COLLECTIONSLAW
LEGAL ISSUES FOR AUSTRALIAN ARCHIVES, GALLERIES, LIBRARIES, AND MUSEUMS BY SHANE SIMPSON

PART D. EXHIBITIONS

CHAPTER 25.

RESTRICTIONS ON FREEDOM OF EXPRESSION

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A. INTRODUCTION

The law restricts the freedom of expression in different ways. The most obvious, are the laws against obscenity, defamation and more recently, discrimination.[2] These restrictions are relevant not only to the content of the material but also to the manner of distribution and the place and manner of exhibition of the material. For example, the classification of publications, films, and digital media can impact on publication or exhibition, not only in the traditional media of print and broadcast but also DVD and Internet. Such restrictions are often antithetical to the intellectual freedom so important to both art practice and curatorial practice.

Throughout most of Australia,[3] it is misleading to talk of a **right** to freedom of expression. Certainly everyone in Australia has the right to be an artist, a performer, a writer, and to curate and present exhibitions. No law permits it and no law forbids it, and the freedom to express oneself can only be protected in a limited

[1] In this chapter the material on defamation is written by Richard Potter, barrister, Lower Ground, Wentworth Chambers. Richard is a specialist in defamation law. Shane Simpson wrote the rest of the material.

[2] Prohibiting racial vilification and homosexual vilification. In the United States such instances also include desecration of the flag and blasphemy.

[3] Except Victoria and the ACT.

way.[4] Unlike the United States where the right of free speech is guaranteed by the First Amendment of the Constitution, in Australia, freedom of expression is not an inviolable constitutional right, able to override legal restrictions or government action.[5]

Two jurisdictions have bucked this approach: Victoria and the Australian Capital Territory. The first was the ACT and its approach was simple and brief: section 16 of the *Human Rights Act 2004* created the first right of to freedom of expression in Australia. It is in the following terms:

> **Freedom of expression**
>
> (1) Everyone has the right to hold opinions without interference.
>
> (2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

Just two years later, Victoria introduced a right to freedom of expression with section 15 of the *Charter of Human Rights and Responsibilities Act 2006.* It took a more comprehensive approach:

> **15. Freedom of expression**
>
> (1) Every person has the right to hold an opinion without interference.

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[4] See *Brown v Classification Review Board* (1998) 154 ALR 67 at 76–77 for a discussion of the common law's limited protection of freedom of expression in Australia.

[5] The High Court of Australia has developed a limited constitutional right to 'free speech' (see discussion below), but this too can be overridden by the legislature in certain circumstances. Similarly in the United States it can be misleading to imagine that the Constitutionally protected right to free speech is an unlimited right, the protection is broader than that provided in Australia but it is not boundless. For a discussion of the protection of speech in the United States, see, for example, S Fish, *There's No Such Thing as Free Speech, and it's a Good Thing Too*, Oxford University Press (1994) and H Foerstel, *Free Expression and Censorship in America: An Encyclopedia*, Westport, Connecticut: Greenwood Press (1997). In relation to the protection of speech under the newer, Canadian Charter of Rights and Freedoms, see J Bakan, *Just Words*, Toronto: University of Toronto Press (1997).

(2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether:

(a) orally; or

(b) in writing; or

(c) in print; or

(d) by way of art; or

(e) in another medium chosen by him or her.

(3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary:

(a) to respect the rights and reputation of other persons; or

(b) for the protection of national security, public order, public health or public morality.

This is an excellent statement as it articulates a balancing of the social responsibilities that attend a right of expression. There are limits. It is a freedom within boundaries.

The belief in freedom of expression is a fairly recent phenomenon, perhaps concomitant with the artist's role transition from tradesman to independent genius. Similarly, the right of collecting institutions to show confronting material is something that is changes with the role of the museum, the politics of the day, and the manner and place of the display.

Certainly, the *restriction* of creativity, of ideas, is not new. The experience of many centuries shows that censors and their motives are extraordinarily diverse. There is the censorship imposed by religious organisations, such as that exemplified by the various popes who sought to reduce or remove the licentiousness that they perceived in Michelangelo's *Last Judgment'.*[6] The political regulation of artistic freedom is similarly easy to point out. That art can be 'ideologically corrupt' is illustrated by the attitudes of Soviet Russia to 'bourgeois' art, the Nazi restrictions upon 'degenerate' art, the cultural stricture of the American 'McCarthy period' or the Taliban's destruction of Bamiyan's majestic fifth-century Buddhas.

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[6] Paul IV and Pius IV added draperies and still more draperies, Pius V had some of the figures repainted and Clement VIII wanted to destroy the whole damned thing. See Anthony Blunt, Artistic Theory in Italy 1450–1600, (1940), pp 118–119.

One of the most obvious tools of control is the legal system itself. The law of obscenity, the law of defamation, classification regimes and anti-vilification provisions are not as dramatic as some earlier forms of restriction, but restrictions they most certainly are.

The first section in this chapter, 'From the Obscene to the Offensive' will examine the origins of obscenity law, the legislative framework that governs the law of obscenity and introduce the different ways in which artistic merit may be taken into account in the context of restriction of artistic expression. This section includes some comments on the compliance with and enforcement of these laws. It will then examine the interrelated statutory regimes that govern the classification, distribution and restriction of work that might be considered obscene, indecent or offensive, and the regulation of online services.

The second section examines the law of defamation. The laws of defamation provide our society with an expensive, highly complex, unsatisfactory apparatus by which some of its individuals can defend their reputation after others have exercised their freedom of speech. It is a balancing mechanism. By it, we are restricted in our commentary on others and indeed, others are restricted in their commentary on us. It is an area of enormous legal complexity and few lawyers are expert in its intricacies. This chapter discusses the components of defamation and its attendant defences of truth, fair comment and privilege.

The final section briefly looks at the legislative restrictions imposed under anti-discrimination legislation. While there are exemptions under the legislation for artistic works and it is likely that they will be interpreted so as to protect artistic expression, the parameters of those exemptions have yet to be conclusively determined.

B. FROM THE OBSCENE TO THE OFFENSIVE

It is the aesthetic which distinguishes the artistic from the pornographic, the moral which provides the societal gauge that transforms the erotic into the obscene, and the utilitarian which suggests that the members of a healthy society enjoy only pure thoughts and can have no proper use for obscene or indecent publications, images or text.

Obscenity laws were originally concerned with protecting people from materials that might have a tendency to 'deprave' or 'corrupt' readers or viewers. They restricted access to publications, works or exhibits that were seen to have no redeeming social value.

There has perhaps been a shift in more recent times that recognises, in a limited fashion, the subjective nature of judgment concerning what is obscene, indecent or offensive. The concern with nudity and sexually explicit materials has been replaced by a broader definition of offensiveness that includes depictions of drug use or violence alongside sexually explicit material. The underlying policy reflected in our classification regime is one that seeks to protect members of a society from *unwanted* exposure to indecent or obscene materials, while at the same time recognising the rights of adults to see, hear and read what they want.[7] This is balanced by the taking of special measures taken to protect children from accessing or being exposed to confronting or potentially indecent material.[8]

> The English Royal Academy held an exhibition in 1997 entitled *Sensation*. Artworks included depictions of the Virgin Mary surrounded by pornographic images, a painting of the Moors murderer, Myra Hindley, made up of child's handprints and depictions of children with images of genitalia superimposed over their faces. The gallery avoided prosecution by designating the exhibition room in which these artworks were displayed an 'adults only' space and posted strong warnings that some of the artworks could be considered 'distasteful'.[9] Would an Australian public gallery have avoided prosecution?

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[7] See Hon. Daryl Williams, 'From censorship to classification' (1997) 4(4) E Law – Murdoch University Electronic Journal of Law, <www.murdoch.edu.au/elaw/issues/v4n4/will441.html>.

[8] The introduction of legislation to 'classify' internet content was consistently portrayed as a necessary protective measure undertaken to shield children from exposure to pornographic or offensive material in their homes. See: 'Legislation introduced to protect children online', media release, Senator Richard Alston, Minister for Communications, Information Technology and the Arts, 21 April 1999.

[9] See Kearns, *The Legal Concept of Art*, Oxford: Hart Publishing (1998) at p 37. This exhibition continued to provoke heated reactions outside of England. In 1999 it toured to New York and was exhibited at the Brooklyn Museum of Art. While in England it was the portrait of Myra Hindley that provoked the strongest reaction, in New York it was the work depicting a Black Virgin Mary daubed with cow dung that was at the centre of the controversy. The mayor of New York at the time threatened to withdraw the Museum's funding if it exhibited the works. The Museum retaliated by applying for an injunction restraining the Mayor from withholding the City's funding for the institution.

