# 'SEXTING' AND THE LAW – HOW AUSTRALIA REGULATES ELECTRONIC COMMUNICATION OF NON-PROFESSIONAL SEXUAL CONTENT

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## Abstract

Sexting – the electronic communication of non-professional images or videos portraying one or more persons in a state of nudity or otherwise in a sexual manner – has serious legal implications. For example, where the content portrays a person who is underage, the sender, receiver and any intermediary involved in the communication can be charged with child pornography offences under current Australian criminal law. In addition, sexting can give rise to other actions under criminal law, as well as a host of actions under civil law. This article describes sexting as a four-step process and seeks to identify the areas of law affect sexting.

## 1 Introduction

'Sexting' (a combination of the words 'sex' and 'texting') can suitably be defined along the following lines:

> Sexting means the electronic communication of non-professional[2] images or videos portraying one or more persons in a state of nudity or otherwise in a sexual manner.[3]

To date, there is a complete lack of research into how Australia regulates sexting. To start remedying this situation, this article identifies what laws in Australia impact upon sexting and highlights key aspects of how those laws regulate sexting. Owing to the fact that a wide range of areas of law affect sexting, and bearing in mind the space restrictions associated with a journal article, each relevant area of law can only be discussed briefly. In that sense, this article can be seen as a modest first step towards a greater understanding of

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2 As opposed to the wealth of more or less professionally produced pornographic materials available online.

3 One could arguably also include audio recordings and pure text messages, but the focus in this article is on images and videos.

sexting regulation, rather than a comprehensive overview of how Australia regulates this practice.

## 2 Sexting and the law

So far, much of the debate about sexting and the law is focused on criminal law, and more specifically, child pornography offences. However, sexting may also be regulated, or affected, by civil law such as defamation law, privacy law, surveillance law, nuisance, confidentiality and even copyright law. Consequently, sexting is regulated by a complex matrix of partially overlapping state and federal, civil and criminal, law. This is particularly true if sexting is approached as a process rather than just the sending of images and videos. It is submitted that, to understand how the law regulates sexting, it is necessary to look beyond the sending as such and also take into account (1) the collection of the images or videos, (2) how those images or videos are used by the party that collected them, (3) how those images or videos are distributed by the party that collected them, and (4) how those images or videos are subsequently used and/or redistributed.

### 2.1 Sexting and criminal law

Criminal law affects sexting in several ways, and while the crimes discussed here are varied in nature (and rightly deserve substantial individual attention) they are grouped together for space considerations. Further, some crimes, such as criminal defamation, have been excluded from the coverage.

Of the areas of criminal law that affect sexting, child pornography has, by far, gained the most attention in the media and academic debate. The reason is obvious – child pornography laws, put in place to protect children from one of the world's most universally condemned criminal activities, are being used to charge teenagers who voluntarily capture and communicate images or videos of themselves. For example, in 2008, around 20 teenage girls were found to have been involved in sexting at one particular school in Pennsylvania (US). The District Attorney responded by announcing potential charges of possession and distribution of child pornography.[4]

It is interesting to note that, in this type of cases, the 'victims' of, and the parties responsible for, the act of child pornography are the same – a somewhat absurd situation bearing in mind the serious purpose for which child pornography laws exist.

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[4] Vivian Berger 'Stop Prosecuting Teens for "sexting"', (2009) *The National Law Journal* <http://find.galegroup.com/gtx/start.do?prodId=AONE&userGroupName=bond>.

Australian law – here discussed by reference to a few well chosen examples, rather than in a systematic manner – could produce a similar result. For example, s 210 of the *Criminal Code 1899* (Qld) states that:

> Any person who […] (e) without legitimate reason, wilfully exposes a child under the age of 16 years to any indecent object or any indecent film, videotape, audiotape, picture, photograph or printed or written matter; or (f) without legitimate reason, takes any indecent photograph or records, by means of any device, any indecent visual image of a child under the age of 16 years; is guilty of an indictable offence.

