



69. Particular Privacy Issues Affecting Children and Young People

Taking photographs and other images

Background

69.106 The taking of photographs and other images of children and young people without consent has raised significant concerns in recent times. While the issues are not limited to photographs and images of children and young people, recent controversies have included: the taking of photographs of young male rowers and footballers and posting them on a website containing links to what the media described as a ‘gay website’; discovery of a website containing hundreds of images of children taken at recreational sites in Queensland, and thought to be used for sexual gratification; and examples of ‘upskirting’—the covert taking of photographs underneath clothing—in a number of public places.^[129]

69.107 Mobile phone cameras and mobile phone video cameras appear to have heightened these concerns, due to their small size and availability. The issue of unauthorised taking of images, however, extends beyond any one type of technology. One author has noted that concerns about covert taking of photographs have existed since the 1890s, and have reappeared on a regular basis as different forms of cameras became available.^[130] Most recently, the concerns about unauthorised images have exploded with the ease and accessibility of online publication.

69.108 Community concerns led SCAG to consider the issue. A discussion paper released for public comment in August 2005 set out the concerns and raised a number of options for reform.^[131] While the paper was particularly focused on the posting of unauthorised photographs on the internet, much of the discussion addressed the issue of taking photographs generally. The SCAG discussion paper includes extensive comment on the issue of giving consent to the taking of a photograph. The discussion paper notes that the absence of consent may affect whether the taking of a photograph is considered to be unauthorised and, if consent was obtained, whether the subsequent use is connected with any consent that was given at the time the photograph was taken.^[132]

69.109 The Victorian Law Reform Commission (VLRC) also has commenced an inquiry on surveillance in public places. It is expected that a number of issues concerning the taking and use of unauthorised photographs will arise in that inquiry. The VLRC is planning to release a consultation paper later in 2008.

The *Privacy Act* and images

69.110 The *Privacy Act* protects personal information that is held, or collected for inclusion, in a ‘record’. A ‘record’ is defined to include a photograph or other pictorial representation of a person.^[133] If an individual’s identity is apparent, or can reasonably be ascertained, from a photograph or other image, then the collection, use and disclosure of that image is covered by the *Privacy Act*. This extends to video images as well as still photographs. The rest of this chapter uses the term ‘image’ to cover photographs and moving images. All of the privacy principles applicable to the collection and use and disclosure of personal information also will apply to the taking and publication of images.

69.111 As with other forms of personal information, the coverage of images is limited by the scope of the *Privacy Act*. For example, an image is not covered by the *Privacy Act* if it was taken by an individual who is acting in their private capacity. The image is also not covered if the image was taken by someone acting on behalf of a small business.^[134] Similarly, images taken by a person acting on behalf of a state or territory agency are not covered by the *Privacy Act*, although they may be covered by a state or territory law.^[135]

Submissions and consultations

69.112 A number of stakeholders raised concerns about the lack of clarity of the existing law in relation to photographing children. Some expressed particular concern about the ease of taking and disseminating photographic images using mobile or digital technology.^[136]

69.113 Stakeholders highlighted the need to safeguard the safety and privacy of children from people with no legitimate purpose for taking and publishing photos.^[137] The ALRC was presented with evidence about the harm that can be done to children where they are the victims of using photographs for sexual gratification, even where the photograph itself was not sexually explicit in nature.^[138] The Queensland Commission for Children and Young People and Child Guardian indicated that it regularly receives phone calls from concerned parents, managers of sporting associations, and others who believe it is against the law to take photos of children at events.^[139] One stakeholder lamented that this is the ‘re-engineering of society by stealth and misinformation’.^[140] The OPC considered that developing social protocols that make it acceptable to ask a person to refrain from using a camera on a beach or outside of a school is a positive step.^[141]

69.114 The issues around unauthorised images are not limited to safety concerns about children and young people. As noted in Chapter 67, the ALRC’s consultations with young people indicated that the online publication of images without the consent of the subject of the photograph is a common occurrence—whether or not the image itself was taken with the subject’s consent. The online posting itself was taken for granted by some, and the ease of online publication accepted as a reality by most. While the posting may not be criminal in nature, the possible consequences of unauthorised posting can include bullying, ridicule, embarrassment and generally an invasion of privacy.