Role of public galleries

Exhibiting institutions themselves play an important role in defining what is acceptable, for their acquisition policies are insidiously influential in determining what material the general public can see. The formation of the Salon des Refuses and the fame that hindsight accorded many of its artists stands testimony to the powerful restrictive influence of the art establishment. Similarly, while one may complain about the machineries of censorship legislation, the commercial galleries and art museums themselves perform considerable informal censorship. Their guidelines are generally informal and unavailable for public scrutiny.

Arguably there is a need for major institutions to stand up for freedom of expression by publicly defending the material they choose to exhibit if they come under attack. By providing for a reasoned and intelligent public discourse in such circumstances, they enhance the public appreciation, understanding or at least tolerance of ideas and expression. Finally, in any consideration of the tools of control, one must acknowledge the role of the critic, the person who can promote the interests of certain creators and institutions and damage the reputations of others.

When considering the restrictive potential of obscenity law, the role of public galleries is an increasingly important one. There have been a number of occasions in Australia where pressure has been brought to bear on institutions that exhibit work that are sexually explicit and which some would characterise as obscene. It is a tradition that reaches past the removal of the Arthur Boyd *Lysistrata* etchings from the Bathurst Gallery and even back beyond 1907 when Norman Lindsay's pen and ink drawing *Pollice Verso* was hung face to the wall at the National Gallery in Victoria. Indeed there are numerous ways that censorship can occur:

- **Hiding the offending portions**: In 1985 a Tasmanian artist, Anne McDonald, was invited to exhibit in *Perspecta '85* at the Art Gallery of New South Wales. After complaints, reportedly from some attendants, the gallery refused to exhibit the works. After certain pressure it agreed to exhibit the photographs if they were 'edited'. This consisted of attaching large and obvious black shapes over the sexually explicit portions of the work. After only a few days, the covers were well dog-eared from being continually lifted by members of the public who wished to see what was being so obviously censored. To the curator's credit, the manner of

censorship emphasised the process to the viewers. The censorship was explicit.

- **Removal of the work**, such as when Nigel Thompson's painting from the 1984–1985 Sulman Prize exhibition at the Art Gallery of NSW, after complaints from some members of the Art Gallery Society.
- **Cancellation of the show**: *Sensation* was a well-named show.[10] When the deliberately provocative show opened at the Royal Academy of Arts in 1997, visitors were greeted with the following warning:

> There will be works of art on display in the Sensation exhibition which some people may find distasteful. Parents should exercise their judgement in bringing their children to the exhibition. One gallery will not be open to those under the age of 18.

There was violent protest, damage to works, extensive press criticism – and the exhibition attracted over 300,000 visitors. When the show opened in New York at the Brooklyn Museum of Art in 1999, public outcry was enormous, violent and the museum's funding was threatened. In Australia, the show was cancelled by the National Gallery of Australia – not on the basis of its content but because, as the then director declared, the show was 'too close to the market'. [11]

- **Alteration of the work itself**. When certain persons from the Art Gallery of New South Wales disapproved of the drug references in the painting *Henri's Armchair* by Brett Whiteley, the artist was asked to paint them out. Even more extraordinary was the incident in which the Art Gallery of Western Australia ordered a conservator to painting the sexually explicit portions of Whiteley's major work, *American Dream*.[12]

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[10] The show was covered extensively in the press but a useful overview is at: <http://en.wikipedia.org/wiki/Sensation_(exhibition)>.

[11] Quite how a collection of works owned by Charles Saatchi would not have been seen as 'close to the market' from the outset might be considered a 'bit of an oops'. Given that the show would have been funded by a conservative commonwealth government, the director of the NGA, Brian Kennedy, must have felt as though he was channelling one of the works – the Damien Hirst shark suspended in formaldehyde, appropriately entitled, *The Physical Impossibility of Death in the Mind of Someone Living*.

[12] The conservator obeyed the order but used a patching technique that allowed the painting to be restored under a subsequent administration.

The threat of prosecution can be enough for galleries to withdraw a work or restrict public access. In 1982, Juan Davila's *Stupid as a Painter* was seized by the Vice Squad from its place of exhibition in the Biennale of Sydney. The complainants on that occasion were an evening newspaper and a member of the Festival of Light who was a candidate in a then approaching by-election. The issue was fought, almost entirely, in the media. After timely comment by the Premier to the effect that the Vice Squad had no place in art galleries, the Minister of Police ordered the Vice Squad to return the work. It was bravely shown to the public again at the University of Sydney's Power Gallery, shielded by an alluring red screen and a sign which read:

> Viewers are advised that they may find some parts of the work in this bay offensive and disturbing. Since the work is classified with an R-rating it may not be viewed by those under the age of 18. Should any question be raised as to the legal age of a viewer, he or she will be required to complete a form stating name, address and date of birth.

In 1993 the National Gallery of Victoria came under pressure to remove Serrano's *Piss Christ* from display.[13] In this case the complaints came from the Catholic Church, represented by Archbishop Pell, who argued that the image was blasphemous. Pell also applied for an injunction restraining the gallery from exhibiting the work on the basis that it was in breach of the indecency provisions of the *Summary Offences Act 1988* (NSW). While Pell's action was unsuccessful, the catalogue from the exhibition was submitted to the Film and Literature Classification Board and given a Restricted Classification.

Certain exhibitions, such as a retrospective of the work of photographer Robert Mapplethorpe (which included photographs depicting sado-masochistic acts) have caused controversy in a number of countries. In the United States the Mapplethorpe exhibition was at the centre of attempts to de-fund the National

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[13] The work is a photograph of a crucifix immersed in urine. One of the unusual aspects of this case is that it is the image combined with the title that gives rise to the potentially offensive nature of the work. See *Pell v Council of Trustees of the National Gallery of Victoria* [1998] 2 VR 391.

Endowment of the Arts.[14] In Australia, the Museum of Contemporary Art exhibited the work but with warning signs and entry restricted. In keeping with the current emphasis on child protection, some of the most controversial photographs were those that Mapplethorpe had taken of a friend's children, not withstanding the fact that these photographs were not pornographic.[15] Other recent cases, such as *Petrillo's Case*, discussed below are also in keeping with this trend.

Just in case we thought that we could dismiss these examples as being indicative of another ethical and cultural time, in 2008 we revisited the past when the Bill Henson controversy took over the front pages. Were the seized works 'obscene' at law? No. However, the power of pressure groups with a specific agenda can influence the actions of the police, corporate sponsors, the rhetoric of politicians, and the quality of decision-making by individuals under pressure.

Another way

Sometimes the puritan or sensationalist attitudes can be tempered with humour. In 2010 the Christchurch Art Gallery in New Zealand had a show called*, The Naked and the Nude*. Perhaps there was no public outcry because, at the entry to the exhibition, there was a sign that read:

The Naked and the Nude contains,

well, nakedness and nudity.

We advise discretion.

Simple, humorous, non-legalistic and charming. Nice.

The legal mechanisms

In Australia, two legal mechanisms operate to restrict the exposure of people to obscenity: common law and statute.

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[14] See Herbert N Foerstel, *Free Expression and Censorship in America: An Encyclopaedia*, Westport, Connecticut: Greenwood Press (1997).

[15] By contrast, at another MCA – that of Chicago – the Mapplethorpe show entitled *Robert Mapplethorpe: The Perfect Moment* drew that museum's highest attendance figures, without a whisper of controversy.

At common law, it is a misdemeanour to 'publish an obscene libel'. This has been described in the following terms:

> Everyone commits a misdemeanour who without justification ... publicly sells, or exposes for public sale or to public view, any obscene book, print, picture, or other indecent exhibition; or any publication recommending sexual immorality, even if the recommendation is made in good faith for what the publisher considers to be the public good.[16]

In such proceedings, three things must be proved. The work must:

- have been published,[17]
- be obscene, and
- be published with a criminal intention (that is, to corrupt public morals).[18]

The offence of criminal libel is rarely alleged these days in Australia. The related common law offence of blasphemous libel, the publication of material that is likely to outrage Christian believers, is likewise rarely prosecuted (the last successful prosecution in Australia was in 1871) but apparently remains part of the law of Australia.[19]

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[16] Stephen, *Digest of the Criminal Law*, 3rd edn, London (1883), p 116.

[17] Publication is not to be given its colloquial meaning. It is used in its legal sense, to mean 'communication to another person'. For example, an artwork would be published if it were merely shown to a prospective purchaser. Mere possession of the work would not be sufficient, for it is its 'publication' not its possession that is subject to sanction: see *Dugdale v R* (1853) 1 E & B 435; 118 ER 499.