This section could arguably be applied to instances of sexting. Similarly, s 91H(2) of the *Crimes Act 1900* (NSW) makes clear that a person who produces, disseminates[5] or possesses child pornography[6] is guilty of an offence.

Turning to law under development at the time of writing, aspects of the Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 will impact on sexting in a similar manner. For example, the proposed 474.27A would criminalise sexting from a person of at least 18 years of age, to a person under 16 years of age:

> (1) A person (the *sender*) commits an offence if:
>
> (a) the sender uses a carriage service to transmit a communication to another person (the *recipient*); and
>
> (b) the communication includes material that is indecent; and
>
> (c) the recipient is someone who is, or who the sender believes to be, under 16 years of age; and
>
> (d) the sender is at least 18 years of age.

However, strong policy reasons speak in favour of an alternative approach being developed:

> Several problems emerge from lumping sexting teens into the same category as depraved criminals who inflict harm on minors. First, and perhaps most obvious, teenagers engaged in sexting are not knowingly

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5 Defined to include sending, supplying, exhibiting, transmitting or communicating it to another person (such as via MMS), or the act of making it available for access by another person (such as posting it on a website). *Crimes Act 1900* (NSW), s 91H(1).

6 Defined to mean 'material that depicts or describes (or appears to depict or describe), in a manner that would in all the circumstances cause offence to reasonable persons, a person who is (or appears to be) a child: (a) engaged in sexual activity, or (b) in a sexual context, or (c) as the victim of torture, cruelty or physical abuse (whether or not in a sexual context).' *Crimes Act 1900* (NSW), s 91H(1).

> harming minors in the same way that traditional child pornographers do. […] Second, the draconian penalties that stem from child pornography convictions can decimate a teenager's life making it all but impossible for the teen to become a productive member of society. […] Finally, the stigma attached to being labeled [sic] a child pornographer is lasting. Few crimes carry such a pejorative marker, and members of the public often link child pornography with pedophilia [sic] and other heinous crimes - sometimes for good reason.[7] (internal footnotes omitted)

Further, it has been noted that there is also a cost to society in that classing sexting teenagers as child sex offenders 'severely dilutes the importance and utility of the sex offender registry'[8]:

> To put it bluntly, a caring mother of a 5-year-old girl wants to know when a pedophile has moved into the neighbourhood [sic]; she probably doesn't care at all whether the 16-year-old girl down the street is sending nude photos of herself to her 16-year-old boyfriend.[9]

Bearing in mind that a person has limited possibilities of controlling what type of content one receives, the issue of possessing child pornography deserves some further attention. Imagine that a person receives a MMS or an e-mail containing underage sexting images. Imagine further that the recipient does not check the inbox on a regular basis or, for some other reason, does not delete the images. Is the recipient then guilty of possessing child pornography? This would seem to depend on how the recipient has acted after becoming aware of the content, and the law provides the following defence for possession of child pornography:

> It is a defence to a charge for an offence under subsection (2) not involving the production or dissemination of child pornography that the material concerned came into the defendant's possession unsolicited and the defendant, as soon as he or she became aware of its pornographic nature, took reasonable steps to get rid of it.[10]

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7 Robert D Richards and Clay Calvert, 'When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case' (2009) 32 *Hastings Comm. & Ent L J* 1, 35.

8 Ibid 36. For information about Australia's sex offender registry, Australian National Child Offender Register (ANCOR), see: <http://www.crimtrac.gov.au/systems_projects/AustralianNationalChildOffenderRegisterANCOR.html>at 11 March 2010.

9 Ibid.

10 *Crimes Act 1900* (NSW), s 91H(5).

Recipients of underage sexting are thus well advised to delete the images or videos promptly, even where the content is provided on the sender's own initiative. Otherwise, they risk being charged with possession of child pornography.