69.115 Overall, concerns about taking and using unauthorised images, particularly of children, led some to consider the need for stricter regulation.

Sadly, there is now good reason for the existence of clear guidance through the *Privacy Act* governing limitations on the broadcasting of identifying images of children, restricting the ability of organisations to publicly display a photo of a child in their care, without the express consent of the parent or guardian.^[142]

69.116 Generally, however, there was not widespread support for a blanket ban on the taking of images of children without express consent. Instead, there were calls for a clearer regime which balances sensibly the need to protect children from exploitation for sexual and commercial purposes with the need not to place undue restrictions on the taking of images by parents, family and friends.^[143] While there are some individuals who offend others through inappropriate behaviour, these are in the minority and the vast majority of appropriate users should not be restricted from using photography in appropriate ways.^[144] Some considered that privacy laws are an appropriate method for regulating this issue.^[145]

69.117 In contrast, the Arts Law Centre of Australia was opposed to any law which requires photographers or documentary filmmakers to obtain the consent of individuals before taking a photograph or film footage.^[146] The concerns of the artistic community in relation to privacy laws preventing street art and the taking of photographs in public places are addressed in more detail in Chapter 74.

Options for reform

69.118 In the SCAG discussion paper on unauthorised photographs, a number of reform options were discussed, including:

- possible criminal offences regarding unauthorised use of photographs of children;
- possible civil remedies regarding unauthorised publication of images of people;
- ‘take down’ provisions for online content; and
- education campaigns.

Criminal offences

69.119 There are a number of existing criminal laws that address the taking and use of unauthorised images for offensive purposes. Some of these include:

- use of surveillance devices to record a ‘private activity’ without consent;^[147]
- filming for indecent purposes;^[148]
- making an image of a child engaged in a private act for prurient purposes;^[149]
- making indecent visual images of a child under the age of 16;^[150]
- committing indecent or offensive acts in a public place;^[151]
- child pornography offences;^[152] and
- using a telecommunications network or carriage service to facilitate certain offences.^[153]

69.120 As noted in the SCAG discussion paper, a number of situations of concern do not fit neatly into the existing laws. Most of the existing criminal offences involve elements of ‘private activity’ or a ‘private act’, so that any activity carried out in a public environment, or at least an activity in a place where privacy is not expected—such as rowing, swimming or playing in a public playground—is not covered by the particular offence. To deal with particular concerns about ‘upskirting’, Victoria has introduced specific offences for the act of deliberately observing or capturing images of the anal or genital area of someone without their knowledge and in circumstances where it would be reasonable to expect that they would not be photographed in this way.^[154] It is also an offence intentionally to distribute such images without the person’s consent. There is, however, a question of whether criminal offences should more broadly extend to the making of images without consent in any public or private situation where the purpose for making the image is to provide for sexual arousal or sexual gratification.

69.121 Another concern raised with the Inquiry is that a number of the criminal offences in the states and territories do not cover images of children that are not sexually explicit in nature, but that may be used for purposes of sexual gratification. The Queensland Police Service provided the ALRC with a number of case studies involving images of children, in socially appropriate situations and

attire, which had been taken and used for sexual gratification.^[155] Due to the existing definitions of ‘child exploitation material’, ‘child abuse material’ and ‘child pornography’ material in Commonwealth and Queensland legislation, the Police have had only limited success in prosecuting the individuals involved, and even greater difficulties in having the images removed from the internet as they were not considered to be offensive content.

Civil rights and remedies

69.122 There are valid concerns that there are some types of capture and publication of images which may not be criminal in nature, but still affect an individual’s privacy interests.

69.123 The SCAG discussion paper looked at the use of copyright law enacted in the Netherlands to eradicate the trade in video recordings showing children on beaches and nudist beaches where the recording is made without the parents’ or child’s consent.^[156] As part of the civil response to the issue, the *Copyright Act 1912* (the Netherlands) was amended to provide that the publication of a photographic or video portrait made without a commission is not permitted if this would be contrary to the reasonable interests of the person shown in the photograph or video. The Act provides that a child or his or her legal representative may apply to the courts for an injunction to restrain publication. A number of submissions made in response to the SCAG discussion paper supported this kind of ‘reasonable interests’ approach, but questioned whether amendment to Australian copyright law was the best response.^[157]

Take down notices for online content

69.124 The current take-down notice scheme administered by the Australian Communications and Media Authority (ACMA) for the regulation of internet content is dependent on the *National Classification Code* and decisions of the Classification Board to determine what is prohibited content that can be the subject of a take-down notice.^[158] Prohibited content includes material rated, or likely to be rated, RC or X18+, or material of a R18+ or MA15+ rating where access is not restricted appropriately. There is no specific regulation in Australia of internet content that is an invasion of an individual’s privacy.