[18] It has been a matter of considerable legal debate whether or not the prosecution has to prove that the publisher of the obscene work actually intended to deprave or corrupt the viewers. The better view appears to be that the offence of obscene libel is not one of strict liability, and that the prosecution does have to prove the criminal intention, namely an intention to deprave and corrupt. Given this, it is clearly difficult for the prosecution to prove that an accused person actually intended to 'deprave and corrupt'. This problem used to be surmounted by reliance on the legal presumption that 'one intends the natural consequences of one's act'. This is no easy matter, and is perhaps a further explanation why cases of obscene libel are now very rare.

[19] See *Pell v Council of Trustees of the National Gallery of Victoria* [1998] 2 VR 391; *Ogle v Strickland* (1987) 71 ALR 41 at 52 (a case about the classification of the film, *Hail Mary*); and *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 128 ALR 238 at 271. The common law of England continues to recognise the publication of a blasphemous libel as a criminal offence: see *Whitehouse v Lemon* [1979] AC

In the English case of Gibson & Sylveire[20], the artists and the gallery curator/owner were convicted of the common law offence of outraging public decency. The artwork that had caused offence was a model of a head with earrings made of freeze-dried human foetuses. The two men appealed their convictions, but the Court of Appeal rejected that appeal. Kearns argues that one of the troubling aspects of the case is that the Court of Appeal did not consider Gibson's position as an artist to be in any way relevant to the offence. Further, there was no defence available to either the artist or the curator that the exhibition was for the public good or of artistic merit.[21]

Although prosecutors do occasionally have recourse to the common law, they prefer to utilise the various pieces of legislation that attempt to limit what society's members can see, if not enjoy.

There are many such pieces of legislation and thus obscene libel is only resorted to in situations in which the legislation is insufficiently flexible to permit prosecution. Given the wide language of the legislation, these occasions will be rare. However the common law provides the basis for the legislative regimes, even where the language of those schemes has changed from being concerned with obscenity to being concerned with offensiveness or indecency.

Defining 'obscenity'

The starting point of any discussion of the definition of what is obscene must be the old English decision of *R v Hicklin.*[22] In that case the judge described obscenity in the following way:

> The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.

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617 (concerning the publication of a homoerotic poem in the British newspaper *Gay News*) and *Choudhury v United Kingdom* (1991) HRLJ 172 (concerning the publication of Salman Rushdie's *Satantic Verses*).

[20] [1990] 2 QB 619.

[21] Kearns at 29. Obscene libel was abolished in England in 1959, see the *Obscene Publications Act 1959*, s 2(4), but as this case shows, other common law offences endure.

[22] (1868) LR 3 QB 360 at 371.

From this point, the dual concepts of 'obscenity' and 'the tendency to deprave and corrupt' were interwoven. Attempts by the judges to give meaning to the phrase 'tendency to deprave and corrupt' cannot be counted as great moments of jurisprudence. Indeed, as Justice Windeyer once observed, the Hicklin test 'has only survived really because, although constantly mentioned, it and its implications have been ignored. Courts have not in fact asked first whether the tendency of a publication is to deprave and corrupt. They have asked simply whether it transgresses the bounds of decency and is properly called obscene. If so its evil tendency and intent are taken to be apparent'.[23]

Many cases have decided what a 'tendency to deprave and corrupt' does **not** mean. For example, the case of *R v Martin Secker & Warburg Ltd,*[24] held it to mean more than 'to shock or disgust', and in *Knuller v DDP*[25] it was held not to correspond with the phrase 'to lead morally astray'. But considerable difficulty lies in understanding the positive guidelines attempted by the courts. Most cases give the words 'tendency to deprave and corrupt' one of three meanings:

> First, they can mean that the tendency of the (work) is to arouse impure thoughts in the mind of the reader or the viewer. Secondly, they can mean that such a person would be encouraged to commit impure actions. Thirdly, they can mean that the reading of a book or looking at the picture would endanger the prevailing standards of public morals.[26]

In Australia, the third of those categories has attained predominant judicial favour. For example, in *Crowe v Graham,*[27] it was held that an indecent picture is one that is 'an affront to modesty'. This is based on the belief that there 'does exist in the community at all times however the standard may vary from time to time – a general instinctive sense of what is decent and what is dirty'.[28]

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[23] *Crowe v Graham* (1967) 121 CLR 375 at 392.

[24] [1952] 2 All ER 683.

[25] [1973] AC 435.

[26] St John-Stevas, *Obscenity and the Law*, London: Secker & Warburg (1956).

[27] (1967) 121 CLR 375 at 396.

[28] R v Close [1948] V.L.R. 445 at 465.

In *R v Close*, Justice Fullagar stated that the 'tendency to deprave and corrupt' was not to be taken as

> a logical definition of the word 'obscene', but was merely explaining that particular characteristic which was necessary to bring an obscene publication within the law relating to obscene libel. The tendency to deprave is not the characteristic which makes a publication obscene, but is the characteristic which makes an obscene publication criminal.

Thus the tendency to deprave and corrupt is not to be taken as the sole test of what constitutes obscene libel. Rather, to prove the offence it will be necessary to show that the work is 'both offensive according to current standards of decency and calculated or likely to have the effect described in *R v Hicklin*.'[29]

Both aspects of this two-limbed test may be influenced by the nature of the work (for example, an artwork or medical text) and the manner and place of its exhibition:

1. THE NATURE OF THE WORK

The cases recognise that works of art enjoy a certain amount of licence. Thus it has been held that the 'representation of nudity in what is not a work of art is not to be regarded as protected (merely) because similar realism in a work of art would not be regarded as indecent.'[30] On the other hand, the issue of indecency cannot be answered by simply asking, 'Is it art?' Had this been the relevant test, a photographic representation of Giorgione's *Sleeping Venus* would surely not have been found to be an indecent document.[31]

2. THE MANNER AND PLACE OF EXHIBITION

The manner and place of the work's exhibition is relevant to both limbs of the obscene libel test.

As to the first (whether or not it is obscene, at all), suppose that a lithograph of erotic theme is exhibited in an art gallery and an identical image is hung in a school. The hypothetical community standard of what is decent would probably accept the former and condemn the latter. An artwork acceptable in the one place is obscene in the other.

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[29] *R v Close* above at 463–465.

[30] *McGavan v Langmuir* 1931 SC (J) 10 at 15.

[31] See *Clarkson v McCarthy* [1917] NZLR 624.

As to the second limb (the tendency to deprave and corrupt), the manner and place of exhibition is directly related to the law's concern with, who is likely to see the work and thus be influenced by it. So, in the above example, the patrons of an art gallery are considered less likely to be 'depraved and corrupted' by the erotic work than the younger and, presumably, more impressionable school children. Furthermore, nobody finds in himself or herself an example of a person actually depraved by erotica:

> (so) discussion tends to centre on a hypothetical, unencountered 'them' in contrast to incorruptible 'us'. This perhaps is why in 1962 the courts established that no amount of exposure can deprave a policeman: He is indissolubly one of 'us'.[32]

The legislation

Every State and Territory has legislation restricting the exposure of its people to obscene or indecent material. These are all derived historically from an English statute of 1857 known as *Lord Campbell's Act*. This was 'intended to apply exclusively to works written for the single purpose of corrupting the morals of youth and of a nature calculated to shock the common feelings of decency in a well regulated mind'.[33] Although the explanation reflects a Victorian attitude, it is none the less one that remains relevant to a description of the modern position in so far as the various legislative schemes show a concern for community standards of decency. When looking at the selection of State legislation below, two things will be apparent: first, the echoing theme of the Hicklin test (the tendency to deprave and corrupt); but second, the variety of ways in which each State has moved away from these early roots.

At a Federal level, the regulation of potentially offensive material occurs through the *Classification (Publications, Films and Computer Games) Act 1995* (Cth)[34] and other Acts such as the *Customs Act 1901* (Cth) (which, generally,

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[32] *The Obscenity Laws, A Report of the Working Party of the Arts Council of Great Britain*, Andre Deutsch, (1969).

[33] St John-Stevas, *Obscenity and the Law*, London: Secker & Warburg (1956).

