

PUBLIC SPACES, PRIVATE FACES: LEGAL ISSUES RELATING TO THE USE OF SCHOOL PHOTOGRAPHS ON WEBSITES

ANNA BUNN AND JOAN SQUELCH*

ABSTRACT

The growth and use of social networking sites worldwide has by all accounts been a remarkable global social and cultural phenomenon. Social networking sites have brought both opportunities and challenges, and have certainly raised some legal issues and concerns especially in the area of privacy and safety. Schools have also had to deal with the ever increasing use of social networking sites by students, as well as by teachers and parents. Although social networking sites are popular with students and teachers, and may provide useful educational tools, they have raised concerns about students and others posting personal information, including photographs, of students on websites for the world at large to potentially view and access. Given the concerns about privacy and safety, some schools have moved to ban the taking and publication of school photographs, other than official school photographs, in the interest of student safety and privacy. However, this has caused some confusion about when photographs at school and away from school may be taken, by whom and for what purpose. The purpose of this article is to clarify the legal position regarding privacy rights, and the rights and limitations of taking photographs within the school context. The first part of the article provides a brief overview of privacy rights and protection of personal information in Australia. The second part of the article discusses the taking and use of images of students for school purposes and a school's rights to regulate the taking and use of students' images by others. The article concludes with a few practical policy guidelines.

I. INTRODUCTION

MySpace, Facebook and now Twitter are all the rage. Young and old are using social networking sites as a powerful means of communication and for instantly sharing information across cyber space. Social networking sites attract millions of users - Facebook has some 200 million active users and MySpace is allegedly signing up about 500 000 new users a week. The photo facility of Facebook is one of the most widely used features on Facebook. According to Facebook engineers, 'users have uploaded over 15 billion photos which makes Facebook the biggest photo sharing website. For each uploaded photo, Facebook generates and stores four images of different sizes, which translates to a total of 60 billion images and 1.5PB of storage.'¹ Whilst no-one can deny the popularity of these sites and the possibilities for data sharing that they create, their use does give rise to some significant legal issues, especially relating to privacy and the protection of personal data, including photographs and images.

Recently, a primary school in Western Australia advised parents that they were not permitted to take photographs of children at school. This followed a number of complaints from some parents who had been in receipt of a request from another parent to place a class photograph on Facebook and who had indicated that the class teacher had given permission for a group photograph to be taken at school for this purpose. The fear engendered in those parents by the very possibility of their child's image being placed on the Internet reflects a growing and more general concern over the publication of children's images, albeit ones that are not in themselves offensive or unlawful. Whilst concerns over

* School of Business Law and Taxation, Curtin University of Technology, Perth

1 Peter Vajgel, *Engineering @ Facebook Notes* (2009) <http://www.facebook.com/note.php?note_id=76191543919> at 23 May 2009.

the way in which photographs are used have been around for at least as long as the camera,² the advancement of technology and the proliferation in use of social networking sites, has caused such concerns to escalate.³ Parents are understandably anxious about the potential harm to children when photographs, that can be easily be manipulated and altered, are published to a wide unseen audience across the Internet, over which they have little control. In 2005, the *Sydney Morning Herald* reported that parents had been warned to 'be aware of people photographing their children after revelations that pictures taken of children playing at a Brisbane beach had appeared on a website'.⁴ The same report quotes the then Queensland Police Minister Judy Spence as saying that it was tragic that modern technology allowed people to take covert photographs of children.⁵ Other media reports have highlighted incidents in which unauthorised photographs of Melbourne schoolboys, photographed whilst engaged in various sports activities, had been posted on a gay voyeuristic website and photographs of a young surf lifesaver had been discovered on a sports fetish website.⁶

Parental concerns are further fuelled by the threat of cyber-predators and fears that children are made more vulnerable to being lured away from safe places by those with ill intent, who make use of online personal information about a particular child in order to gain a child's trust.⁷ There are also a growing number of incidents of cyber-bullying: a recent report in the *Sunday Times* (Western Australia) refers to a Youth Poll survey of 2008 in which more than one in five young Australians reported having been affected by cyber bullying.⁸

Child safety is not, however, the only concern surrounding the taking and publication of child images. In 2007 a survey carried out in conjunction with the United Nations Youth Association in South Australia interviewed over 300 young people and found that nearly 78 percent of them believed that technology imposed a significant threat to privacy and close to 41 percent indicated that photographs or videos had been posted on the Internet without their permission.⁹ The Australian government's CyberSmart website notes that '[c]hildren may—unwittingly or deliberately—share personal information without realising that they could be subject to identity theft, or that they are leaving behind content which might not reflect well on them in the future'.¹⁰

Yet, despite fears for child safety and concerns around privacy and security, the school situation described above highlights the confusion that often surrounds the law relating to the taking and publication of photographs of children. In particular there is confusion as to whether the law will protect children's privacy and whether schools can exercise any control over personal social networking sites and the images posted on them. A recent

2 See, for example, Samuel Warren and Louis Brandeis, 'The Right to Privacy' (1890) 5 *Harvard Law Review* 4: 'Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that what is whispered in the closet shall be proclaimed from the house-tops'.

3 The focus and scope of this paper is on legitimate, lawful photos and not offensive, indecent or unlawful material that is covered by various other laws such as criminal law and the classification of films legislation.