Conditional rights

69.125 Many bodies have begun to include as part of conditions of entry to premises, or participation in an event, that cameras, video cameras or mobile phones incorporating cameras or video cameras, are not to be brought onto the premises or used. This has become typical in change rooms and private gyms, where people expect an element of privacy, but has been more controversial when applied to public events and places such as life saving and sports carnivals, or public swimming pools.^[159]

Education

69.126 The activity of taking images appears to many members of the community to be under siege. The ALRC heard complaints from people who were challenged or castigated when taking photographs of family members, and from those concerned about a loss of artistic freedom. Conversely, others have concerns about guaranteeing the privacy and safety of children in the community. Clearly there is confusion about what is acceptable, what is legal, and when inappropriate behaviour can be stopped or punished. It is also an area where community attitudes and behaviours are changing.

69.127 A number of bodies have begun to publish educational information about the law surrounding the taking of images in public. The Privacy Commissioner of Victoria has published a fact sheet on mobile phones containing cameras covering many of the issues of concern and the legal protections in place.^[160] The Queensland Commissioner for Children and Young People and Child Guardian has developed a similar fact sheet on photography and video footage, with a particular emphasis on children's and young people's right to privacy.^[161]

ALRC's view

69.128 **The ALRC does not recommend a blanket ban on the taking of images without consent. This is not seen as a practical or desirable option.** Decisions regarding imposing conditions of entry or participation that include a ban on taking images should be left to the bodies owning premises or organising events. These views were set out in DP 72.^[162] The ALRC received no comment on this position.

69.129 As noted above, however, there is confusion and concern around issues of taking and publishing images of children and young people. The ALRC believes that a multifaceted approach is required to alleviate these concerns.

69.130 The criminal law regulates more severe forms of inappropriate behaviour. It is clear that there are gaps in the existing criminal law, however, and not all inappropriate conduct relating to the taking and use of unauthorised images is presently covered in all jurisdictions. Further consideration must be given to what types of behaviour the community wants to label as criminal, but merely taking an image without consent should not be considered a criminal act.

69.131 It is outside the scope of this Inquiry to examine and improve criminal laws to ensure that the full range of inappropriate behaviour relating to the making and using of offensive images is dealt with effectively in criminal offences. This issue should be progressed further by SCAG to ensure uniformity across the jurisdictions. The ALRC notes, however, that stakeholders contributing to this Inquiry have not expressed support for making it a criminal offence to take an image of a child or an adult without consent. Any proposed criminal offences should not be unduly restrictive and must still provide for family, friends, community bodies, schools, media, the artistic community and others to take and publish acceptable images.

69.132 The ALRC's considerations have focused on privacy regulation that may assist with concerns in this area. While acknowledging that individuals taking and publishing images for personal use are not covered under the *Privacy Act*, the ALRC does not consider it appropriate to broaden the take-down notice scheme to address privacy issues arising from the online publication of personal information. As discussed in Chapter 11, a take-down notice scheme would require a decision-maker to balance the right of freedom of expression and the right to individual privacy. It is more appropriate for a court, rather than a regulator, to undertake such a balancing act. The ALRC also queries the utility of an Australian take-down notice scheme given the ease of moving internet content to a website hosted in another jurisdiction. The statutory cause of action for a serious invasion of privacy, recommended in Chapter 74, is a more appropriate approach to regulation of the issue. The issuing of a take-down notice may be an appropriate remedy for a court to order in certain cases.

69.133 The statutory cause of action will provide protection where a person (including a child or young person) has a reasonable expectation of privacy and the act or conduct is sufficiently serious to cause substantial offence to an ordinary person. This will provide a remedy in cases where there is

serious harm arising from the invasion of privacy, and also provide a message to the community in general about what constitutes acceptable behaviour.

