

## Media Law

Every broadcaster needs a basic understanding of media law, as breaches could prove very costly to both the broadcaster and the station. Community broadcasters are often familiar with the responsibilities they must meet under the Broadcasting Services Act (1992) and the associated Community Broadcasting Code of Practice. But this is not the only area of the law to affect the community broadcasting sector. Broadcasters also need to be aware of their obligations under common law and relevant federal and state legislation. Media law primarily deals with broadcast material that may be viewed as

- defamatory
- in contempt of court
- offensive, including discriminatory content
- in breach of copyright

There's a journalistic adage that says, "If in doubt, leave it out". You should refer all suspicious material to someone at the station who has the expertise to advise you. If you feel there is even a remote possibility that the material you want to broadcast could break a law, don't use it until it is cleared.

As the broadcaster, you are responsible for what you broadcast. In the case of court action, both the presenter and the station could be liable, and be sued or fined. In addition, the presenter could be sued again, by the station this time, for getting the station into trouble in the first place.

### Defamation

Defamation has been described as:

- ❖ A statement which may tend to lower the plaintiff in the estimation of right-thinking members of society generally, or
- ❖ A publication without justification which is calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule.

In essence, defamation is injury to a person's reputation. There is no defence in suggesting that "very few people would have heard the program". If only one person hears the comment, the grounds for defamation have been laid. Careful drafting of material so that the defamatory meaning is contained in innuendo or implied will not avoid liability. There's also no defence in claiming that the material was broadcast in a language other than English. Another common problem is rebroadcast - using defamatory material from another source makes you as liable as if you were the original publisher.

It has been judged defamatory to say that a person is a coward, dishonest, or cruel. It would be defamatory to suggest that a public figure acted in his or her public capacity to further his or her private interests. It is defamatory to suggest that some one has committed a criminal offence, prior to a conviction. It has also been held to be defamatory to publish anything which makes a person look ridiculous, or which lowers a persons professional standing. You can defame a person without intending to do so, without naming them or even without knowing of their existence.

Companies are persons in the eyes of the law, and can be defamed, as can identifiable groups of people. You cannot defame someone who is dead.

Injurious falsehood is when it is falsely suggested that a person does not own his or her property. Injurious falsehood may also be committed when the quality of a person's goods is attacked with malice and falsely so that actual damage results to a person's trading. This is to be distinguished from "mere puffery" eg. where it is said that for instance XYZ cereal is far more nutritious than any other. Malicious falsehood is also actionable and occurs where it is falsely said that a person has died, retired or ceased to trade.

A useful thing to remember is to try and place yourself in the shoes of the person/s you are talking about. Would you be outraged if you were that person?

Defamation law is not defined in federal legislation but is based on state and territory succeeded in some states, but failed in others. In the instances where programs are produced in one state, and also replayed in other states, special care needs to be taken that you adhere to the law in all states in which your material may be broadcast.

## **Defences**

### **1. Truth**

In some states truth alone is a defence - if you can prove that what you said is true. In other states the defence is that it must be true and in the public interest or for the public benefit. Most matters concerning the actions of public figures, like politicians, for instance, would probably be held to be "in the public interest" if the reference is to the actions of those persons as public figures.

### **2. Qualified Privilege**

There are special occasions when a person must be able to defame another, and get away with it. Such cases could be a Member of Parliament speaking inside the parliament; someone giving evidence at a trial; or a Royal Commissioner handing down findings. On these occasions, things that need to be said could not be said, if the speakers were not covered by absolute privilege.

The media is covered by what's termed qualified privilege. It can repeat what has been said in Parliament, the courts, or a Royal Commission, as long as it is a 'fair and accurate' report of what was said.

It would not be fair and accurate to broadcast a report of the sensational aspects of a trial, without devoting time to the defendant's plea of not guilty. Or not mentioning any of a parliamentarian's rebuttal of a particularly damaging attack made under the protection of absolute privilege in Parliament. In essence, you need to be fair in your report of what happened.

Again, there are different state interpretations of how the media exercise qualified privilege.

The laws are pretty tight in South Australia, Victoria, Western Australia, the ACT and the Northern Territory as the media is not viewed as having a duty to give the information and the listener is not viewed as having a duty to receive it. In New South Wales the duty carried by the media is limited and dependent upon the type of information being conveyed. Queensland and Tasmania laws are more liberal as the media is viewed as holding a duty to inform. Again, all laws are contingent on fair and accurate reportage.

### **3. Fair Comment**

Fair comment means that you may comment on a matter of public interest, so long as it is in the public interest. Comments must be based on true statements (facts), whilst opinions must be "honestly held" by you and based on the true statements - in other words, the comments may not be made out of malice. Opinion must be clearly distinguished from the facts on which it is given. Those facts must themselves be true.

### **Penalties**

A retraction or an apology on air is not a defence against a defamation action, and in some cases might only harm your defence. You should seek legal advice before announcing an apology or retraction.

The present remedy for defamation is damages - the payment of money by you and/or the station sufficient to compensate the person for the harm to their reputation.

Judgments in defamation cases in recent years have been sizeable, well beyond the resources of the average community broadcaster. Some community stations carry defamation insurance. For more information on the CBAA's Defamation Insurance deal for members please refer to the Insurance Chapter.

