



GOVERNMENT OF THE
VIRGIN ISLANDS

WITHOUT PREJUDICE



GUIDANCE

OF THE PROSECUTION
OF CRIMINAL LIBEL,
ELECTRONIC DEFAMATION,
OTHER RELATED OFFENCES
CONTRARY TO THE COMPUTER
MISUSE AND CYBERCRIME ACT, 2014
(as amended by No. 9 of 2019) (the Act)

GUIDANCE FOR THE PROSECUTION OF CRIMINAL LIBEL, ELECTRONIC DEFAMATION, OTHER RELATED OFFENCES CONTRARY TO THE COMPUTER MISUSE AND CYBERCRIME ACT, 2014

20 October, 2020

Purpose:

The Freedom of Expression is an important right that is granted in our Virgin Islands Constitution Order 2007, it allows our citizens to express their views, share ideas and formulate fair and informed opinions on events, and public matters. It is acknowledged that a free press is necessary to keep the public informed and to ask elected officials inquiries on matters affecting the lives of citizens. This guidance is not to restrict persons' right to freedom of expression, or limit the right of the press to professionally, accurately and ethically keep the public informed, as well as to provide a form of check and balance to public officials; the purpose of this guidance is to explain what speech is not considered to be protected speech with regards to criminal liability.

1. The Freedom of Expression is a right that is provided in Section 23 of the 2007 Virgin Islands Constitutional Order which is stated below:

Protection of Freedom of Expression

- (1) *No person shall be hindered in the enjoyment of his or her Freedom of Expression.*
- (2) *A person's Freedom of Expression includes freedom to hold opinions without interference, freedom to receive information and ideas without interference, freedom to disseminate information and ideas without interference (whether to the public generally or to any person or class of persons) and freedom from interference with his or her correspondence or other means of communication.*
- (3) *Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society—*
 - (a) *in the interests of defence, public safety, public order, public morality or public health;*
 - (b) *for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings or proceedings before statutory tribunals, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telecommunications, posts, broadcasting or public shows; or*
 - (c) *that imposes restrictions on public officers that are reasonably required for the proper performance of their functions.*
- (4) *For the purposes of subsection (3) (c), "law" in subsection (3) includes directions in writing regarding the conduct of public officers generally or any class of public officer issued by the Government of the Virgin Islands.*

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2. This constitutional provision does not make the Freedom of Expression an absolute right. Section 23 (3) places restrictions. The following are exceptions to what persons can freely opine or report on and that includes:
 - a) matters that affect national security and safety
 - b) matters that affect public order, morality and health
 - c) legal proceedings
 - d) public officers and the performance of their duties
 - e) protecting persons' reputations and their right to private life.

A person's right to reputation is enshrined in the right to private life which is protected under the Virgin Islands Constitution Order Section 19.

3. The importance of preserving the reputation of persons is important to not only an individual but to the wider public as stated by Lord Nicholls in *Reynolds v Times Newspapers Ltd* [2001] 2 A.C. 127 as follows:

“Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever, especially if there is not opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely.[sic]”

4. Lord Diplock in *Silkin v Beaverbrook Newspapers Ltd* [1958] 1 WLR 743 addressed the importance balancing the right of Freedom of Expression and the rights to private life or reputation:

“Let us look a little more closely at the way in which the law balances the rights of the public man, on the one hand, and the rights of the public, on the other, in matters of freedom of speech. In the first place, every man, whether he is in the public life or not, is entitled not to have lies told about him; and by that is meant that one is not entitled to make statements of fact about a person which are untrue and which redound to his discredit, that is to say, tend to lower him in the estimation of right-thinking men.” [sic]

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5. Defamatory statements, obscenity, harassment or intentionally misleading statements are not considered to be protected speech neither under statute nor in the common law. The Freedom of Expression is not an absolute right and has to be balanced against other fundamental rights granted in the Virgin Islands Constitution Order, 2007. The right to Freedom of Expression should be always balanced with the right to due process, the right to a fair trial or the right to private and family life.

