

## ***Isn't it illegal to take photographs of a person without their consent?***

Not in Australia. If a person can see you, then they also have a right to take your photograph, whether you approve or not.

If you wish to prevent this, simply block the camera's lens with your hand. This is what celebrities have done for decades.

The following reasons explain why it is perfectly legal to take photographs without consent in this country:

(1) Both NSW and Federal constitutions lack a Bill of Rights. Therefore we have no guaranteed "right to privacy" in Australia, at least not with respect to photography. See *Victoria Park v. Taylor* (1937) and *ABC v. Lenah* (2001). See also *Regina v Sotheren* (2001), where a NSW SC judge noted: "A person, in our society, does not have a right not to be photographed".

(2) Federal and NSW Privacy legislation does not apply to occasional photos taken by individual photographers. (The Acts currently only regulate data acquisition by Government departments and large corporations.)

(3) In Aug 2005 the Commonwealth Attorney General remarked: "[...] for any society to function in a relatively free and open manner, there could not realistically be a requirement for all photographs to be taken with consent. If there were such restrictions, candid shots could never be taken [...]".

(4) All Council restrictions against "unauthorised" photographs at Sydney beaches or swimming pools were revoked in 2005. This was because the restrictions were found to be legally and politically unenforceable.

(5) You are already photographed without your permission dozens of times a day, usually when you enter a bank, a railway station, supermarket, use an ATM etc.

## ***When do you need a person's consent to take their photograph?***

Only in the following circumstances:

(1) According to the *NSW Workplace Surveillance Act 2005*, employees cannot be filmed at work by their employers without their prior consent.

(2) Photographs must not be taken (or published) if a person's identity is protected by a court order (eg. a suppression order, witness protection, child custody or protection order).

(3) According to Division 15B of the *NSW Crimes Act 1900*, photographs are prohibited if you have a "reasonable expectation of privacy" (eg. in a toilet or changing room) AND the images are of a sexual or voyeuristic nature. Thus photos of bathers at public beaches are generally not covered by 15B as there cannot be any "reasonable expectation of privacy" in public places or crowds. OTOH if the images are close-ups of a person's "private parts", then they are deemed to be in breach of the Act, regardless of where they were taken.

## ***Isn't it illegal to publish a person's photo without their consent?***

Only in Quebec or France. In every other country, including Australia, publication is fully legal, provided the following criteria are met:

(1) The pictures are not defamatory;

(2) They are not indecent, offensive or otherwise demean the people in them or;

(3) They are not being used for a "commercial purpose" (see below).

## ***An unauthorised photo of me has appeared in an advertisement. What can I do?***

By the *Federal Trade Practices Act 1974*, photographs cannot be used for "commercial purposes" without the written consent of people in them.

If the photographer / publisher doesn't have your permission (usually in the form of a signed release), then they are in breach of TPA legislation and are liable for statutory fines. Contact the ACCC to take the matter further (see end of article).

What is "commercial use"? In a photo context it does *not* mean the sale of a picture, but rather the use of a person's likeness to endorse a product or service, or to entice others to buy it.

### ***Can I stop people from taking photos of my children?***

Only if the images are indecent or offensive. Otherwise children are not afforded any special protection under current law.

What can you do? Simply ask the photographer to stop. If they don't, then ask someone in authority (eg. a surf-lifesaver) to intervene.

### ***Do I have any right to prevent people taking pictures on or of my private property?***

On your property – yes. You can legitimately order a photographer to stop taking photos when they are on your land. You can even use reasonable force to evict them if they refuse to comply.

From outside your property – no. This was the finding in *Victoria Park v. Taylor* (1937) and is still the law: see *ABC v. Lenah* (2001). The only exception is when a large number of photos are taken over an extended period of time – see *Bathurst City Council v. Saban* (1985).

### ***Can photography be prevented "due to copyright"?***

No. Nothing in the *Copyright Act 1968* prohibits any act of photography.

Section 66 of the Act specifically exempts photographic infringement if the pictures are taken of buildings, their interiors, or "building models". Likewise s65 exempts photos of statues or other "works" publicly displayed.

Photographs taken during school plays and live performances also do not infringe copyright, as still images cannot generally reproduce a "substantial part" of a "dramatic or choreographic work" (you have to video most of the performance to do so).

### ***Can I physically seize cameras or film, or force photographers to delete digital files?***

No, you cannot touch another person's camera merely because they took a photo you don't like. Nor can you force people to delete pictures or destroy film. Even police or security personnel must initiate legal proceedings before seizing cameras or memory cards.

For example: in 2005 the men who assaulted a photographer in Melbourne for filming their attendance at a terrorist trial, were all subsequently charged with the criminal offence of Affray. A few weeks later the youth who smashed a press photographer's camera at Cronulla beach, was in turn charged with Malicious Damage.

If you threaten someone with violence, it's Assault. If you physically touch them, it becomes Affray or Battery. All are criminal offences, and result in criminal records upon conviction, along with fines and even imprisonment.

### ***How can I distinguish between a legitimate photographer and someone who isn't?***

Legitimate photographers tend to carry large and expensive equipment. They also make no attempt to conceal themselves. If approached they will freely discuss their work. They will offer to give you their business card, which in turn should provide a web address to their online portfolio. Some photographers even carry small samples of their work, to show what they do.

Voyeurs on the other hand – don't. They sneak about in corners with cheap cameras and long lenses, and then run away when confronted.

### ***Need More Information?***

**Website:** <http://photorights.4020.net>

**Arts Law Centre of Australia:**

Tel: (02) 9356 2566 or 1800 221 457

**NSW Privacy Commissioner:**

Tel: (02) 9228 8585

**Federal Attorney-General's Department:**

Tel: (02) 6250 6666

**Australian Competition and Consumer Commission (ACCC):**

Tel: 1300 302 502

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