### **Contempt of Court**

While you don't normally face a prison sentence for defamation, contempt of court is punishable by a fine and/or imprisonment.

In the case of broadcasting, contempt of court consists of anything mentioned on air which could obstruct the proper administration of justice, with emphasis on the "could", or could jeopardise the respect of the community for the administration of justice.

There is no federal legislation defining contempt of court. Legal precedents have provided the working definition. There are three main types of contempt of concern to community broadcasters:

#### **1. Broadcasting material which may prejudice an impending trial.**

You can comment on a crime before a person has been charged, and after the person has been convicted, but not while the case is being, or is about to be considered by a court.

Once a person is charged or summonsed, the proceedings are "sub judice" preventing mention or comment on the facts of the case. Everyone is entitled to a fair trial, regardless of their prior record. Nothing can be said by the media that would unfairly prejudice a person's fair trial. Thus it is a contempt to say "two persons murdered" as opposed to "two persons allegedly shot dead" as the case may be not one of murder at all but may allow for a more innocent interpretation. This pre-judges the issue.

Remember that a court case is not over until any appeals have been heard. During the trial a fair and accurate report of the proceedings can be given, but no comment.

#### **2. Scandalising the Court.**

It is a contempt of court to bring the legal system into disrepute, to infer for instance, that a judge lacked impartiality. To imply that a person received a light sentence for some reason could affect the respect of the community for the proper administration of justice.

### **3. Refusing to reveal sources of information to a court or tribunal.**

This is a particular problem for journalists, whose Code of Ethics requires them to "respect all confidences". The Courts do not accept the principle of the confidentiality of information sources and could hold a person to be in contempt of court for refusing to disclose their sources.

Publication of confidential sources may tend to prejudge the issue. For instance, if the confidential source says "I saw Mr X murder Mr Y", it should be reported as "it has been alleged by a person claiming to have witnessed the incident that Mr X shot Mr Y". Clearly there are dangers for broadcasters if suspicion is cast on a person who is not charged or is innocent.

### **Contempt of Parliament**

Breach of privilege, or contempt of parliament, is hard to define. In practice, material that could be considered in contempt of parliament would be anything broadcast that may be regarded as exerting improper pressure on members of parliament, or bringing the institution itself into disrespect, or disclosing the secret proceedings of parliamentary committees.

The sentence for contempt of parliament, like the present defences to defamation, varies from state to state. The federal, Victorian and South Australian Parliaments have the power to imprison offenders. The New South Wales parliament simply excludes representatives of offending media organisations from its precincts.

### **Offensive Content**

Offensive material usually refers to content that may be considered to be discriminatory or obscene.

### **Discriminatory and Racist Content**

Federal legislation allows for prosecution of individuals who broadcast material that is deemed to be discriminatory on the basis of race (Racial Discrimination Act), gender (Sex Discrimination Act) or disability (Disability Discrimination Act). The Racial Discrimination Act was amended in 1995 to make it an offence to incite racial hatred or violence, or to vilify a person or group because of their race.

The Human Rights and Equal Opportunity Commission Act provides the basis for prosecution if a person has not received equal treatment based on their sexual preference, religious beliefs, age, political convictions, etc.

In addition to federal discrimination law, a community broadcasting station may be found in breach of its licence conditions. The Community Broadcasting Code of Practice 2.3 states "community broadcasting licensees shall not broadcast material which may stereotype, incite, vilify or perpetuate hatred against, or attempt to demean any person on the basis of ethnicity, nationality, race, gender, sexual preference, religion, age, or physical or mental disability".

Furthermore Code 1.6 states that stations shall "incorporate programming policies which oppose and attempt to break down prejudice on the basis of race, sex, nationality, religion, disability, ethnic background, age or sexual preference".

### **Obscenity**

Under the common law it is an offence to broadcast obscene material however there are no hard and fast laws as to what constitutes obscene material. Material is judged on a case by case basis and is measured against "contemporary community standards". For example, there is no absolute ban on the use of

particular language. Whether the material is to be judged by the standards of the community as a whole, or by the standards of the section of the community to which it is addressed, has not been resolved in law.

The Community Broadcasting Code of Practice 2.2 states that "community broadcasting licensees will avoid censorship wherever possible, however, consideration shall be given to the audience; the context; the degree of explicitness; the propensity to alarm, distress or shock; and the social importance of the event".

Judging whether program material is obscene can be very difficult. Because of the nature of community radio, catering as it does to diverse groups, there are occasions when language not acceptable on commercial radio stations may be allowed. Factors such as the target audience, the age of listeners, the time of broadcast and the existence of content warnings, will be relevant.

Judging current community standards is equally difficult. Are words that were considered obscene ten years ago still considered obscene today? The answer is, not always. The context is relevant - words used in a serious discussion of a matter of social interest will not be obscene while they would be if used in another context, flippantly or gratuitously.

Blasphemy is a sub-category of obscene content. There has been no prosecution for blasphemy in Australia. It has been argued in the courts that there is no foundation for the offence under Australian law as there is no formal national religion. For more on this issue refer to the chapter on Censorship.