It must be made clear that publishing, broadcastings, posts, images, articles, caricatures etc, that are merely irritating or unfavourable would not be subjected to criminal liability which may result in investigation and prosecution. The purpose of the provisions in the Act and Criminal Code are to protect persons from expressions, communications, publishing, etc that are harassing, bullying and are capable of destroying one's reputation. It is necessary to protect citizens and the Territory from such actions that can destroy reputations and places the Territory in a negative light internationally.

6. These offences which directly deal with this issue of Freedom of Expression are found in Sections 273-280 of the 1997 Criminal Code and Sections 14A, 14B, 14F and 14H of the Act. This paper serves to explain what is required to prove these offences. It is hoped by media houses knowing what constitutes an offence they would be able to improve on their role on keeping the general public informed as well as to prevent their sites from being used to commit offences.
7. The Act also provides for other offences that would be committed using a computer, while these offences do not give any restriction to the Freedom of Expression, it is imperative for these novice offences to be properly explained.

8. SENDING OFFENSIVE MESSAGES THROUGH A COMPUTER CONTRARY TO 14A (1) OF THE ACT.

The Act provides as follows:

- (1) *A person commits an offence if he or she sends by means of a computer*
 - (a) *information that is grossly offensive or has menacing character;*
 - (b) *information which he or she knows is false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, he or she persists in doing so by such computer; or*
 - (c) *electronic mail or an electronic message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages.*

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- (2) *For the purpose of this section, the term “electronic mail” or “electronic message” means a message or information created or transmitted or received on a computer including attachments in text, images, audio, video and any other electronic record which may be transmitted with the message.*
- (3) *A person who commits an offence under subsection (1) is liable*
- (a) *on summary conviction to a fine not exceeding two hundred thousand dollars or to imprisonment for a term not exceeding seven years, or both; or*
- (b) *on conviction on indictment to a fine not exceeding five hundred thousand dollars or to imprisonment for a term not exceeding fourteen years, or both.*

In order to prove this offence the following must be proved:

- i. a computer which also includes a laptop, tablet, smart phone
- ii. the accused sends to another, or publishes on a person’s social media account
- iii. information that is -
 - a) grossly offensive
 - b) menacing character meaning it causes fear or apprehension
 - c) false information which causes annoyance, in convenience, danger, obstruction, insulting, to cause injury, intimidation, hatred or ill will.
- iv. it can also be that an accused has sent an email that causes annoyance or inconvenience which is meant to mislead or deceive the recipient as to the origin of the message. For example, to make it appear it was sent by another person.
- v. it can be an email, video recording, an audio recording, text, images or any electronic media.

It must be noted that this offence does not have any direct impact on the functioning of a free press.

9. ELECTRONIC STALKING CONTRARY TO SECTION 14F OF THE ACT.

The Act provides as follows:

- (1) *A person commits an offence if he or she, with intent to harass, intimidate, torment, or embarrass any other person, communicates by computer to such person or to a third party*

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- (a) *using any lewd, lascivious, indecent, or obscene words, images, or language, or suggesting the commission of any lewd or lascivious act anonymously or repeatedly whether or not conversation occurs; or*
 - (b) *threatening to inflict injury on the person or property of the person communicated with or any member of his or her family or household.*
- (2) *A person who commits an offence under subsection (1) is liable*
- (a) *on summary conviction to a fine not exceeding two hundred thousand dollars or to imprisonment for a term not exceeding seven years, or both; or*
 - (b) *on conviction on indictment to a fine not exceeding five hundred thousand dollars or to imprisonment for a term not exceeding fourteen years, or both.*
- (3) *An offence under this section may be committed either at the place from which the communication was made or at the place where the communication was received*

The Elements of this offence are as follows:

