unless:**

- the court consents.
- the young person between 16 and 18 years of age consents.
- the Director-General consents on behalf of a child or young person under ministerial responsibility.
- the child or young person has died.

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## AVO proceedings

- Does the information relate to the pending or ongoing involvement of a child in AVO proceedings?
- Does the information name, or could it otherwise identify, the child?
- Will the information be published?

**If YES to all of the above questions, then disseminating this information is an offence unless:**

- the court consents;
- the child consents.

## Sexual offence proceedings

- Is the information likely to identify a complainant in sexual offence proceedings?
- Will the information be published?

**If YES to the above questions, then disseminating this information is an offence unless:**

- authorised by the presiding judge;
- the complainant consents, and is more than 14 years old;
- the court consents, in the case of a child less than 16 years old;
- the complainant is deceased.

## Legal Professional Privilege (NSW): Risk Management Checklist

Legal professional privilege (LPP) protects the disclosure of certain communications between a lawyer and a client. These communications must be for the dominant purpose of seeking or providing legal advice, or for use in existing or anticipated legal proceedings.

- Is this a confidential communication or document?
- Was the communication made between a lawyer and client; or by the lawyer or client to a third party?
- Was the communication made:
  - In order to provide or receive legal advice? or,
  - Regarding actual or anticipated proceedings?
- Was this the dominant purpose of the communication or document?
- Does a court or other administrative or investigative body require the client to disclose this communication or document?

**If YES to all of the above questions, the client may claim the benefit of legal professional privilege to protect this material from disclosure unless:**

- the material was made in continuance of an illegal object.
- the material was made to frustrate the purpose of the law.
- a statutory provision overrides the privilege:
  - a statutory provision may repeal the common law privilege; or
  - if privilege is claimed to rebut a demand to adduce evidence, then certain exemptions apply under the *Evidence Act 1995* (Evidence Act).
- the client can waive the privilege in the following ways, but usually should avoid doing so:
  - A client who acts in a manner inconsistent with non-disclosure of the material can waive the privilege;
  - A client can agree to waive privilege and take the risk of not being able to keep their frank discussions with their legal advisor confidential.
  - The lawyer has no authority to waive privilege on behalf of the client and should be careful to avoid accidentally releasing information in a way that waives privilege.

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