Another relevant aspect of the NSW Act relates to how images used in sexting are captured. That Act makes it an offence to, without consent, film another person who is engaged in a private act, for the purpose of obtaining, or enabling another person to obtain, sexual arousal or sexual gratification.[11] The same applies to such filming of 'private parts'.[12]

In some cases, the sender in a sexting situation could be subjected to stalking law. For example, s 359B of the *Criminal Code 1899* (Qld) gives the following definition of unlawful stalking:

> Unlawful stalking is conduct (a) intentionally directed at a person (the stalked person); and (b) engaged in on any 1 occasion if the conduct is protracted or on more than 1 occasion; and (c) consisting of 1 or more acts of the following, or a similar, type […]
>
> (ii) contacting a person in any way, including, for example, by telephone, mail, fax, email or through the use of any technology; […] (iv) leaving offensive material where it will be found by, given to or brought to the attention of, a person; (v) giving offensive material to a person, directly or indirectly; […]
>
> (d) that (i) would cause the stalked person apprehension or fear, reasonably arising in all the circumstances, of violence to, or against property of, the stalked person or another person; or (ii) causes detriment, reasonably arising in all the circumstances, to the stalked person or another person.

While not framed as a stalking matter, a recent US decision addresses conduct that, if carried out within Australia, arguably could meet the test outlined above. The background of the case is as follows:

> On May 15, 2005, C E, a fourteen-year-old female attending high school, received two photographs via e-mail from Jorge Canal. Canal was eighteen years of age and attended the same school when this incident occurred. One of the photographs was of Canal's erect penis; the other was a photograph of his face. A text message attached to the photograph of his face said, "I love you."

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11 Ibid s 91K.

12 Ibid s 91L. See also s 91M regulating the installation of devices to facilitate observation or filming.

> C E and Canal were friends and had known each other for roughly a year before Canal sent the photograph of his erect penis. They both associated with the same group of friends. C E generally hung out with teenagers older than herself. Both Canal and C E acknowledged they were only friends. Canal sent the photograph of his erect penis only after C E asked him to send a photograph of his penis three or four times in the same phone call. C E received the photograph on her e-mail account, viewed it, and thought she had deleted it. C E testified the photograph was sent only as a joke because some of her friends were doing it. She further testified that she did not ask for the photograph as a means to excite any feelings. Finally, C E testified that she asked for a photograph of Canal's penis, but not his erect penis.[13]

The Supreme Court of Iowa affirmed the decision of the lower courts and Mr Canal was convicted for knowingly disseminating obscene materials to a minor.

Further, sexting activities can be affected by obscenity regulations, such as s 578C(2) of the *Crimes Act 1900* (NSW): 'A person who publishes an indecent article is guilty of an offence.'[14] While the definition of what amounts to indecent content has varied over time, there can be little doubt that some content communicated in sexting can be classed as indecent.

Turning to the aspects of criminal law that are directly targeted at the relevant technologies, we see significant developments in recent times.[15] An important step was taken when the Standing Committee of Attorneys-General presented a National Model Criminal Code. This Model Code, which adopts a terminology consistent with that of the Council of Europe's *Convention on Cybercrime*, contains provisions specifically aimed at cybercrime. It is now the foundation for the criminal laws in New South Wales, Victoria, South Australia, the Australian Capital Territory, the Northern Territory, as well as for the Commonwealth legislation. In contrast, Queensland, Western Australia and Tasmania have yet to implement the Model Code.

Most importantly for the scope of this article, the Model Code led to the creation of the *Cybercrime Act 2001* (Cth) which replaced a part of the *Crimes Act 1914* (Cth) and inserted Part 10.7 of the *Criminal Code Act 1995* (Cth). As far as the approach taken in the Model Code is concerned, this article focuses on the federal legislation.

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13 *State of Iowa vs. Jorge Canal, JR, 773 N.W.2d 528*.

14 *Crimes Act 1900* (NSW), s 578C(2).

15 This discussion draws upon parts of chapter 16 of Jay Forder and Dan Svantesson, *Internet & E-Commerce Law* (2008).

Looking at the *Criminal Code Act 1995* (Cth), the two most relevant parts are, Part 10.6 dealing with telecommunications services and Part 10.7 dealing with computer offences.