- i. using a computer which also includes a laptop, tablet, smart phone;
- ii. sends to another person or to a third party
- iii. lewd, obscene, lascivious, words or images
- iv. accuses or suggests that someone has committed any lewd or lascivious act
- v. threaten of injury or damage of property to another
- vi. either to the person directly or indirectly

10. VIOLATION OF PRIVACY CONTRARY TO SECTION 14H OF THE ACT

The Act provides as follows:

- (1) *A person commits an offence if he or she, knowingly or without lawful excuse or justification, captures, publishes or transmits an image of a private area of another person, without his or her consent, under circumstances violating the privacy of that person.*

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- (2) *A person commits an offence if he or she, knowingly or without lawful excuse or justification, captures, publishes or transmits an image of a private area of a mentally or physically impaired person.*
- (3) *A person who commits an offence under subsections (1) or (2) is liable*
- (a) *on summary conviction to a fine not exceeding two hundred thousand dollars or to a term of imprisonment not exceeding seven years or to both; or*
 - (b) *on conviction on indictment to a fine not exceeding five hundred thousand dollars or to a term of imprisonment not exceeding fourteen years or to both.*
- (4) *For the purposes of this section*
- (a) *“capture” means to videotape, photograph, film or record by any means;*
 - (b) *“private area” means the naked or undergarment clad genitals, pubic area, buttocks, or female breast;*
 - (c) *“publishes” means reproduction in the printed or electronic form and making it available publicly;*
 - (d) *“transmit” means to electronically send a visual image with the intent that it be viewed by a person or persons;*
 - (e) *“under circumstances violating privacy” means circumstances in which a person can have a reasonable expectation that*
 - (i) *he or she could disrobe in privacy, without being concerned that an image or his or her private area was being captured; or*
 - (ii) *any part of his or her private area would not be visible to the public, regardless of whether that person is in a public or private place.”*

This offence deals with the issues of revenge porn, or the dissemination of private or embarrassing matters which violate the victim's right to private life. The elements of this offence are as follows:

- i. without lawful excuse or justification (meaning they do not have any right to)
- ii. take an image of another's private areas (naked body, genitalia, breasts clothed and unclothed) without consent
- iii. and then publishes it, transfers it or sends it without consent

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- iv. the age of consent is 16 years, a person under the age of 16 is incapable of providing consent
- v. it is also an offence to take images of physically or mentally impaired persons' private areas and then publish it, send it or transfer it
- vi. it does not matter if the images are captured in a public or private place
- vii. publication or transfer includes distribution electronically or in print

11. CRIMINAL LIBEL AND ELECTRONIC DEFAMATION

These are the offences that concern the Freedom of Expression as it relates to published materials whether written, audio or video. Reference is made to Sections 273 – 280 of the Criminal Code 1997 which provide as follows:

273.

- (1) *Subject to the other provisions of this Part, any person who, by printing, effigy or by any other means in a permanent form and otherwise than solely any gestures, spoken words or sounds, unlawfully publishes any defamatory matter concerning another person with intent to defame that other person, commits the offence of libel and is liable on conviction to imprisonment for a term not exceeding one year or to a fine not exceeding one thousand dollars, or both.*
- (2) *Notwithstanding subsection (1), for the purposes of this Part, the broadcasting of words by any means of wireless telegraphy shall be treated a publication in a permanent form.*
- (3) *A prosecution for an offence under this section shall not be instituted except by, or with the consent of the [Director of Public Prosecutions].*

274.

- (1) *Defamatory matter is matter likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation or to disturb the peace of the community.*
- (2) *It is not necessary for libel that a defamatory meaning should be directly or completely expressed, and it suffices if such meaning and its application to the person alleged to be defamed can be collected either from the alleged libel itself or from any extrinsic circumstances, or partly from one and partly the other.*

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A person publishes a libel if he causes the medium by which the defamatory matter is conveyed to be so dealt with or used that the defamatory meaning thereof becomes known or is likely to become known either to the person defamed or to any other person.

276.

