

15 November 2013

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

Via email: privacy@alrc.gov.au

ACCAN thanks the Australian Law Reform Commission for the opportunity to contribute to its inquiry on Serious Invasions of Privacy in the Digital Era.

ACCAN supports a statutory cause of action for serious invasions of privacy as a way to provide consumers with a remedy in situations for which there are currently very limited avenues of redress. The cause of action would allow for more flexible and proportionate remedies which properly take into the account the emotional and psychological distress occasioned by particular breaches of privacy.

Question 2: What specific types of activities should a statutory cause of action for serious invasions of privacy prevent or redress? The ALRC is particularly interested in examples of activities that the law may not adequately prevent or redress.

Two specific types of activities that invade privacy, with potentially serious implications for communications consumers and which are not adequately prevented or redressed by existing laws, is the practice of so-called ‘sexting’ and the use of location data to reveal sensitive information about individuals.

‘Sexting’

‘Sexting’ is the practice of sending sexually explicit photographs, in a text message or email form, to an individual or group. It can be consensual in the case of, for example, two individuals in a relationship agreeing to ‘sext’ one another, or it can be non-consensual where images are taken of an individual and distributed to others without that person’s permission.

Some research on ‘sexting’ has focused on its beneficial and somewhat harmless objectives as it has become “a method for flirting and assessing whether further amorous advances might be welcomed” and is a way for teenagers to “take possession of their own bodies and sexuality, thus affording [them] a sense of power and control”¹. Whether this is indeed the case or not, it is the non-consensual taking and distribution of sexually explicit images which can constitute a serious invasion of privacy. A recent study by the University of Utah found that approximately 40 per cent of the teenagers surveyed for the research had received a

¹ Julia Halloran McLaughlin, ‘Exploring the First Amendment Rights of Teens in Relationship to Sexting and Censorship’ (2012) 45(2) University of Michigan Journal of Law Reform 315, 33 in National Children’s and Youth Law Centre & Legal Aid NSW, *New Voices/New Laws*, November 2013, http://www.law.unsw.edu.au/sites/law.unsw.edu.au/files/docs/new_voices_law_reform_report.pdf

'sext'. Out of this group, 25 per cent claimed to have shared the image with friends² (presumably without the consent of the person in the image). In a similar Australian survey which had a much smaller sample size, the percentage of respondents admitting that a 'sext' had been shared with others was much smaller (although not insignificant) at 8.1 per cent³. This suggests that, among teenage 'sexters', there is a relatively high likelihood that images are not kept private and as a result the individual in the image loses all power and control over how a photograph of themselves is being used. This, of course, has serious implications on an individual's reputation, feelings of self-worth and could make the individual a target for threats and harassment.

The National Children's and Youth Law Centre, together with Legal Aid NSW, published a report in November 2012 which examined the criminal laws that apply to the online behaviour of school aged young people. The report's focus on cyber-bulling and 'sexting' described how, in the context of these activities and behaviours, these instances of privacy breaches are generally dealt with through criminal law, on charges such as child pornography and (distribution of) child abuse material (which might be an inappropriate charge for a teenager who has just made a thoughtless and imprudent mistake). Further options include pursuing the matter through common law means, such as defamation⁴.

The suite of different legal and regulatory avenues for addressing breaches of privacy, in specific relation to cases of non-consensual 'sexting' is, as described by the Australian Privacy Foundation, "far from ideal, but it is a natural consequence where the laws predate, and did not anticipate, the type of conduct they are applicable to"⁵. As such, a statutory cause of action for serious invasions of privacy, which prevents or redresses cases of non-consensual 'sexting' could be a solution to the piecemeal legislation which victims of 'sexting' currently look to for redress.

Use of mobile location services

Another problem area which would benefit from a cause of action is mobile app location services which have the potential to create security risks, open consumers up to highly directed marketing, and reveal sensitive personal information about individuals. In the context of this ALRC inquiry, of particular concern to ACCAN is this potential to reveal sensitive information about individuals without their informed consent, such as revealing that a user attends premises associated with particular religions and political groups.

Under the *Privacy Act 1988* (Cth)⁶, "sensitive information" includes (among other things) information or an opinion about an individual's:

- racial or ethnic origin;

² Lohmann, R. C. *The Dangers of teen Sext*, 20 July 2012, <http://www.psychologytoday.com/blog/teen-angst/201207/the-dangers-teen-sexting>

³ National Children's and Youth Law Centre & Legal Aid NSW, *New Voices/New Laws*, November 2013, http://www.law.unsw.edu.au/sites/law.unsw.edu.au/files/docs/new_voices_law_reform_report.pdf

⁴ National Children's and Youth Law Centre & Legal Aid NSW, *New Voices/New Laws*, November 2013, http://www.law.unsw.edu.au/sites/law.unsw.edu.au/files/docs/new_voices_law_reform_report.pdf

⁵ Australian Privacy Foundation, *Submission to the Victorian Parliament's Law Reform Committee on the Inquiry into Sexting*, 7 June 2012, http://www.parliament.vic.gov.au/images/stories/committees/lawreform/isexting/subs/S08_-_Australian_Privacy_Foundation.pdf

⁶ *Privacy Act 1988* (Cth), <<http://www.comlaw.gov.au/Details/C2013C00125>>.

- political opinions or membership of a political association;
- religious beliefs or affiliations;
- philosophical beliefs;
- membership of a professional or trade association or trade union;
- sexual orientation or practices; or
- health information about an individual.

Location data has the potential to reveal any of these types of information about an individual. Under the NPP 10 (and APP 3), sensitive information is protected above and beyond other forms of personal information. Location data can also reveal information about an individual that is not a form of sensitive information⁶, as defined by the *Privacy Act 1988* (Cth), but which presents particular risks if revealed. Victims of crime, for instance, may have a particular need to keep their location private.

Question 20: Should the Privacy Commissioner, or some other independent body, be able to bring an action in respect of the serious invasion of privacy of an individual or individuals?

For the consumer, access to justice is an important means to seek redress for serious invasions of privacy. The means of accessing justice must not be prohibitively complex or expensive, otherwise only those with legal know-how and the means to take their case to court will be able to do so.

Consistent with the principle of ‘access to justice’, ACCAN recommends providing the OAIC with powers to investigate serious intrusions of an individual’s privacy and apply the penalties to issues arising under the statutory cause of action. If substantiated, this would also invoke all the existing complaint machinery, remedies and sanctions (including the new ones from March 2014). This measure could provide consumers with a quick, inexpensive and more accessible redress mechanism than the courts. A precedent for such an arrangement already exists in the model of the Consumer, Trader and Tenancy Tribunal, an independent decision-making body addressing disputes on behalf of tenants as well as landlords⁷.

In keeping with the principle of accessibility, ACCAN also supports the proposal to allow an independent regulator, such as the Australian Privacy Commissioner, to bring proceedings on behalf of living, natural persons.

Thank you for considering ACCAN’s submission to the inquiry.

Sincerely,

Katerina Pavlidis
Grants and Research Assistant

⁷NSW Government, *Resolving renting problems*, 13 February 2013,
http://www.fairtrading.nsw.gov.au/ftw/Tenants_and_home_owners/Renting_a_home/Resolving_renting_problems.page