

**Please Read Disclaimer on page Four**

## **PHOTOGRAPHERS' RIGHTS**

I am an Amateur Photographer, a member of two camera clubs, a member of the Australian Photographic Society and a strong supporter of the Federation of Camera Clubs NSW.

I am also a Justice of the Peace and a law abiding citizen.

When it is lawful for me to take pictures I like to do so.

In situations where it is not lawful (eg. court houses, schools, toilets, change rooms, fitness gyms, military installations or other locations of national security) I refrain from photographing.

I recent times, I and numerous other amateur photographers have been challenged by over zealous life savers, security guards and 'officials'. Many amateur photographers, exercising their legal rights to photograph, have been told they must cease photographing (for one reason or another) and/or that they should leave the area.

I am aware of at least two instances where grandfathers who were photographing their grandchildren playing sport were told they must stop! A common thread seems to be where children are present and might be included in the photos. It appears, in these situations, if you are using a camera, particularly if it has a 'long' telephoto lens, you are suspected of being a paedophile. It might be noted that the Summary Offences Act of 1988 No. 28 Sect. 11G defines a child as being a person under the age of **16** years and also states that a **convicted** child sexual offender who loiters (without reasonable excuse) near a school or public place frequented by children is guilty of an offence. Provided you are not one of these it appears you are legally permitted to photograph children.

We photographers who are entering photographic competitions at local, Camera Club or National/International level take a wide variety of photos to meet the 'nationally accepted' competition categories which include Sport, People, Social Documentation and Photo Journalism. If we are restricted or prevented from taking these types of pictures, in years to come there will be little recorded photographic evidence of our lifestyle in the present era. And what a loss it would be if we were to be prevented from photographing children at sport, at play, having fun – showing their beauty and quaintness!

### **Some interesting facts and observation follow:**

#### **Photographing in a Public Place.**

The Summary Offences Act 1988 states: '**public place**' means (a) a place (whether or not covered by water) or (b) a part of a premises, that is open to the public, or is used by the public, whether or not on payment of money or other consideration, whether or not the place or part is ordinarily so open or used and whether or not the public to whom it is open consists only of a limited class of persons, but does not include a school.

This Act, Section 3. Definitions (1) indicates that 'school' includes a child minding centre or pre-school.

It appears that many (if not all?) 'public places', where admission is charged for entry, are still officially deemed to be public places?

The general rule in Australia about photographing in a public place seems to be that, unless there is a legal prohibition such as a statute or ordinance or a legally authorised sign indicating photography is not allowed, you can photograph virtually anything you wish. Members of the public, street performers etc. are deemed to be 'fair game' and can be photographed without their consent – provided they are not in a place where there is a 'reasonable expectation of privacy.' It is also wise to be cautious of photographing anyone involved in an indecent act. Be mindful of what is proper and within the limits of decency. Taking pictures of a person in a public place would not normally be regarded as an invasion of privacy.

In the UK photographers are not only free to take photographs of people in public places but they can use those photos as they wish, including for commercial gain.

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### Privacy.

Unlike a number of other countries, Australia does not have a 'Bill of Rights'. As a consequence, *no one in our society has the right to be not photographed*. (Reference - Justice Dowd in R v Sotheren (2001) NSWSC 204. It is perfectly legal to photograph a person (with or without their knowledge or permission) provided the image is not to be used for advertising - in which case a 'model release' is necessary

The High Court decision in Victoria Park Racing v. Taylor (1937) 58 CLR 479 (at p.496) and reaffirmed in 2001 ABC v Lenah (2001) HCA 63 that any concept of a "Tort of invasion of privacy" *still* remains non-existent in this country.

The taking and publication of such a photograph of a person in Australia, is **not** an invasion of privacy, nor is it in breach of any case or statute law. At present it is quite legal to do so.