[34] This Act was accompanied by complementary State and Territory legislation that provides for the enforcement of the provisions of the Act.

controls the importation of indecent or obscene works),[35] the *Criminal Code 1995* (Cth)[36] (which makes it an offence to 'transmit, make available, publish, distribute, advertise or promote child pornography material).[37] The latter is relevant to every collection that places on its website any sexually explicit image involving a child. There is no artistic merit defence. A lack of intention is not a defence. It is a strict liability offence.[38] If you think that the Henson image on your website is not problematic, consider the definition of child pornography provided by the Act:

> ***'child pornography material'*** means:
>
> (a) material that depicts a person, or a representation of a person, who is, or appears to be, under 18 years of age and who:
>
> (i) is engaged in, or appears to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or
>
> (ii) is in the presence of a person who is engaged in, or appears to be engaged in, a sexual pose or sexual activity;
>
> and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or
>
> (b) material the dominant characteristic of which is the depiction, for a sexual purpose, of:
>
> (i) a sexual organ or the anal region of a person who is, or appears to be, under 18 years of age; or
>
> (ii) a representation of such a sexual organ or anal region; or
>
> (iii) the breasts, or a representation of the breasts, of a female person who is, or appears to be, under 18 years of age;
>
> in a way that reasonable persons would regard as being, in all the circumstances, offensive; or

[35] See s 233BAB of the Act and Regulation 4A of the Customs (Prohibited Imports) Regulations 1956 (Cth). Note that these Regulations use an 'objectionable goods' definition.

[36] See ss 471.16–471.23.

[37] Section 474.19.

38 Section 474.22(2).

(c) material that describes a person who is, or is implied to be, under 18 years of age and who:

(i) is engaged in, or is implied to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or

(ii) is in the presence of a person who is engaged in, or is implied to be engaged in, a sexual pose or sexual activity;

and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive; or

(d) material that describes:

(i) a sexual organ or the anal region of a person who is, or is implied to be, under 18 years of age; or

(ii) the breasts of a female person who is, or is implied to be, under 18 years of age;

and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive.

Obscene, indecent, offensive or objectionable?

Some states have now opted to use the term 'indecency' rather than 'obscenity' (and indeed some States use both). The definitional distinction has attracted considerable attention in the courts. Generally speaking, both terms contemplate the contravention of accepted societal standards of decency, with obscenity at the higher end of the scale and indecency at the lower end. What is indecent is not necessarily obscene, but what is obscene will always be indecent.[39] Thus, presumably, the law is stricter in those States that prohibit indecency than those which prohibit obscenity. But the distinction and its importance is always only one of degree and fact and thus, in practice, the personal view of society's standards held by the judge will have more impact on the outcome of any particular case than this matter of sliding definition. Other States have developed categories that refer to 'objectionable' or 'offensive' material, but again it the underlying test looks at whether the material offends recognised community standards of decency.

Summary offences, crimes and misdemeanours

Most States regulate indecent or obscene material though legislation such as their Crimes Acts, Summary Offences Acts and Police Acts. Some of this legislation has moved explicitly towards a 'reasonable adult' or 'community standards test, while

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[39] See *R v Stanley* [1965] 2 QB 327; *Crowe v Graham* (1967) 121 CLR 375 at 390–394.

others continue to use the language of the Hicklin test and prohibit material that has a tendency to corrupt morals.[40] However, where the case concerns sexually explicit material, these different sections frequently rely on the judge to decide whether the publication, picture, film or photograph offends accepted community standards.

Thus, as already mentioned, the case of *Crowe v Graham*[41] held that an indecent picture was one that was an affront to modesty, taking into account the current community standards. In *Sancoff v Holford; Ex parte Holford*,[42] the judge described the proper approach for a magistrate to take. It was held that the magistrate should:

(i) look at the article;

(ii) adopt what he or she reasonably thinks are proper standards of decency now commonly accepted by the average person in the community; and

(iii) find whether such a person taking up the publications and reading them would regard them as publications offensive to his or her modesty in regard to matters of sex.

In determining whether or not a work 'offends modesty' the courts will generally take into account the manner and place in which the article was displayed (note however the South Australian exception discussed below). For example, *In the Appeal of Marsh*[43] concerned four sketches by Tane, which were seized from the Nth Degree Gallery in Paddington. They could be plainly seen through the window from the street. In dismissing the charge his Honour said that the distinction between the decent and indecent in works of art depends on the honesty and integrity of the work in its use of the sexual or erotic theme. Such a work – if it is dealt with frankly and artistically – is not indecent. He went on to say that the place and manner of display is a relevant factor. Thus, something that might be indecent if exhibited in a church or outside a school might not be indecent if exhibited in a Paddington art gallery, for the community has different expectations and imposes different standards on such a place.

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[40] *Criminal Code Act 1899* (Qld), s.228.

[41] Above, para 20.

[42] [1973] Qd R 25.

[43] (1973) 3 DCR (NSW) 115 at 123–124.

However, the placing of a work in a gallery will not always avoid prosecution. In 1984, Juan Davila, along with several other artists were commissioned by the Lake Macquarie Regional Gallery to create works for an exhibition on the theme of 'Romance'. The show had been previewed by the mayor and local government members and had been seen by large numbers of viewers. The Vice Squad went to the gallery after receiving a complaint from a member of the public (who was also a member of the Call to Australia Party, the political wing of the so-called Festival of Light). A week later, only a few days before the closure of the show, they returned with a warrant and seized three of the works by Davila. The council was charged and convicted. It did not appeal because it did not wish to prolong the considerable publicity that the Call to Australia Party was receiving over the affair.

Pell v Council of Trustees of the National Gallery of Victoria[44] has been mentioned above in the context of the offence of blasphemous libel. This case also examined the meaning of indecency and obscenity under the *Summary Offences Act 1966* (Vic), placing the two concepts along a spectrum. Both concepts represented 'a failure to meet recognised standards of propriety', and the extent of the failure was what determined whether an act or display was indecent or obscene. The question raised in *Pell* was whether the photograph that offended specific religious standards or could constitute an offence against contemporary community standards, given the predominantly secular, tolerant and multicultural nature of the Australian community. The court avoided making a conclusive finding but seemed to indicate that the photograph ought not be regarded as obscene or indecent.

Phillips v South Australian Police[45] is interesting for its discussion of the relevance of the location or manner of display of the material in question. The South Australian Summary Offence Act directs that such considerations are irrelevant to a finding of obscenity or indecency. The court in this case, asked to

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[44] [1998] 2 VR 391; see Bede Harris, 'Should blasphemy be a crime? The *Piss Christ* case and freedom of expression (1998) 22 Melbourne University Law Review 217 (Case Note: *Pell v Council of Trustees of the National Gallery of Victoria*).

[45] (1994) 75 A Crim R 480. The report of this case includes considerable discussion of the Australian authorities, noting the relevance of drawing a distinction between the concepts of obscenity and indecency, expressing disquiet that the legislation seems to regard the concepts as interchangeable and that this could lead to an 'undesirable level of censorship'.

determine whether video tapes of boys undressing and urinating were indecent or obscene, indicated a preference for the common law position that took into account the circumstances in which the material was produced and displayed and the purpose for which it was made. The court (applying the same sliding scale referred to in *Pell*) indicated that, taking into account contemporary community standards, there was nothing inherently obscene or indecent in the depiction of the bodies of young boys. Ironically, because the Act *prevented* the court from considering the circumstances in which the tapes were made (secretly, in a boys changing room, without the consent of the subjects), the finding that there was nothing inherently obscene or indecent in the tapes meant that the defendant was successful in his appeal against conviction.

Artistic merit?

The law has approached the intersection between art and obscenity in different ways. One approach is to say art and obscenity are two mutually exclusive categories; if a work has artistic merit it cannot be indecent. This argument works until the artistic purpose pushes beyond an uncertain line of social acceptability whereupon the public says 'that is a bridge too far'. For example, artwork that depicts two adults performing a sex act might be acceptable (think Persian miniatures) but if the adults were substituted for children we may wish to say, 'This is art, but it is indecent.'

A second approach is to say artistic merit should be relevant to determining whether or not material is indecent. It recognises that we should treat *Les Demoiselles d'Avignon* differently from gross and demeaning sexually explicit photographs readily available from any Internet porn site. This approach says that even if a work is of proven artistic merit[46], that merit will not necessarily provide a licence for talented obscenity.