Any publication of defamatory matter concerning a person is unlawful within the meaning of this Part, unless

- (a) the matter is true and it was for the public benefit that it should be published; or*
- (b) it is privileged on one of the grounds hereafter in this Part mentioned.*

277.

(1) The publication of defamatory matter is absolutely privileged, and no person shall under any circumstances be liable to punishment under this Code in respect thereof, in any of the following cases:

- (a) if the matter is published by the Governor or by the Legislative Council in any official document or proceeding;*
- (b) if the matter is published in the Legislative Council by the Governor or by any member of the Legislative Council;*
- (c) if the matter is published by order of the Governor;*
- (d) if the matter is published concerning a person subject for the time being to naval, military, air-force or police discipline, and relates to his conduct as a person subject to such discipline and is published by some person having authority over him in respect of such conduct, and to some person also having authority over him in respect of such conduct.*
- (e) if the matter is published in the course of any judicial proceeding by a person taking part therein as a Judge, Magistrate, Justice of the Peace, Commissioner, Barrister-at-Law, Juror, Assessor, Arbitrator, Referee, Witness or party thereof;*
- (f) if the matter published is in fact a fair report of anything said, done or published in the Legislative Council; or*
- (g) if the person publishing the matter does so in pursuance of a duty imposed by law.*

(2) For the purposes of this section, references to the Legislative Council shall be deemed to include any committee of the Legislative Council.

(3) Where a publication is absolutely privileged, it is immaterial for the purposes of this Part, whether the matter be true or false, and whether it be or be not known or believed to be false, and whether it be or be not published in good faith.

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A publication of defamatory matter is privileged if it was published in good faith, if the relation between the parties by and to whom the publication is made is such that the person publishing the matter is under some legal, moral or social duty to publish it to the person to whom the publication is made or has a legitimate personal interest in so publishing it, and provided that the publication does exceed either in extent or matter what is reasonably sufficient for the occasion, in any of the following cases:

- (a) if the matter published is in fact a fair report of anything said, done or shown in a civil or criminal inquiry or proceeding done before any court, except that if the court prohibits the publication of anything said or shown before it, on the grounds that it is seditious, immoral or blasphemous, the publication thereof shall not be privileged;*
- (b) if the matter published is a copy by reproduction, or in fact a fair abstract or summary, of any matter which has been previously published, and the previous publication of which was or would have been privileged under section 277;*
- (c) if the matter is an expression of opinion in good faith as to the conduct of a person in a judicial, official or other public capacity, or as to his personal character so far as it appears in such conduct;*
- (d) if the matter is an expression of opinion in good faith as to the conduct of a person in relation to any public question or matter, or as to his personal character so far as it appears in such conduct;*
- (e) if the matter is an expression of opinion in good faith as to the conduct of any person as disclosed by evidence given in a legal proceeding held in public, whether civil or criminal, or as to the conduct of any person as a party, witness or otherwise in any such proceeding, or as to the character of any person so far as it appears in any such conduct;*
- (f) if the matter is an expression of opinion in good faith as to the merits of any book, writing, painting, speech or other work, performance or act published or publicly done or made or submitted by a person to the judgment of the public, or as to the character of a person so far as it appears therein;*
- (g) if the matter is a censure passed by a person in good faith on the conduct of another person in any matter in respect of which he has authority, by contract or otherwise, over the other person, or on the character of the other person so far as it appears in such conduct;*
- (h) if the matter is a complaint or accusation made by a person in good faith against another person in respect of his conduct in any matter, or in respect of his character so far as it appears in such conduct, to any person having authority by law to inquire into or receive complaints respecting such conduct or matter or*
- (i) if the matter is published in good faith for the protection of the rights or interests of the person who publishes it, or of the person to whom it is published or of some person in whom the person to whom it is published is interested.*

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279.