69.134 As discussed in Chapter 74, a statutory cause of action will balance the right of privacy with competing rights, in particular freedom of expression. Combined with appropriate criminal offences to deal with the most unacceptable actions, a statutory cause of action allows a balanced way forward to allow individuals to continue to photograph and video friends and family, and to allow the artistic community to use this medium of artistic expression, while providing some limits on the invasion of personal privacy.

69.135 It is clear, however, that further information about the laws relating to the taking of images is required in order to educate the community, provide information on what is appropriate and inappropriate behaviour, inform the public about available remedies, and facilitate an informed debate about future law reform in this area. In conjunction with proposals for the introduction of a statutory cause of action for a serious invasion of privacy, the ALRC recommends that the OPC should provide information to the public concerning the statutory cause of action.^[163] As the publication of images, particularly in the online environment, is an issue of particular concern to the community, such information should include discussion of when publication of an image is likely to be considered an invasion of privacy.

^[129] Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues*, Discussion Paper (2005), 5.

^[130] C Ludlow, “‘The Gentlest of Predations’: Photography and Privacy Law’ (2006) 10 *Law Text Culture* 135, 137. See also Australian Mobile Telecommunications Association, *Submission to the Standing Committee of Attorneys-General Discussion Paper Unauthorised Photographs on the Internet and Ancillary Privacy Issues*, October 2005. The seminal article on privacy was prompted by advances in photographic technology: S Warren and L Brandeis, ‘The Right to Privacy’ (1890) 4 *Harvard Law Review* 193.

^[131] Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues*, Discussion Paper (2005). For an overview of some of the examples that have led to consideration of the issue, see [7]–[18].

^[132] See, eg, *Ibid*, [31]–[38]. Some jurisdictions were pushing for uniform criminal laws on these issues through SCAG, although the issue was not discussed at the March 2008 meeting: see K Ngyuen, ‘Law Chiefs have their Eyes on Voyeurs’, *The Age* (online), 28 July 2006, <www.theage.com.au> and Standing Committee of Attorneys-General, ‘Communiqué’ (Press Release, 28 March 2008).

^[133] *Privacy Act 1988* (Cth) s 6. For more detailed discussion of the definitions of ‘record’ and ‘personal information’, see Ch 6.

^[134] Although see Rec 39–1 which seeks to bring small business under the coverage of the *Privacy Act*.

^[135] See Ch 2 for an overview of applicable state and territory privacy laws and the ALRC’s recommendations in Ch 3 for introduction of nationally consistent privacy laws.

^[136] See, eg, Youth Affairs Council of Victoria Inc, *Submission PR 172*, 5 February 2007.

^[137] Queensland Police Service, *Submission PR 222*, 9 March 2007; Office of the Victorian Privacy Commissioner, *Submission PR 217*, 28 February 2007.