> The fact that conduct is engaged in for political or artistic purposes does not throw around such conduct a kind of cordon sanitaire, producing the result that it cannot be found to be illegal. It is entirely possible that a person might, for

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[46] In *Hennessy v Lee* [1973] WAR 127 at 129–130, the expert witness said of the artwork: 'it was pretty, of good design, well balanced and rhythmical. The colour was pleasing, very skilfully executed. It was a good piece of commercial art.' This was not sufficient to establish that it was of artistic merit.

political or artistic purposes, take a photograph of an act that a jury regards as an act of indecency.[47]

This quote is from the judgment in a case in which the defendants had taken a number of photographs of an eleven-year-old girl, with the consent of the girl's mother, for purpose that the court accepted could be 'described as political, in the broadest sense, or artistic. In particular the photographs were taken, it was said, for the purpose of making a protest against abuse of females'. The court recognised that the artistic or political purpose was relevant for determining whether the photographs were indecent and also that the test was whether the photographs offended contemporary community standards. However, the Court of Criminal Appeal dismissed the appeals, indicating that artistic purpose or merit was not determinative and that it was open to the jury to find that, notwithstanding that legitimate purpose, the photographs were indecent. The CCA implicitly endorsed the direction given to the jury that the relevant community standard was 'not a test of the most avant garde members of the community' but the 'ordinary standards of propriety of respectable people in this community.' In a similar case in Western Australia, an art student, Concetta Petrillo, who had taken photographs of her children as part of her coursework was prosecuted under the Western Australian Criminal Code. Despite the clearly apparent artistic purpose of the work, the case dragged on for nearly two years. Petrillo, however, fared better. Her trial culminated in a verdict of not guilty.[48]

The Henson affair

In May 2008 the police seized 20 of 41 images from a Bill Henson exhibition at Roslyn Oxley 9 Gallery. The police informed the press that they were doing so with the intention of laying charges under both the NSW and the Commonwealth legislation for publishing an indecent article.[49] In explaining the seizure, the police superintendent who made the decision to seize the works issued the statement:

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[47] *R v Manson & Stamenkovic*, Unreported, NSW CCA, 17 February 1993, Nos 60773/91 & 60821/91, per Gleeson CJ.

[48] This case is discussed in Manchester, 'Obscenity, pornography and art' 4(2) *Media and Arts Law Review* 65 at 78,and apparently led to the establishing of the Censorship Advisory Committee under the Censorship Act 1996 (WA).

49 The Commonwealth offence presumably related to publishing an indecent article on the Internet. For consideration of what 'offensive' and 'sexual pose' mean, refer to R v Alexandro Silva [2009] ACTSC 108.

'This morning police have attended the gallery and executed a search warrant and seized some items depicting a child under the age of 16 years in a sexual context.'[50] Apparently 'sexual context' means 'nude' in police speak.

It was a shock horror media event that allowed the ignorant and the righteous an opportunity to voice their views. The distinction between pornography, paedophilia, and sexually explicit art was ignored. Prime Minister Rudd, without seeing the images, felt able to publicly state that he found 'the work absolutely revolting' and without artistic merit. Anonymous callers threatened to burn down the gallery that had exhibited the works. The police accompanied by TV news crews examined the Henson works held by public collections. Talkback radio was in meltdown. And all this over works that involved nudity but not obscene acts and where the artist had the consent and support of the child and the parents.

Eventually everyone had a cup of tea, a Bex and a good lie down when the works were submitted to the Classification Board. The Board gave the works that had sparked the fire, a PG rating. And remember that the film *Harry Potter and the Prisoner of Azkaban* is rated M15+.

Some legal analysis of Henson affair

1. NSW OFFENCES

In NSW there are two avenues available – although commentators in the general media rarely bother to distinguish between them. First, there are the traditional 'indecent/obscene publications' provisions and then there are the provisions designed to deal with hard-core child pornography offences. We know now that the police would fail to lay charges of any kind but while they made up their mind, the public debate veered between paedophilia, pornography and offensiveness without much concern for the difference.

It was never likely that either artist or gallery would be convicted of having committed an offence under the child pornography laws: 'A person who produces, disseminates or possesses child pornography...',[51] or...uses a child for pornographic purposes',[52] is guilty of an offence. To establish such an offence, the Act requires that the prosecution show that the material is child pornography. To do this the prosecution would have to prove that the material:

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[50] L Kennedy, 'Henson show charges' *SMH*, May 23, 2008.

[51] Section 91G(2) *Crimes Act 1900* (NSW).

[52] Section 91 G(3).

(i) depicted or described a child:

    (a) engaged in sexual activity, or

    (b) in a sexual context, or

    (c) as the victim of torture, cruelty or physical abuse (whether or not in a sexual context), and

(ii) that the material would in all the circumstances cause offence to reasonable persons.

None of the images showed children 'engaged in sexual activity' and certainly none depicted a child as the 'victim of torture, cruelty or sexual abuse'. The only possibility was to argue that children were depicted 'in a sexual context'. This phrase is not defined in the legislation but it would be a Sisyphyian taskto argue that 'nudity' is a synonym for 'sexual context'. Unless the prosecution could get over this hurdle it was not even necessary to ask whether the material would 'in all the circumstances' cause offence to reasonable persons[53] or whether the artistic purpose defence provided in the legislation would apply.[54] It would have been a defence if,

> having regard to the circumstances in which the material concerned was produced used or intended to be used, the defendant was acting for a genuine … **artistic** … purpose and the defendant's conduct was reasonable for that purpose.

No, although the media had allowed the argument to slew off into anger and indignation against child abuse and child pornography, there was little likelihood of proving any such thing.

Alternatively, the police may have laid charges under section 578C of the *Crimes Act 1900*. A person who publishes an indecent article is guilty of an offence.[55] This was a much more viable avenue for the prosecution. Section 578C is

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[53] And thus the author avoided making mention of the former Prime Minister who was able to be disgusted on morning TV without an opportunity to view the exhibition and the NSW Premier who was then in China but who was similarly disgusted. One might assume that both would be found to be reasonable persons.

[54] Section 4(c).

[55] Section 578(2).

a provision that has been around for a very long time in one form or another and has spawned many cases as to the meaning of 'indecent'. This is discussed at length elsewhere in this chapter.

One interesting aspect of section 578C is that it is sometimes thought to provide an artistic merit defence:

> (6) In any proceedings for an offence under this section in which indecency is in issue, the opinion of an expert as to whether or not an article has any merit in the field of literature, art, medicine or science (and if so, the nature and extent of that merit) is admissible as evidence.

As you will note, this does not actually say that the work cannot be 'indecent' if it has artistic merit. Indeed it does not provide a real defence of artistic merit. It doesn't even say that the artistic purpose and merit of a work must be taken into account when determining whether a work is indecent. It merely provides that such evidence is admissible. In practice it is relevant to the magistrate's sentencing decision.

When the Henson storm had calmed, the NSW Attorney-General announced that the government would amend the legislation. Those old enough might have remembered that after the ruckus caused by the seizure of Juan Davila's *Stupid As A Painter*, Premier Wran declared that the NSW Government would amend the indecency laws so that artistic merit would be an absolute defence. No such changes were introduced. Two decades later, another government faced by the same embarrassments, took a different approach and declared that it would repeal the artistic merit defence altogether.

Fortunately, the reform was more nuanced than the press release. In 2010 the NSW Government passed the *Crimes Amendment (Child Pornography and Abuse Material) Act 2010*.[56] This did away with general concept of child pornography[57] and replaced it with 'child abuse material'. Child abuse material is defined as material that depicts or describes:

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[56] See the very useful Report of the Child, Pornography Working Party, Dept of Justice and AG (NSW) (2010) upon which the reforms were based: <www.lawlink.nsw.gov.au/...Child_Pornography_Working.../Final_Child_Pornography_Working_Party_Report_8Jan.pdf>.

[57] It abolished the old definition of child pornography: that is material that depicts or describes ... a child: '(a) engaged in sexual activity, or (b) in a sexual context, or (c) as the victim of torture, cruelty or physical abuse (whether or not in a sexual context)', in a manner that would in all the circumstances cause offence to reasonable person.

(a) a person who is, appears to be or is implied to be, a child as a victim of torture, cruelty or physical abuse, or
(b) a person who is, appears to be or is implied to be, a child engaged in or apparently engaged in a sexual pose or sexual activity (whether or not in the presence of other persons), or
(c) a person who is, appears to be or is implied to be, a child in the presence of another person who is engaged or apparently engaged in a sexual pose or sexual activity, or
(d) the private parts of a person who is, appears to be or is implied to be, a child,

in a way that reasonable persons would find, in all the circumstances, offensive.

It will no longer be a defence to that offence that the material concerned was produced, used or intended to be used by the defendant acting for a genuine child protection, scientific, medical, legal, artistic or other public benefit purpose.[58] Instead, the new provisions set out the factors to be taken into account in deciding whether reasonable persons would regard particular material as being, in all the circumstances, offensive. These factors include any literary, artistic, educational or journalistic merit of the material. These are matters now to be taken into account when considering whether or not the material is offensive. If it fulfils the definition of 'child abuse material' and if the court finds that reasonable persons, in all the circumstances, would (not could) find the material offensive, the offences may be proved. Now, artistic merit and intention is relevant only to the determination of whether the material is offensive. If it is, artistic merit and intention is no defence. If a gallery wishes to show sexually explicit images, the safest avenue is to submit them to the Commonwealth Classification Board. Classification provides the exhibitor with a defence.[59]

2. COMMONWEALTH OFFENCE

As mentioned above, when the NSW police seized the Henson works they said that they were considering laying charges under the Commonwealth legislation. How real was this possibility?