A publication by any person of defamatory matter shall not be deemed to have been made in good faith, within the meaning of section 278, if it is made to appear

- (a) that the matter was untrue and that he did not believe it to be true;*
- (b) that the matter was untrue and that he published it without taking reasonable care to ascertain whether it was true or false; or*
- (c) that in publishing the matter, he acted with intent to injure the person defamed in a substantially greater degree or substantially otherwise than was reasonably necessary for the interest of the public or the protection of the private right or interest in respect of which he claims to be privileged.*

280.

If it is proved, on behalf of an accused person, that any defamatory matter was published under such circumstances that the publication would have been justified if made in good faith, the publication shall be presumed to have been made in good faith until the contrary is made to appear, either from the libel itself or from the evidence given on behalf of the accused person or from evidence on behalf of the prosecution.

ELECTRONIC DEFAMATION CONTRARY TO SECTION 14B OF THE ACT

- (1) A person commits an offence if he or she defames another person using a computer.*
 - (2) A person who commits an offence under subsection (1) is liable on conviction to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding three years, or both*
12. Defamation is defined as any spoken or written word that has been published, and it has the tendency to injure the reputation of another. A statement whether spoken or written will be deemed to be defamatory if the statement lowers the victim in the estimation of right thinking members of the society generally or exposes the victim to public hatred, contempt, ridicule or causes them to be eschewed by the society.

In the case of electronic defamation it refers to printed statements or spoken words that are recorded and published through a computer, cell phone or the internet including social media.

Criminal Libel – The Criminal Code 1997 defines libel as defamation in permanent form i.e. in writing, painting, effigy, caricature, by a recording or by any other means. It does not include spoken word. Spoken defamation is referred to as slander and is not covered by the Criminal Code. In the case of Section 14B of the Act, electronic defamation includes recordings, words spoken and published throughout a computer, a cellular phone, the internet including social media.

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13. The prosecution of all these offences can only commence with the consent of the Director of Public Prosecutions (DPP). As with any other prosecution, it starts with an investigation that is submitted to the Office of the DPP. The file is then reviewed. It should be noted that criminal proceedings will only commence if there is sufficient evidence that would more than likely lead to a conviction and it is in the public interest to commence criminal proceedings. The offences of Criminal Libel and Electronic Defamation are more complex than the other offences mentioned and are explained below.
14. A defamatory statement for the purposes of the offences of criminal libel and electronic defamation is a statement where under the circumstances the words, statements, recordings were published and the reasonable person who is reading or viewing same would understand that it discredits, ridicules, humiliates and damages the esteem that the subject (victim) is held in in the community.
15. What does it mean to publish?
In order to be found guilty of criminal libel or electronic defamation, the Crown has to prove that the matter deemed to make the victim appear in lower esteem in the eyes of the public, was published. It means that it is distributed or given to another person. That when it was distributed there was the intent to defame the person using the matter or it was distributed recklessly, knowing that it was not true, or did not check/investigate to see whether it was true.
16. Publishing of Blogs:- It has become the norm of online media houses to allow members of the public to anonymously post comments. Some of these comments contain defamatory allegations which have the tendency to lower the estimation of right thinking members of the public's view of the person (who is the subject of the blog) and expose them to ridicule, public hatred or contempt.

Media Houses and Newspapers have to operate with caution to ensure that only accurate and truthful information is made public. A media house who has permitted a defamatory blog to be published may be liable for electronic defamation, as they have a responsibility for what is published on that site. The failure to erase or otherwise remove defamatory matter from a place where it can be seen by others is deemed to be publication for the purposes of criminal libel and electronic defamation.

In determining whether there would be liability, these factors may be considered:

- i. the media house's responsibility for the decision to publish the statement.
- ii. the extent of the media house's responsibility for the content.
- iii. the nature and circumstances of the publication.
- iv. whether the media house knew or believed the contents were defamatory and still published it.

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It may be prudent for online media houses to require bloggers to register their legal names and email addresses, and to verify the accuracy and truth of content of that blog blogs before publishing and to monitor, review and remove defamatory blogs.