The telecommunications services offences outlined in Part 10.6 are mainly traditional offences committed via telecommunications services. Some of those offences are of relevance to sexting. For example, Part 10.6 makes it an offence to do any of the following using telecommunications services:

- Make an unlawful threat;[16]
- Menace, harass or cause offence;[17]
- Access, transmit, publish, possess, control, produce, supply or obtain child pornography;[18]
- Access, transmit, publish, possess, control, produce, supply or obtain child abusive material;[19] or
- Procure, encourage, entice, recruit or induce a person under 16 years of age to engage in sexual activity.[20]

Similarly to the *Broadcasting Services (Online Services) Act 1992* (Cth), Part 10.6 also places obligations on Internet Service Providers and Internet Content Hosts. For example, section 474.25 states that:

> A person commits an offence if the person:
>
> (a) is an Internet service provider or an Internet content host; and
>
> (b) is aware that the service provided by the person can be used to access particular material that the person has reasonable grounds to believe is:
>
> (i) child pornography material; or
>
> (ii) child abuse material; and
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> (c) does not refer details of the material to the Australian Federal Police within a reasonable time after becoming aware of the existence of the material.

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16 *Criminal Code Act 1995* (Cth), ss 474.15 and 474.16.

17 Ibid s 474.17.

18 Ibid ss 474.19 and 474.20.

19 Ibid ss 474.22 and 474.23.

20 Ibid ss 474.26 and 474.27.

While dealing with the relevance of the technology-specific parts of Australia's criminal law, it is interesting to revisit the US case involving Mr Alpert, outlined above. In that case Mr Alpert gained access to his former girlfriend's email account by using a password she previously gave him. Such situations may involve a person gaining access to the content in question in an illegal manner.

Part 10.7 of the *Criminal Code Act 1995* (Cth) is the main regulation for the crimes targeted at computers. A distinction is drawn between serious computer offences on the one hand and other computer offences on the other hand. A *serious offence* is 'an offence that is punishable by imprisonment for life or a period of 5 or more years'.[21]

The key part of s 477.1 reads as follows:

> A person is guilty of an offence if:
>
> (a) the person causes:
>
> (i) any unauthorised access to data held in a computer; or
>
> (ii) any unauthorised modification of data held in a computer; or
>
> (iii) any unauthorised impairment of electronic communication to or from a computer; and
>
> (b) the unauthorised access, modification or impairment is caused by means of a carriage service; and
>
> (c) the person knows the access, modification or impairment is unauthorised; and
>
> (d) the person intends to commit, or facilitate the commission of, a serious offence against a law of the Commonwealth, a State or a Territory (whether by that person or another person) by the access, modification or impairment.

Interestingly, subsection 3 goes on to state that, '[i]n a prosecution for an offence against subsection (1), it is not necessary to prove that the defendant knew that the offence was an offence against a law of the Commonwealth, a State or a Territory, or a serious offence'. Furthermore, subsection 7 states that '[a] person may be found guilty of an offence against this section even if committing the serious offence is impossible.'

[21] Ibid s 477.1.

The above should have made clear that criminal law may affect sexting in several different ways, and that more detailed research is required to ascertain the exact implications criminal law has on sexting and sexting-related activities.

### 2.2 Sexting and privacy law

Australia's privacy law is currently undergoing a comprehensive reform following the Australian Law Reform Commission's report of May 2008.[22] As the law stands prior to reform taking place, it is clear that the *Privacy Act 1988* (Cth) has no effect on sexting. That is because amongst its broad exemptions, the Act excludes individuals acting in a personal capacity.[23] Consequently, the *Privacy Act* fails to provide any relief for victims of sexting, and that is not likely to change.

One of the few glimmers of hope in Australia's pre-reform privacy landscape is the judgment of a District Court judge in Queensland. In *Grosse v Purvis,*[24] Skoien J concluded that:

> It is a bold step to take, as it seems, the first step in this country to hold that there can be a civil action for damages based on the actionable right of an individual person to privacy. But I see it as a logical and desirable step. In my view there is such an actionable right.[25]

This judgment was, at least in part, motivated by the decision in *ABC v Lenah Game Meats Pty Ltd,*[26] where the High Court, made clear that the 1937 decision in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*[27] does not stand in the way for a privacy tort,[28] and made some observations as to what privacy means. For example, Gleeson CJ noted that:

> Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable

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22 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (*ALRC 108*).