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[58] NSW Bills Explanatory Notes: <www.austlii.edu.au/au/legis/nsw/bill_en/capaamb2010475/capaamb2010475.html>.

[59] Section 91HA; *Classification is under the Classification (Publications, Films and Computer Games) Act 1995* (Cth).

The basic offence is for a person to use a 'carriage service' in a way that 'reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive'.[60] The test for what is 'offensive' is as follows:

> **Determining whether material is offensive**
> The matters to be taken into account in deciding for the purposes of this Part whether reasonable persons would regard particular material, or a particular use of a carriage service, as being, in all the circumstances, offensive, include:
> (a) the standards of morality, decency and propriety generally accepted by reasonable adults; and
> (b) the literary, artistic or educational merit (if any) of the material; and
> (c) the general character of the material (including whether it is of a medical, legal or scientific character).[61]

It is for the magistrate to determine the standards of 'morality, decency and propriety generally accepted by reasonable adults' and this makes the test enormously subjective. Note that 'artistic merit' is not, in itself, a defence. It is merely one of the factors to be taken into account in determining whether or not the material is indecent. There is no question that that the communication could have artistic merit but still breach the 'morality, decency and propriety' test.

Enforcement, compliance and reform

Enforcement of the obscenity laws is the responsibility of the police. They usually act only when a complaint is made but they have the power to proceed on their own volition. Usually, members of the vice squad will enter the gallery and informally look at the suspect works. Then, if some of the works give offence, they will approach the director and suggest that if the offensive works are not removed, they will be seized and legal proceedings may be commenced. Sometimes, this informal enforcement procedure sees the work removed from exhibition and society's sensibilities protected. However, the work may be in itself an important one, or it may be important to the balance or theme of the exhibition. Or the work may gain an importance by the very fact of its censorship and become a symbol of artistic freedom denied.

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[60] Part 10.6 of the Criminal Code 1995 (Cth), s 474.17.

[61] As above, s 473.4.

With the informal system of enforcement at least the gallery, and to a lesser extent the artist, has two options: concede quietly or fight loudly.

There is no doubt that any sophisticated society will demand that there be some laws against 'offensive', 'indecent' or 'obscene' material and it is totally impracticable to suggest that such laws should be repealed or that works of art in general should be excluded from their ambit or even that there should be an absolute defence for works of art. To argue the social desirability of such suggestions is a waste of time. They are politically impossible. Rather, a simple (and politically acceptable) reform would be to enact a statutory presumption whereby material exhibited in a bona fide art gallery or museum would be presumed to be not 'indecent', 'offensive' or 'obscene' for the purposes of the legislation. The suggestion that this would allow every porn vendor to open an 'art gallery' and sell disgusting material without appropriate public control would surely be met by the ability of any court to determine whether the gallery was bona fide.[62] In addition, a suitably drafted defence of 'artistic merit' would also ensure that the material (as well as the venue of exhibition) was put into its proper perspective.

As matters stand, the customer of a newsagency is subjected to material that is far more sexually explicit, confronting and lacking in artistic merit than that which adorns any museum wall.

For the exhibiting organisation the message is clear – if not simple. If the material is erotic or brutish to such an extent that it breaches the community's standards of 'decency' one can expect trouble. The heinous feature of the law of obscenity is that one cannot possibly know whether one has breached that nebulous standard until it is too late.

National classification scheme

The classification process is a legislative scheme designed to restrict or regulate access to material according to the principles outlined in the *National Classification Code 2005* and the *National Classification (Serial Publications) Principles 2005*. These, on the one hand seek to protect people from unwanted exposure to offensive material, while at the same time recognising that adult members of the community should ordinarily have a choice about what they can see, read and

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[62] Certainly being a public institution should meet the standard.

watch.[63] In 1995 a national cooperative scheme was established.[64] This legislation was accompanied by complementary state legislation containing the enforcement provisions. These enforcement provisions compel compliance with the Federal scheme and set out the penalties for failure to comply. In some cases these enforcement provisions intersect with other state legislation that governs indecent or obscene material. For example in New South Wales if a film, publication or computer game has been given a classification under the Commonwealth scheme allowing it to be published or distributed, then it can not be an indecent article. It is specifically excluded from the definition.[65]

Classification decisions are made by the Office of Film and Literature Classification in accordance with the *National Classification Code*. The Code sets out the criteria for different levels of classification (from General to Refused Classification) and also indicates that the Code is concerned with not only nudity or sexually explicit material, but also material that depicts or promotes illegal activity, violence or drug use.[66] In making classification decisions, the matters that are to

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[63] Clause I of the Code states:

> Classification decisions are to give effect, as far as possible, to the following principles:
>
> (a) adults should be able to read, hear and see what they want;
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> (b) minors should be protected from material likely to harm or disturb them;
>
> (c) everyone should be protected from exposure to unsolicited material that they find offensive;
>
> (d) the need to take account of community concerns about:
>
> (i) depictions that condone or incite violence, particularly sexual violence; and
>
> (ii) the portrayal of persons in a demeaning manner.

[64] *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

[65] Section 578C *Crimes Act 1900* (NSW).

[66] The Rabelais case involved a student publication that contained an political article, 'The art of shoplifting' that allegedly promoted illegal activity. The publication was refused classification. See *Brown v Members of the Classification Review Board of the Office of Film and Literature Classification*

be taken into account include the 'standards of morality, decency and propriety generally accepted by reasonable adults', whether the material has artistic merit, where the material is going to be displayed or distributed and the material's intended audience.[67] The 'reasonable adult' test owes much to the development of the law in relation to the regulation or prohibition of the possession, publication or distribution of indecent or obscene materials away from the Hicklin test towards a standard that looks not so much at the tendency of material to deprave or corrupt, but rather asks whether the material offends generally accepted community standards.[68]

The National scheme treats 'publications' and 'films' differently. Publications (which includes 'any written or pictorial matter') need only be classified if they are 'submittable publications' and they are sent to the Board for classification. In effect, with regards to artworks, catalogues and so forth, these will not ordinarily come to the attention of the Classification Board unless they are sent to the Board or someone makes a complaint. This is what happened in both the Henson case and the Pell case (see above). Following the controversy over the exhibition of Serrano's work, *Piss Christ*, the catalogue was sent to the Board by someone offended by the work and the Board gave it a restricted classification. When the Board reviewed the Henson photographs they were given a PG rating.

By contrast, all films must be submitted for classification, regardless of content, if they are to be shown in public. The definition of 'film' is a broad one and would include video installations shown in galleries as well as animated art. It certainly includes all film and video shown in the institution's education programs.

Perhaps the ordinary procedure would be to apply for an exemption from classification. An application for an exemption needs to be accompanied by a synopsis of the 'film'. An exemption can only be granted if the classification board

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(1998) 154 ALR 67; M Clayton & T Borgeest, 'Free speech and censorship after the Rabelais case' (1998) 3 *Media and Arts Law Review* 194.

[67] Section 11 *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

[68] Critics of classification decisions point out that the material that is refused classification is often that which is aimed at audiences outside the 'mainstream' and can operate in a discriminatory fashion. See *Queer Screen Ltd v The Chief Censor*, Unreported, FC of A, Lindgren J, 23 February 1995; cf Bad Attitude/s decision in *R v Butler* [1992] 1 S.C.R. 452, 89 D.L.R. (4th) 449 (Canada).

is satisfied that the 'film' would not be given any form of restricted classification such as MA, R or X (see above). The board could ask to see a copy of the work if it cannot make a decision based on the synopsis. In making its decision to grant an exemption or to classify a submitted film the classification board is bound to consider the 'artistic merit' of the film but as with publications, the artistic qualities of the work will not in and of themselves be determinative of the decision.

Regulation of online services

A recent development in the area of classification and censorship has been the attempts to extend censorship regimes to material available over the Internet. This 'net-widening' has been prompted by concerns about the easy availability of pornographic material on the web and in particular the use of the Internet for the circulation of child pornography. The move to regulate and restrict Internet content is characteristic of what has been termed the 'moral panic' engendered by the difficulties of restricting access to indecent, obscene or offensive material on the Internet.[69] The Australian response to concerns about the content of websites and the use of the Internet for circulation of potentially illegal material has been to extend the classification scheme governing publications and films to the content of websites. The *Broadcasting Services Amendment (Online Services) Act 1999* (Cth)[70] establishes procedures for the removal of content that breaches the standards of the national classification scheme.