DEFENCES TO DEFAMATION: PRIVILEGE

17. In Criminal Libel/ Electronic Defamation, privilege is a defence. This means that statements made in certain and specific circumstances regardless of how defamatory they are; are considered to be protected. Privilege is also explained in Section 278 of the 1997 Criminal Code. There are two categories of privilege statements:
1. Absolute Privilege: This applies to the statements made by members of the House of Assembly during sessions or by a judge during judicial proceedings. Absolute Privilege is a complete defence to Criminal Libel and Defamation.
 2. Qualified Privilege on the other hand is a partial defence. A statement has qualified privilege if it is:
 - i. A fair and accurate report of proceedings in public of a legislature anywhere in the world.
 - ii. A fair and accurate report of proceedings in public before a court anywhere in the world.
 - iii. A fair and accurate report of proceedings in public of a person appointed to hold a public inquiry by a Government or legislature anywhere in the world.
 - iv. A fair and accurate report of proceedings in public anywhere in the world of an international organisation or an international conference.
 - v. A fair and accurate copy of or extract from any register or other document required by law to be open to public inspection.
 - vi. A notice or advertisement published by or on the authority of a court, or of a judge or officer of a court, anywhere in the world.
 - vii. A fair and accurate copy of or extract from matter published by or on the authority of a Government or legislature anywhere in the world.
 - viii. A fair and accurate copy of or extract from matter published anywhere in the world by an international organisation or an international conference.

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If it is proved that the statement was made maliciously, or not in good faith, then the defence of privilege is unavailable. What constitutes malicious or not in good faith? It means that:

- a) The contents are untrue and the person who made/published the statement did not believe them to be true.
 - b) That the contents are untrue and same was published without having taken reasonable care to ascertain whether it was false or not; or
 - c) In publishing the matter it was done with intent to injure the person defamed in a substantially greater degree or substantially otherwise than reasonably necessary for the interest of the public or for the protection of the private right or the interest of which the defendant claims to be privileged.
18. Fair comment on a matter of public interest is another defence to criminal libel and electronic defamation. Fair comment allows the news media or other person to express their opinion on matters that are within the public interest. The defence fails if any of the following are present:
- 1) A wilful or careless misstatement of the material facts on which are being commented.
 - 2) If the defamation deals with an allegation of fact.
 - 3) If it involves the topic that is not in the public interest and focuses on the private life of the person (regardless if it is a public figure or not).
19. In determining this defence it will be examined whether:
- 1) The writer has exercised a reasonable care to make it clear it is their comment or opinion.
 - 2) That there are no misrepresentations.
 - 3) That the writer was objectively fair and not done maliciously.
20. What is meant by a matter of public interest or public benefit has been a matter widely construed by the Courts. Untruthful and unfounded statements against any public official are not in the public benefit. While fair comment based on accurate information on the operations of a Government ministry, department or statutory body are considered to be of public benefit. Individuals within those organisations who are named, can make a complaint to the police to launch a criminal investigation but can also commence civil proceedings which require a lower burden of proof.
21. Justification is a complete defence and it is where the defendant or accused proves that the matter reported was indeed true even if the publication was malicious.

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MISLEADING HEADLINES

22. News media should be cognisant to the fact that their headlines may attract liability (either Criminal or Civil). This occurs when there is a headline that is used to attract readers and it is deemed to be a defamatory statement; even if the published story does not fall into the category. There should be great care in the formation of headlines.

CONCLUSION

Freedom of Expression and the Freedom of the Press are important to our society but these freedoms that are granted in section 23 of the Constitution Order are not absolute rights, they have to be balanced against other rights granted in the Virgin Islands Constitution Order 2007. We encourage and support the expression of views, opinions and ideas as well as a properly functioning media, who would produce accurate, fair and an impartial view of matters, as these are essential to a proper working democratic society. However, everyone must be mindful on how they exercise this right to ensure that their expressions fall into the category of unprotected speech that attracts criminal liability.

Director of Public Prosecutions

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