23 *Privacy Act 1988* (Cth) ss 7B(1) and 16E. Note, however, that it is possible that the *Privacy Act* could be relevant where the images or videos are collected by an organisation and subsequently distributed by someone working for that organisation.

24 [2003] QDC 151.

25 Ibid ¶442.

26 [2001] HCA 63.

27 (1937) 58 CLR 479.

28 See Kirby J's statement that: *'[i]t may be that more was read into the decision in Victoria Park than the actual holding required.'* (Above n 26, ¶187).

> person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.[29]

So far, only one subsequent decision has agreed with Skoien J that a cause of action for invasion of privacy is part of Australian common law.[30] Other judgments have either found it unnecessary to decide whether such a cause of action exists,[31] or have found Skoien J's conclusion premature.[32] For example, in *Giller v Procopets*[33], Neave JA stated that: 'Because I have already concluded that Ms Giller has a right to compensation on other grounds, it is unnecessary to say more about whether a tort of invasion of privacy should be recognised by Australian law.'[34]

Either way, as Skoien's reasoning may give an indication of the direction in which Australian privacy law is going, it is interesting to examine the elements Skoien J anticipated would make up the tort of privacy:

> In my view the essential elements would be:
>
> (a) a willed act by the defendant,
>
> (b) which intrudes upon the privacy or seclusion of the plaintiff,
>
> (c) in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities,
>
> (d) and which causes the plaintiff detriment in the form of mental psychological or emotional harm or distress or which prevents or hinders the plaintiff from doing an act which she[/he] is lawfully entitled to do.[35]

It seems clear that sexting could fall within such a tort, for example:

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29 Above n 26, ¶42.

30 *Doe v Australian Broadcasting Corporation* [2007] VCC 281.

31 *Gee v Burger* [2009] NSWSC 149, ¶55, and *Giller v Procopets* [2008] VSCA 236, ¶452.

32 *Kalaba v Commonwealth of Australia* [2004] FCA 763, at para 6.

33 [2008] VSCA 236.

34 *Giller v Procopets* [2008] VSCA 236, ¶452.

35 Above n 25, ¶444. For a detailed discussion of a privacy tort in Australia, see: Des Butler, 'A Tort of Invasion of Privacy in Australia?' [2005] *Melbourne University Law Review* 11.

- where images or videos are captured without the knowledge and/or consent of the victim; and
- where images or videos are distributed, or re-distributed, without the knowledge and/or consent of the victim.

In light of the ALRC's recommendations it is likely that a potential tort of privacy will be superseded by a statutory cause of action for invasion of privacy. Interestingly, however, the ALRC makes clear that its suggested statutory cause of action for invasion of privacy would capture certain sexting-like situations. Indeed, one of the specific examples the ALRC provides of matters intended to fall within their recommended cause of action is a situation where: 'Following the break-up of their relationship, Mr A sends copies of a DVD of himself and his former girlfriend (B) engaged in sexual activity to Ms B's parents, friends, neighbours and employer.'[36]

### 2.3 Sexting and surveillance law

Some aspects of surveillance law have been address above. However, not all surveillance law will affect conventional sexting practices. For example, the *Surveillance Devices Act 2004* (Cth) aims to regulate surveillance carried out by law enforcement agencies.[37] While images or videos captured in such a context could end up in a sexting situation, this will not be discussed further here.

When looking at how surveillance laws affect sexting, one also has to take account of context-specific law, such as legislation regulating the collection of images and videos in a particular context. The *Workplace Surveillance Act 2005* (NSW) is an example of such an Act.