The scheme is established under Schedule 5 and Schedule 7 of the *Broadcasting Services Act 1992.* It establishes a complaints mechanism that allows complaints to the Australian Communications and Media Authority (ACMA) about potentially offensive website content. The Act sets out certain categories of prohibited online content.[71] The ACMA has powers to investigate complaints and can issue a 'take-down' notice to the 'content service provider' – the host of the content. There are a number of penalties available under the act for failure to comply with a take-down notice or failure to take reasonable steps to restrict access. If you wish to challenge the take-down notice, you have a right of appeal to the Administrative Appeals Tribunal.

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[69] Wilson & White (eds), 'Panic: Media, morality, culture' (1997) 85 *Media International Australia*.

[70] A Philips, 'How not to be offensive online' (1998) 144 *Communications Update* 20.

[71] See <www.acma.gov.au/WEB/STANDARD/pc=PC_90156>.

C. DEFAMATION[72]

Introduction

Defamation, or libel and slander as it is still referred to England, is the delicate balance which the law tries to achieve between freedom of speech and protection of reputation. That balance seeks to give effect to contemporary custom and culture. What used to be offensive and damaging may now be accepted as satirical or even complimentary.

The relevant principles are found in state and territory laws as opposed to federal law. This meant that eight different laws could apply to one publication across Australia on the television or Internet for example. However, in 2005, defamation law in Australia was simplified by a uniform law across Australia. That is, each state and territory enacted a statute which is identical in terms of the law applying to defamation and the defences available to those who publish defamatory material.

What is defamatory?

Publication can be in almost any medium of communication whether by conversational word, written communication, a film or photograph, a painting or sculpture or even by silent gestures. Publication must also, of course, be communicated to at least one person other than the person defamed.

The publication must convey a defamatory meaning, which is referred to as an '*imputation*'. Many cases do not concern explicit outbursts of invective, but are subtle inferences or innuendos which are often unintentional. Whether one intends to defame is of course irrelevant;, it is what the words actually convey which matters.

Whether or not an imputation is defamatory will depend on whether the published material conveyed a meaning which can lower that person's personal or business reputation in the eyes of reasonable members of the community (applying general community standards) or lead people to ridicule, avoid or despise that person.

Examples of what can be defamatory – that the plaintiff was:

- running Premier Cabs like a 'little Hitler'[73]

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[72] The Defamation material is written by Richard Potter, barrister, Lower Ground, Wentworth Chambers. Richard is a specialist in defamation law.

- a con-man or confidence trickster[74]
- fraudulently obtaining a disability pension while still able to pursue a hobby of parachuting[75]
- a gangster and a criminal.[76]

Identification

The person defamed must show that he or she is the actual individual referred to if not expressly named. For example, there may be a drawing of a recognisable person (even known only to a few people) portrayed in a ridiculous light. One such case concerned a cartoon showing a well-known female newsreader dressed on top but graphically naked under the desk, entitled 'newsflash'. The real person was recognisable from the cartoon and it portrayed her in a ridiculous light, which she considered went beyond harmless humour (the case was settled without trial).

The test is whether some readers or viewers (who have knowledge of certain facts) would reasonably understand the words or images as referring to the person defamed.

A person may also be identified by a description of their occupation such as a CEO or even a director (there may also be a danger in a small group such as directors of coincidentally defaming other directors as well).

Ridicule and satire

> Satire tears down façades, deflates stuffed shirts and unmasks hypocrisy by cutting through the constraints imposed by pomp and ceremony, it is a form of irreverence as welcome as fresh air.[77]

> If a man in jest conveys a serious imputation he jests at his peril.[78]

Two very different views and illustrative of the lottery in seeking these questions to be determined by the Courts, as one judge may think it is harmless satire or acceptable opinion, another may think it offensive and defamatory. There is no

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[73] *Hyer v Lindholdt* [2007] NSWSC 795.

[74] *Atrill v Christie* [2007] NSWSC 1386.

[75] *Arthur Dent v Macquarie Radio Network Pty Ltd* [2006] NSWSC 186.

[76] *Moumoutzakis v Caprino* [2008] NSWDC 168.

[77] *Hustler Magazine v Falwell* (1988) 485 US 46.

[78] *Donogue v Hayes* (1831) Exch 265.

doubt that ridicule can be defamatory. There is a fine line between trivial ridicule and that which is actionable. Satire is a particularly effective means of ridicule and thus susceptible to defamation actions.

There are cases going both ways. After all, what seems on the surface to be trivial has been held to be defamatory and vice versa. A few cases illustrate the point:

- A photograph of the footballer Andrew Ettingshausen's penis was said to expose him to ridicule and the photograph was found by a jury to be defamatory.
- A song by Pauline Pantsdown called *Back Door Man*, which featured digitally sampled words of Pauline Hanson was held to be prima facie defamatory of her (enough to warrant an injunction).
- The case over the 'newsflash' cartoon referred to above was settled out of court.
- A Gary Larson cartoon depicted Satan, a trident and the words, 'For a good time, call 555 1232' and 'Satan is a warm and tender guy'. The phone number belonged to a woman who sued on the grounds that the cartoon led people to believe that she was 'akin to the devil' and 'pretends to be a pleasant person when in fact she is evil with evil intentions'. The plaintiff failed on the grounds of reasonableness. In this case,[79] Justice Levine commented that the test was 'the ordinary reasonable reader, knowing the relevant facts' and not 'what must have been a great deal of weird people who merely called the telephone number'.

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[79] *Falkenberg v Nationwide News Pty Ltd* Unreported (16 December 1994) (NSW).

They like to watch

'While the best advertising seduces us, feminism too often simply wants to tell women what "real" women ought to want.'

- Bare Buttocks and the *SMH*: *The Sydney Morning Herald* also found itself on the defence after it published a photograph of a man positioned beneath a billboard displaying the bare buttocks of two women, accompanied by text including 'they like to watch'. The plaintiff pleaded that the whole of the matter complained of conveyed the defamatory imputations that he was a dirty old man, a voyeur, sexist and the kind of low individual who would pose in front of a billboard of scantily clad young girls for the purpose of having his photograph in *The Sydney Morning Herald*. The case was settled before the jury had the opportunity to decide the publication's meaning and its implications.

Ridicule – what is defamatory?

Ridicule can equally be considered defamatory. Case law to date has found exposure of a plaintiff's penis, description of an actor as 'hideously ugly', or photographs of a plaintiff looking absurd sufficient ridicule to be held defamatory. In many instances it simply depends on the subjective view of the judge or jury.

However insulting they may be, words that do not tend to damage a person's reputation or cause their exclusion from society or hold them up to ridicule are not actionable. Determining in all the circumstances what is 'more than trivial degree of ridicule' and what is mere 'vulgar abuse' is not straightforward. Invective, such as labelling a person an idiot or stupid or even insane, where the context is clear that the publication is a more of a rant than a calm and clinical allegation of fact, would not be actionable as the reasonable reader would not believe it to be literally true.

However, comparisons of photographs of individuals as ‘Miss Piggy’ or ‘hideously ugly’ have been held to be defamatory.

Defences

1. HONEST OPINION

For publications that may engage in reviews of public works, truth is rarely a defence as such views cannot usually be proved literally true. If they can be proved true then this is an effective defence as after 2005 there is no public interest condition to this defence, so there is no ‘privacy’ element any more in defamation (prior to 2005 an allegation not in the public interest, for example adultery or the like, could not be defended on truth). As an aside, there are proposals to introduce a statutory tort of privacy in Australia but this has not happened yet so there has been no replacement law following its removal from defamation law. (England for example has a much stricter personal privacy law.)

The most appropriate defamation defence in this sphere of publication (public reviews and so forth) is the law of ‘fair comment’ now known as ‘honest opinion’.

The rationale of this defence is the public protection of an expression of opinion on an issue of fact that is considered to be a matter of public interest. It is of course every person’s right to express an opinion on matters of public interest. In essence this is a right to freedom of speech on a topic of public interest. ‘Public interest’ has been interpreted very broadly to include any public exhibition or topic within the public arena.

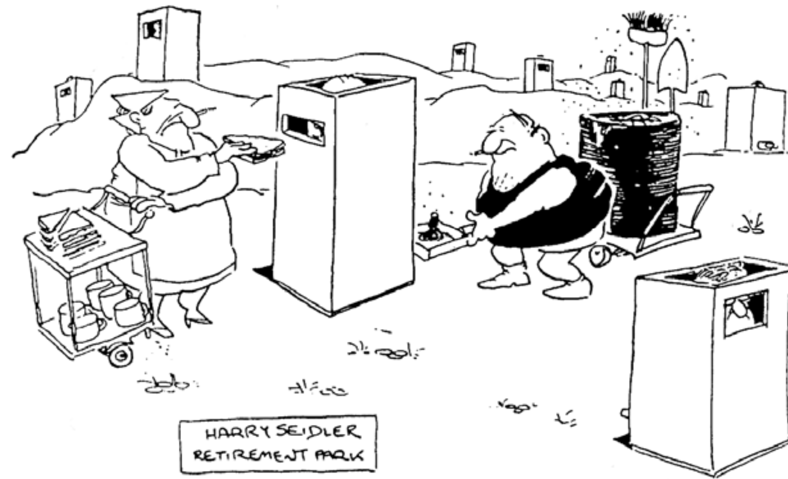
Such an opinion may be contentious or possibly grossly exaggerated, but it is nevertheless defensible. The first step is to ensure that the matter complained of was an opinion and not a statement of fact.