### Expectation of Privacy.

"In the likes of schools, fitness gyms, change rooms, toilets etc. there is of course an 'expectation of privacy'. On the street, eating an ice cream or performing juggling tricks eg. there is none. I can take your picture all day long and unless you specifically ask me to stop and then I continue following you around (which could be harassment and possibly assault) you have no recourse".  
(Jay Giusti Chicago)

### Harassment.

"Harassment is essentially behaviour that causes another person alarm or distress and it refers to **a course of conduct**, not a single incident A course of conduct means at least two occasions If a photographer stalks a subject in order to get a photograph of them, or repeatedly thrusts a camera in someone's face, this **might** be harassment.

(Linda Macpherson LLB, DipLP.,LLM – lecturer in law, Herriot Watt University UK with particular experience in Information Technology Law, Intellectual Property Law and Media Law.)"

### Nuisance & Trespass

Likewise, 'Nuisance or Trespass', only becomes an actionable Tort if you photograph the same person over & over again over an extended period of time (**Bathurst City Council v Saban** (1985) 2 NSWLR 704 at pp.706-8).

### Offensive Behaviour

To take 'offensive pictures' with say, a mobile phone camera (or no doubt the likes of a concealed 'spy' camera) can lead to a charge of Offensive Behaviour. P.J.Mac Kenzie was arrested and fined \$500 for secretly photographing topless women on Coogee beach in November 2004.

### Offensive, Indecent or Demeaning Photos .

A person who considers a photo falls into this category has the right to try to obtain an injunction to prevent its publication. . It appears that such a picture has to be **clearly degrading** otherwise a court is not likely to proceed with the request - Donnelly v Amalgamated TV Services (1998) NSWSC 509

### Photography on Beaches and Swimming Pools

Waverly Council and Randwick Councils recently attempted to ban photography on their beaches and swimming pools. Public outcry and/or their discovery that they did not have the constitutional right to legislate any ban on such photography caused them to quickly rescind their actions.

I have recently contacted Wollongong, Shellharbour and Kiama Councils and have been advised verbally that *they have no restrictions on amateur photography on their beaches, playing fields or parklands*.

Despite this, two local camera club photographers have recently been questioned by lifesavers and one, at a Kiama beach, was told to stop photographing. I have queried this with Kiama Council and have been told that the lifesaver involved was in error – he did not have the right to take this action

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### Photographing Surf Club ‘nippers’ (child life saver ‘trainees’)

We also still hear comments that there is a ban on photographing ‘nippers’ whilst they are training or competing. Following my query, on 7/3/05 Sean O’Connell, Communications Manager – Surf Life Saving Australia, advised me that SLSA currently has no policy that would restrict the photographing of ‘nippers’.

He pointed out that ‘some State branches or clubs may have taken their own advice and introduced their own policies’. If this is the case, I would be surprised if such restrictions/bans are legal.

Mr.O’Connell stated that ‘SLA is currently in the process of developing a national photography policy to clarify these issues and set out the legal rights and responsibilities of our members’.

### Photography in NSW National Parks

National Parks website indicates there is no restriction for amateurs – nor is a permit necessary. But, see article in Australian Photography, February 2005 .P 9. It is also mentioned that if you are taking photographs originally as a hobby, a tourist, or as a personal interest then you are not considered a commercial photographer (and not required to pay fees), even if some of your images may occasionally be sold or used commercially.

Letter from Robert Oakshott MP (Port Macquarie) dated 15/12/03 states: “I have been advised by Mr. Greg Croft, NSW National Parks and Wildlife Service Regional Manager, that a fee only applies for commercial photographers who sell the photos to be used in publications including calendars and post cards. Mr. Croft further advises that anyone can take a photo for personal use using whatever type of equipment they have including a tripod.)”

### Photography at The Rocks, Darling Harbour and Sydney Harbour Foreshores.

Sydney Harbour Foreshore Authority is the land owner of The Rocks and Darling Harbour. SHFA permits any visitor, tourist or amateur photographer to take personal images in its precincts (Public Areas) that will not be used for commercial or professional purposes. Members of the public are permitted to use their own photography/video equipment, including tripods, to take images at any time of the day or night, without risk of confiscation. ‘Public Areas’ are defined as any part of the Sydney Harbour foreshore that the public is entitled to use and includes Luna Park, the Rocks and Circular Quay, Darling Harbour. Woolloomooloo, Prymont, White Bay, Roselle.