### 2.4 Sexting and defamation law

In 2005, Australia's State and Territory Governments agreed to enact uniform defamation laws. This uniform law was adopted in 2006. However, the various State Acts that were introduced as a result of that agreement are meant to amend, rather than replace, the pre-enactment common law on defamation. As a consequence, the three classic elements of defamation remain as the starting point when dealing with defamation law. Thus, the plaintiff has to show that:

> the imputations complained of were published to (i.e. entered the mind of) a third person;

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36 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (*ALRC 108*), at 2570.

37 *Surveillance Devices Act 2004* (Cth), s 3.

the plaintiff was identified as the one the imputations relate to; and

the imputations were in fact defamatory.[38]

The first element would not be a major hurdle for a victim of sexting where she/he can prove that re-distribution has taken place. However, one can of course imagine situations where the victim has a justified suspicion that re-distribution has taken place, but the images or videos have been deleted prior to actions being taken by the victim. In those cases, establishing re-distribution may become technically difficult and a victim of sexting may struggle even to overcome the first element.

Where the sexting content shows the senders face, the second element should rarely be a problem. However, imagine that a person sends images of herself/himself showing only intimate body parts. While the receiver would know the identity of the sender in such a case, no one else would typically be able to identify the sender simply by looking at the images. Where that is the case, it may be difficult for a victim of re-distribution to show that anyone to whom the images were re-distributed were aware of the fact that the images portrayed the victim. The victim may, for good reasons, suspect that the re-distributor informed the subsequent receivers of the victim's identity, but proving it may be virtually impossible.

Further, if the re-distribution takes the form of the images in question being placed on a website or social networking site, available to anyone that accesses it, most of the people who view the images may have no knowledge of the victim's identity. In such a situation, the victim cannot meet the second element, but may nevertheless feel uncomfortable about the images being available for the world to see.

The third element is the most complex in a typical sexting situation. Do the images or videos actually defame the plaintiff? Whether that is the case or not is judged 'by reference to the standard of the hypothetical referee, namely ordinary, reasonable, fair-minded members of society.' [39] Applying this standard, an imputation is defamatory if it:

(i) 'is likely to injure the reputation of the plaintiff by exposing him or her to hatred, contempt or ridicule.'[40];

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38 *Consolidated Trust Company Limited v Browne* (1948) 49 SR (NSW) 86.

39 Des Butler and Sharon Rodrick, *Australian Media Law* (3rd ed, 2007), 35, referring to *Reader's Digest Services Pty Ltd v Lamb* [1982] HCA 4.

40 Ibid, referring to *Parmiter v Coupland* (1840) 6 M&W 105,108 and *Brander v Ryan* (2000) 78 SASR 234, 245.

(ii) 'contains a statement about the plaintiff which would tend to cause the plaintiff to be shunned or avoided.'[41]; or

(iii) '"has the tendency to lower the plaintiff in the estimate of others.'[42].

The re-distribution of sexting materials could do all three things.

In light of the above, it seems victims of re-distribution may be able to prove successfully all three elements necessary for an action in defamation. However, the defendant in such an action has several defences to rely on, based both on common law and on legislation. The most significant of those defences is so-called justification.

Using the Queensland *Defamation Act* as an example, section 25 makes clear that: 'It is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true.'[43] Interestingly, in the context of sexting, justification provides a complete defence even where the publication was motivated by malice.[44]

Where the defendant relies on justification, she/he needs to justify all the publication's imputations.[45] Consequently, it may not be sufficient to prove that the plaintiff voluntarily participated in the capturing of the image or video where the imputations include, for example, that the plaintiff is willing to share such images with third parties.

### 2.5 Sexting and confidentiality law

For a long period of time, confidentiality law has been used to protect privacy on a personal level. One such example is *Lennon v Newsgroup Newspapers Ltd*,[46] where the famous ex-Beatle sought to prevent the publication of intimate details of his marriage. Indeed, some countries have opted to give its confidentiality laws a wide application as a substitute for recognising a more specific action for invasion of privacy.[47]

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41 Ibid.

42 Ibid, referring to a range of cases.

43 *Defamation Act 2005* (Qld), s 25.

44 Above n 40, 52.

45 Ibid.

46 [1978] FSR 573. See also e.g. *Argyll v Argyll* [1967] Ch. 302.