Having determined this and that the subject matter is one of public interest, the following must be established:

- the facts upon which the comments are made are contained in the publication or are ascertainable by the reader;
- the facts are true (or were published under another defence called ‘qualified privilege’);
- the comment was the defendant’s opinion.

The usual examples are theatre or book reviews where the writer’s personal opinion is the central theme. A cartoon by Patrick Cook in *The Sydney Morning Herald* depicting a retirement home with individuals living in boxes being fed

through slits was found by a jury to be an honest opinion based on the known facts of the architectural style of Harry Seidler.[80]



A further colourful example was the case of *Meskenas v Capon*[81] where the artist Vladas Meskenas sued the director of the Art Gallery of NSW for describing his portrait of Rene Rivkin as 'Yuk'. Capon raised the defence of comment but in cross-examination admitted that he did not intend to convey the defamatory meanings (imputations) pleaded by the plaintiff (which related to Meskenas' ability to paint not the quality of the painting). As the law in NSW was then (under the old 1974 *Defamation Act*), a defensible opinion had to be the actual imputation pleaded by a plaintiff (and not as per the 2005 Act where the opinion may be derived from the publication itself not just the precise defamatory meaning). Under the old law therefore, the defence failed. However, the victory was rather pyrrhic with a meagre damages award of $100 from the jury.

Following a recent High Court case,[82] the law relating to public reviews has been clarified. For comment to usually apply, the facts upon which it is based must be present or indicated or notorious (that is in the public arena). Often a review does not supply all the facts but simply passes opinion (for example the view of the

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[80] *Harry Seidler & Associates Pty Ltd v John Fairfax & Sons Ltd* [1986] Aust Torts Reports 80 – 002.

[81] District Ct (NSW), Unreported, 28 September 1993.

[82] *Channel Seven v Manock* (2007) 232 CLR 245.

Rivkin painting as 'yuk'). Now where material is submitted for public criticism, it is not necessary for any reviewer to include the facts behind the review and therefore public reviews stand apart from the conventional cases on comment.

2. INNOCENT DISSEMINATION

Another defence worthy of mention in this context is innocent dissemination. This defence excuses those who have no control over publication such as printers, libraries and newsagents as well as Internet service providers. However, this is only where such a person or entity 'neither knew nor ought to have known' of the defamatory content. There is a difference between mediated or unmediated (unfiltered) web material as where it is clear that material has been considered beforehand then in it is no longer innocently disseminated and other defences must be relied upon.

The defence could be applicable to a collecting institution which is not aware that something is defamatory in circumstances for example, where a work is believed to be fictional or is only defamatory with special knowledge of extrinsic facts.

There are other defences available (such as qualified privilege) but in this context the main defences would be comment/honest opinion and possibly innocent dissemination.

Damages capped

A surprising inclusion to the uniform law is the capping of general damages (currently indexed at $294,500). Under the old law in NSW, each imputation was a separate cause of action, so multiple imputations could mean cumulatively large awards. Under the new regime there is only a single cause of action for each publication,[83] so general damages will be capped at the statutory total unless the court awards aggravated damages in excess of that figure.

Damages can be mitigated by evidence of an apology or correction being published before the trial or evidence that a plaintiff has already recovered damages or even brought proceedings elsewhere in similar circumstances.

An apology cannot constitute an admission of liability and is not admissible in evidence for this purpose. This is a very effective way of dealing with complaints as

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[83] Section 8.

apologies can be given freely without concern that they constitute admissions of liability.

Limitation period

Proceedings for defamation must be brought within one year from the date of the publication. The period can be increased to three years if the court is satisfied that it was not reasonable for a plaintiff to have commenced proceedings within a year. If not brought within time, the right to claim is lost.

Risk management checklist

Below is a series of suggestions in no particular order that may assist in minimising risk:

- Always look at potentially defamatory statements as if you are the person defamed. Ask yourself how you would feel to be on the receiving end and consider alternative wording if appropriate – a carefully worded qualification can diffuse a defamatory statement without losing the intended thrust.
- Be sure that the real meaning of facts is obvious and there is no unintentional inference present.
- Avoid expressing an opinion unless you honestly hold that opinion.
- Always check the information that underlies any defamatory statement; do not assume its correctness. If there is simply too much, try taking a sample and test the thoroughness of an author's research on that sample.
- Satire – although vulgar abuse and light ridicule are not actionable, assess whether the material is humiliating or unnecessarily cruel. Also consider whether it ridicules someone's race, gender or sexuality.
- Instil an effective email policy to ensure staff are aware of these pitfalls in such a spontaneous forum.
- Put in place a system for vetting third party material such as contracted or guest seminars or other public programs. Check draft contracts to provide warranties/indemnities about defamatory and copyright material from such individuals.
- Carefully filter any material intended for a public website and ensure access is restricted for new material.

Getting a complaint

There is nothing quite like a solicitor's letter threatening defamation proceedings to get stomach muscles knotted! The most obvious advice is do not respond (apart

from a holding letter) until the facts have been properly investigated and an assessment made as to the real risk of liability.

If after such an investigation (including possible legal assistance), you decide that there is a significant risk then you should consider an offer of amends under the Act and/or an apology.

First, the Act provides a procedure whereby an early apology and offer to pay costs and consideration of some monetary compensation (although this is not mandatory) may provide you with a *full* defence (regardless of other defences) if it is a reasonable offer and made within 28 days of a letter of complaint (which should state that the letter should be regarded as a 'concerns notice' under the Act). Part 3 of the 2005 Act spells out the steps which must be taken for such an offer and which must be followed carefully.

Even if no offer of amends is made, an apology can now be given openly without fear that this is an acceptance of liability that may take away defences such as truth or comment. The Act now forbids any apology being used in such a way, so it can always be used by a defendant to reduce damages without fear and should be seriously considered if there is a real risk of ultimate liability.

Misleading or deceptive conduct

Finally, a brief word should be said about misleading or deceptive conduct under section 52 of the *Trade Practices Act 1975 (Cth)*. Often a complaint may include this as well as defamation. This Act does not apply to the media who are exempt from section 52 as they are 'information providers' under section 65A of the Act. There are no known cases on this topic, but there must also be an argument that a collecting institution may also be an 'information provider' and also exempt. If such a claim is made against you then this may be an available argument.

C. ANTI-VILIFICATION LEGISLATION

The structure of this legislation that makes vilification on the basis of race or homosexuality unlawful is similar in all jurisdictions.[84] Generally, in the context of

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[84] *Racial Discrimination Act 1975* (Cth), s 18C – unlawful behaviour, s 18D – exemptions; *Anti-Discrimination Act 1977* (NSW), s 20C – Racial Vilification, s 38S – transgender vilification, s49ZT – homosexual vilification, s 49ZXB – HIV/AIDS vilification unlawful; *Discrimination Act 1981* (ACT), s 66 – vilification in relation to race, sexuality, gender identity or HIV/AIDS); *Civil*

considering whether the display of an artwork or the performance of a dramatic or musical performance might be affected by the legislation, it is the following questions are relevant:

- Was the conduct or act in public?
- Did the act or conduct 'incite hatred towards, or serious contempt for, or severe ridicule of, a person or group of persons"[85] or was the act 'reasonably likely, in all the circumstances, to offend, humiliate or intimidate a person or group of people'?[86]
- Was the act done because of the race or other characteristic of the person or group of people?
- Was the act or conduct done reasonably and in good faith for an artistic purpose?

It is unlikely that this legislation will have any major affect on the freedom of creative expression because of the difficulties faced in proving that the act was done because of the race or characteristic of the person or group, and because the terms 'reasonably and in good faith' and 'artistic purpose' are likely to be interpreted broadly in the favour of artists: *Bryl & Kovacevic v Louis Nowra & Melbourne Theatre Company* (Unreported, HREOC, Peter Johnson (Inquiry Commissioner), 21 June 1999, H97/161). However, these provisions remain relatively untested and it is certainly possible that an artistic work could be rendered unlawful by the operation of the various legislative provisions.

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