(Sydney Harbour Foreshore Authority Regulations 1999 (NSW) and see Australian Photography December 2004 Page.9 – Dr. Rob Lang CEO)

Copyright: This is complex and I don’t propose to cover it. However, I found this interesting:

“Copyright is infringed by making a copy of all or a substantial part of a copyright work, without the consent of the copyright owner. It would be infringement of copyright to deliberately set out to recreate another photographer’s photo.

Copyright is not infringed by the incidental inclusion of a copyright work in a photograph. Thus, a portrait of a person which happens to have a painting on the wall behind the subject would not infringe copyright, nor would a photograph of a street scene in which there was advertising material on display, but this was not the main subject of the photo.

In the UK, it is **not** an infringement of copyright to take photographs of buildings, sculptures and works of static craftsmanship that are permanently situated in a public place or in premises that are open to the public.”

(Linda Macpherson LLB, DipLP.,LLM – lecturer in law, Herriot Watt University UK with particular experience in Information Technology Law, Intellectual Property Law and Media Law.)

Filming. If you come across the requirement that it is necessary to get a permit to film in National Parks, City areas, Council areas etc. note that the Local Government Amendment (Filming) Act – Schedule 1 (6) Dictionary states: “filming means recorded images (whether on film or video tape or electronically or by other means) for exhibition or broadcast (such as cinema, television or the Internet or by other means) and includes such acts or things as may be described by the regulations as being filming, **but does not include:** (a) still photography, or (b) video recording of a wedding ceremony or other private celebration or event principally for the purpose of making a record for the participants in the ceremony, celebration or event

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Your Rights if confronted by Life Savers, Life Guards, Security Guards, or other officials:

They **do** have the rights to keep you away from areas where you may impede their activities or endanger safety. They **do not** have the legal right to prohibit you from taking photographs from other locations.

**Without a court order** they have no rights to confiscate your photographic equipment, film or digital media card. The taking of this equipment directly or indirectly by threatening to use force or call a law enforcement agency can constitute criminal offences such as theft and coercion.

Generally, it is unlawful for anyone to instill a fear that they may injure you, damage your equipment or take your property, or falsely accuse you of a crime just because you were taking photographs

If someone has threatened, intimidated, or detained you because you were taking photographs, they may be liable for crimes such as kidnapping, coercion, and theft. In such cases you should report them to police.

You may have civil remedies against such persons and their employers. The torts for which you may be entitled to compensation include assault, conversing, false imprisonment and violation of your constitutional rights.

If the party becomes 'pushy', combative, or unusually hostile consider calling the police

Ask the following questions: (1) What is the person's name?, (2) Who is their employer?, (3) If they insist you cease photographing and leave the area how do they propose to make you do this? (4) If they are unnecessarily delaying you, and you wish to leave immediately, ask them 'are you free to leave the area'? – if not, on what legal basis do they assert for the detention? (5) By law they do not have the right to be not photographed..

Consider taking their photo for positive identification should you need to make charges against them.

(Bert P. Krages 11, Attorney at Law Portland Oregon)

**More about Photographers Rights** My thanks to Andrew Nemeth, (Blue Mountains) Sydney for his permission to quote information from his website <http://privacy.4020.net>

This fine website contains a great deal of additional, detailed, information on Photographers Rights and also includes a collection of his inspiring photographs. I urge you to have a look at it.

Also of interest:

<http://www.sirimo.co.uk> and <http://www.railfan.net/lists/rshdepot-digest/200407/msg00029.html>

<http://www.danheller.com/model-release.html>

Australian Photography December 2004 (Pages 9 and 10) and February 2005 Page 9.

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L. Barry Daniel JP AAPS SSAPS  
Shell Cove NSW  
8<sup>th</sup> March 2005.