47 See the UK development through cases such as *Campbell v MNG Ltd (No 2)* [2005] 4 All ER 793 and *Douglas v Hello! Ltd* [2005] EWCA Civ 595. See further: ALRC 108, at 2543-2545.

Under Australian confidentiality law, three elements need to be established in an action for breach of confidence:

- The information must be of a confidential nature;
- The circumstances of the communication must have imposed confidentiality; and
- There must be an actual (threat of) unauthorised use of the confidential information.[48]

Should all these elements be present, one may be able to rely on an action for breach of confidentiality to protect against the use of the confidential information.

So could it then be said that images and videos used in sexting constitute information of a confidential nature? The easiest way to answer this question is to focus on when information is not of a confidential nature. Information is not of a confidential nature where the information is publicly available or can be derived from publicly available information. In other words, to be of a confidential nature, the information must be private in some sense, but need not be an absolute secret known only by the party originally communicating it. Thus, in most instances, images and videos used in sexting would constitute information of a confidential nature.

Whether the situation in a particular case was such that the circumstances of the communication impose confidentiality is judged by reference to whether a reasonable person, being in the position of the recipient, would have realised that the circumstances of the communication imposed confidentiality.[49] Typically, this test is affected by:

- The nature of the information; and
- The nature of the context in which the communication took place.

The typical sexting situation would certainly seem to also meet this test – it would be reasonable for the receiver to assume that the communication imposes confidentiality.

The third aspect of an action for breach of confidentiality is unauthorised use of the confidential information, or the threat of such a use. In other words, an action does not lie until the person who communicated the confidential information stands to lose something.

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[48] See *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39.

[49] *Coco v AN Clark (Engineering) Ltd* [1969] RPC 41, 48.

While not a sexting case as such, the dispute in *Giller v Procopets*[50] has many characteristics of a sexting case. There, Mr Procopets had filmed his sexual activities with Ms Giller. On the first five occasions, Ms Giller was unaware of the filming, but on the other occasions she was aware of, and acquiesced in, her sexual activities being captured on tape. When the parties' relationship deteriorated, Mr Procopets showed the video tape to some people and attempted, and threatened, to show it to others (including Ms Gillers' parents and 17 year old brother). The only reason this case cannot be classed as a sexting case is that no electronic communication took place.

In the courts, Ms Giller argued that Mr Procopets' conduct amounted to a breach of confidence, intentional infliction of harm and a violation of her privacy.

In the Supreme Court of Victoria, Gillard J declined to award damages for any of the pleaded actions. While the Court found that Mr Procopets' conduct amounted to a breach of confidence, it was held that Ms Giller could not be compensated for mental distress falling short of psychiatric injury.[51]

On appeal to the Court of Appeal, Ms Giller was awarded $40,000 for injury to feelings as a result of the breach of confidence.[52]

### 2.6 Sexting and the law of intentional infliction of harm

As mentioned, the plaintiff in *Giller v Procopets*[53] also argued that Mr Procopets had committed the tort of intentionally inflicting harm to Ms Giller. However, in contrast to the action for breach of confidence, only one of the three judges allowed the appeal in relation to this action.

As noted by one commentator: 'With all three judges offering different opinions on the state of the current law and how it should develop, the decision does little to clarify this muddled area of law.'[54] In other words, it is not possible to conclusively assess whether this tort could be successfully pleaded in a sexting situation. However, it is likely that a victim of threatened or actual re-distribution of sexting materials would be tempted to raise the tort.

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50 [2008] VSCA 236.

51 *Giller v Procopets* [2004] VSC 113.

52 *Giller v Procopets* [2008] VSCA 236.

53 [2008] VSCA 236.

54 Normann Witzleb, 'Giller v Procopets: Australia's Privacy Protection Shows Signs of Improvement' (2009) 17(2) *Torts Law Journal* 121,128.