- [138] Queensland Police Service, *Submission PR 222*, 9 March 2007.
- [139] Queensland Government Commission for Children and Young People and Child Guardian, *Submission PR 171*, 5 February 2007.
- [140] Institute of Mercantile Agents, *Submission PR 101*, 15 January 2007.
- [141] Office of the Privacy Commissioner, *Submission to the Standing Committee of Attorneys-General Discussion Paper Unauthorised Use of Photographs on the Internet and Related Privacy Issues*, November 2005.
- [142] Caroline Chisholm Centre for Health Ethics, *Submission PR 69*, 24 December 2006.
- [143] Queensland Police Service, *Submission PR 222*, 9 March 2007; Office of the Victorian Privacy Commissioner, *Submission PR 217*, 28 February 2007; Queensland Government Commission for Children and Young People and Child Guardian, *Submission PR 171*, 5 February 2007; Australian Privacy Foundation, *Submission PR 167*, 2 February 2007; Institute of Mercantile Agents, *Submission PR 101*, 15 January 2007.
- [144] Australian Mobile Telecommunications Association, *Submission to the Standing Committee of Attorneys-General Discussion Paper Unauthorised Photographs on the Internet and Ancillary Privacy Issues*, October 2005.
- [145] Queensland Government Commission for Children and Young People and Child Guardian, *Submission PR 171*, 5 February 2007; Australian Privacy Foundation, *Submission PR 167*, 2 February 2007; Electronic Frontiers Australia Inc, *Submission PR 76*, 8 January 2007; Caroline Chisholm Centre for Health Ethics, *Submission PR 69*, 24 December 2006.
- [146] Arts Law Centre of Australia, *Submission PR 125*, 15 January 2007. See also Australian Library and Information Association, *Submission PR 446*, 10 December 2007; Australian Network for Art and Technology, *Submission PR 434*, 10 December 2007; National Association for the Visual Arts Ltd, *Submission PR 415*, 7 December 2007; P Hammer, *Submission PR 396*, 7 December 2007; N Griffiths, *Submission PR 395*, 7 December 2007; Contemporary Arts Organisations Australia, *Submission PR 384*, 6 December 2007; R Anderson, *Submission PR 373*, 4 December 2007; E Halvorson, *Submission PR 367*, 3 December 2007; M Schaefer, *Submission PR 364*, 3 December 2007; O Esmonde-Morgan, *Submission PR 361*, 3 December 2007; H Page, *Submission PR 360*, 2 December 2007; K Purcell, *Submission PR 359*, 2 December 2007; J Mortelliti, *Submission PR 357*, 2 December 2007; National Association for the Visual Arts, *Submission PR 151*, 30 January 2007.
- [147] See, eg, *Surveillance Devices Act 1999* (Vic) ss 6–7; *Surveillance Devices Act 2000* (NT) s 5; *Surveillance Devices Act 1998* (WA) ss 5–6. Not all of the surveillance devices legislation in Australia, however, has a general prohibition on the use of surveillance devices without authorisation or consent: see, eg, in South Australia the prohibition is limited to listening devices: *Listening and Surveillance Devices Act 1972* (SA) s 4.
- [148] See, eg, *Summary Offences Act 1988* (NSW) pt 3B. In some jurisdictions, however, the offence only applies where the indecent material is produced for the purpose of sale: see, eg, *Summary Offences Act 1953* (Qld) pt 7.
- [149] See, eg, *Criminal Law Consolidation Act 1935* (SA) s 63B.
- [150] See, eg, *Criminal Code* (Qld) s 210(1)(f)
- [151] See, eg, *Ibid* s 227(1); *Summary Offences Act 1988* (NSW) s 4; *Police Offences Act 1935* (Tas) s 13.

^[152] See, eg, *Crimes Act 1958* (Vic) pt 1 div 13; *Criminal Code Act 1924* (Tas) ss 130–130G.

^[153] See, eg, *Criminal Code* (Cth) s 474.14 (using a telecommunications network to commit a serious offence); s 474.17 (using a carriage service to menace, harass or cause offence); ss 474.19–474.20 (using a carriage service to intentionally access, transmit or make available child pornography material); ss 474.22–474.23 (using a carriage service to intentionally access, transmit or make available child abuse material).

^[154] *Summary Offences Act 1966* (Vic) div 4A, inserted by the *Summary Offences Amendment (Upskirting) Act 2007* (Vic). Similar offences have been introduced to the South Australian Parliament for debate: *Summary Offences (Indecent Filming) Amendment Bill 2008* (SA).

^[155] Queensland Police Service, *Submission PR 222*, 9 March 2007.

^[156] Standing Committee of Attorneys-General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues*, Discussion Paper (2005) citing *Convention on the Rights of the Child: Initial Reports of States Parties Due in 1997: Netherlands: Addendum*, CRC/C/51/Add.1 (1997).

^[157] See, eg, New South Wales Commission for Children and Young People, *Submission to the Standing Committee of Attorneys-General Discussion Paper Unauthorised Use of Photographs on the Internet and Ancillary Privacy Issues*, October 2005.

^[158] *Broadcasting Services Act 1992* (Cth) sch 7.

^[159] R Grayson, 'No Right Not to Be Photographed—Councils Overreact', *On Line Opinion* (online), 12 July 2005, <www.onlineopinion.com.au>.

^[160] Office of the Victorian Privacy Commissioner, *Mobile Phones with Cameras—Info Sheet 05.03* (2003).

^[161] Queensland Government Commission for Children and Young People and Child Guardian, *Tips for Parents on Photography of Children and Young People*, Fact Sheet 3 (2007).

^[162] Australian Law Reform Commission, *Review of Australian Privacy Law*, DP 72 (2007), [59.112].

^[163] See Rec 74–7.

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