### 2.7 Sexting and the law of nuisance

Depending on how the images or videos are collected, the law of nuisance may come into play. While it is clear that the tort of nuisance protects against unlawful interference with the enjoyment of land, its exact scope and limitations are not set in stone: 'The category of interest covered by the tort of nuisance ought not to be and need not be closed, in my opinion, to new or changing developments associated from time to time with normal usage and enjoyment of land.'[55]

In *Raciti v Hughes*,[56] the defendants had installed a floodlight supported camera surveillance system on their property. The system lit up and captured images from the plaintiff's property, causing the plaintiff to seek an interlocutory injunction based on the tort of nuisance. The Court viewed the surveillance as 'a deliberate attempt to snoop on the privacy of a neighbour and to record that on video tape'.[57] This was, in the Courts view, an actionable nuisance.[58]

In light of this, where the capturing of images or videos unlawfully interference with the victim's enjoyment of public or, perhaps more likely, private space, the tort of nuisance may be pleaded. However, as it has been held that 'mere 'besetting' such as filming, photographing or watching the plaintiff's property from other premises without more does not amount to'[59] nuisance, this tort may be less likely to succeed that some other actions canvassed here.

### 2.8 Sexting and copyright law

Perhaps one of the easiest ways for a victim of unauthorised re-distribution of images or videos to take action is under copyright law. Like creators of other forms of content, a person who has captured photographs[60] or videos[61] of themselves automatically enjoys copyright protection for that content. In more detail, the protection extends to the copying[62] and publication[63] of the content,

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55 *Nor-Video Services Ltd v Ontario Hydro* (1978) 84 DLR (3d) 221,232.

56 (1995) 7 BPR 14, 837.

57 Ibid.

58 Ibid.

59 Above n 40, 414, referring to *Ward, Lock & Co Ltd v Operative Printers' Assistance Society* (1906) 2 TLR 327.

60 In their capacity as 'artistic works' (*Copyright Act 1968* (Cth), s 10(1)), photographs amount to 'works' for the purpose of the Act.

61 *Copyright Act 1968* (Cth), s 10(1).

62 For photographs refer to *Copyright Act 1968* (Cth) s 31(1)(b)(i), and for videos refer to *Copyright Act 1968* (Cth) s 86(a).

as well as making the content available to the public.[64] The fact that a person has chosen to communicate the content to another person means neither that they have abandoned their copyright, nor that they have automatically consented to the content being re-distributed.

Consequently, where the recipient of sexting content, for example, forwards it to a third person, she/he is likely to be acting in violation of Australian copyright law. Similarly, were the recipient of sexting content to make it available online (e.g. on a social networking site or on video facilities such as YouTube[65]), she/he is likely to be acting in violation of Australian copyright law, in that she/he has made the content available to the public.

## 3 Concluding remarks

The above has demonstrated that sexting is regulated by a complex matrix of partly overlapping federal and state, civil and criminal, law. As often is the case with an activity not contemplated at the time the relevant law was created, it is also clear that the regulation of sexting is haphazard, and in large parts coincidental.

This article will obviously not solve the issues associated with sexting in Australia. Indeed, an effective solution to the issues associated with sexting is likely to encompass many elements other than legal regulation, such as education, parental involvement and technological developments. However, it is hoped that the article will help to clarify how Australian law currently (*de lege lata*) regulates sexting. Such clarity is a necessary first step for any sensible discussion of how sexting ought to be regulated (*de lege ferenda*). It will also create greater certainty for those engaging in sexting (offenders, victims and others) as well as others that may need to deal with sexting, such as the legal community and various authorities, including the courts. The conceptual analysis presented in this article can also inform education campaigns and help set the direction for Australia's approach to sexting.

Finally, gaining a better understanding of sexting and the law may inform future discussions of other clashes between emerging technological trends and established laws.

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63 For photographs refer to *Copyright Act 1968* (Cth) s 31(1)(b)(ii), and for videos refer to *Copyright Act 1968* (Cth) s 86(b).

64 For photographs refer to *Copyright Act 1968* (Cth) s 31(1)(b)(iii), and for videos refer to *Copyright Act 1968* (Cth) s 86(c).

65 <www.youtube.com>.