4 'Parents warned after child play pictures appear on web', *Sydney Morning Herald* (Sydney), 28 January 2005, <<http://www.smh.com.au/news/National/Parents-warned-after-child-play-pictures-appear-on-web/2005/01/27/1106415711007.html>> at 25 August 1009.

5 Ibid.

6 Michael Winram, 'Keeping students safe. Photographs and privacy law s in Australia' (2008) March *Teacher* 52.

7 See, for example, Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108, [67.59]: 'In addition to chat rooms, there are now concerns that social networking websites are being used by sexual predators'.

8 'Police clamp put on cyber bullies', *The Sunday Times* (Western Australia), 5 July 2009, 1.

9 Australian Law Reform Commission, *Children, Young People and Attitudes to Privacy* (2008) at [67.11].

10 Australian Government, Australian Communications and Media Authority, *Parents Resources, Risks and Concerns* <<http://www.cybersmart.gov.au/en/Parents/Risks%20and%20concerns.aspx>> at 25 August 2009.

report from the Australian Law Commission ('ALRC') for instance notes that 'concerns raised about handling personal information in schools appear to stem from a combination of poor practices that are inconsistent with privacy principles and school policies that provide sometimes questionable interpretations of the privacy principles'.¹¹ The ALRC further states that there is 'confusion about what is acceptable, what is legal and when appropriate behaviour can be stopped or punished'.¹² The purpose of this article is therefore to address the confusion and, in particular, to answer the following questions:

- (a) What are the rights and obligations of schools to take and use images of students for their own purposes?
- (b) What are the rights and obligations of schools to regulate the taking and use of images of its students by others?

In order to answer the above questions, it is firstly necessary to consider privacy more generally and whether Australians have an enforceable right to privacy.

II. THE RIGHT TO PRIVACY IN AUSTRALIA— AN OVERVIEW

In June 2009 *Women's Day* magazine published a number of photographs of Prime Minister Kevin Rudd's wife, Therese Rein, whilst she exercised in the gym. The photographs had been taken and published without Ms Rein's consent. In response to the publication the Prime Minister stated that '... most women in Australia would feel that they should have some privacy when they go to the gym' and even the opposition leader, Malcolm Turnbull, reportedly referred to the photographs as an 'unfortunate invasion of privacy'.¹³ Yet, whilst an invasion of privacy, in this case as in others, is one of the main concerns that has been raised about the publication of images and personal data, and whilst people will often assert their apparent right to privacy, there is in Australia no constitutional or common law right to privacy (in public places).¹⁴ Although there have been a few recent court decisions in which the court was prepared to grant a remedy for someone whose privacy had been invaded¹⁵ it is generally the case that the extent of privacy protection at common law is limited to actions for breach of confidentiality and to defamation. Whilst some countries do expressly recognise in legislation a right to privacy¹⁶ and have been prepared to grant a remedy in situations where someone has a 'reasonable expectation of privacy' which has been interfered with,¹⁷ in Australia the doctrine of 'reasonable expectation of privacy' is yet to be developed as a recognised legal principle.

There are nonetheless various pieces of legislation that cover the *protection of personal information* (data) and which have become increasingly important with the growth in information technology. The federal *Privacy Act 1988* (Cth) ('*Privacy Act*') is the primary piece of legislation relating to information privacy at a federal level. The *Privacy Act* applies only to Commonwealth and Australian Capital Territory agencies, credit providers,

11 Australian Law Reform Commission, *Particular Privacy Issues Affecting Children and Young People* (2008) [69.56].

12 Ibid [69.127].

13 ABC News online, 9 June 2009, <<http://www.abc.net.au/news/stories/2009/06/09/2593384.htm>> at 25 August 2009.

14 Though note that in the Australian Capital Territory the *Human Rights Act 2004* (ACT) recognises, in s 12(a), 'Everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily'.

15 See for example *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2002) 208 CLR 1999; *Grosse v Purvis* [2003] QDC 15; *Jane Doe v ABC* [2007] VCC 281 and *Kalaba v Commonwealth of Australia* [2004] FCA 763. See also Jonathan Horton, 'Common law right to privacy moves closer in Australia' (2001) 7 *Privacy Law and Policy Law Reporter* 62.

16 See for example, *Human Rights Act 1998* (UK) which incorporates into UK law the European Convention on Human Rights which contains, in Article 8, recognition that everyone is 'entitled to respect for his private and family life, his home and his correspondence'.

17 See for example *Murray v Express Newspapers plc and another* [2008] EWCA Civ 446; [2008] WLR (D) 143.

credit reporting agencies, organisations that use tax file numbers and to certain private sector organisations.¹⁸ The *Privacy Act* does not create a right to privacy but rather it regulates the way in which personal information is collected and used. Personal information is defined as ‘information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion’.¹⁹

The *Privacy Act* sets out eleven Information Privacy Principles which are the ‘base line privacy standards which the Australian and ACT government agencies need to comply with in relation to personal information kept in their records’.²⁰ The *Privacy Act* also sets out the ten National Privacy Principles which are the ‘base line privacy standards which some private sector organisations need to comply with in relation to personal information they hold’.²¹ The principles regulate how private sector organisations should collect, use, record, maintain and disclose ‘personal information’. Certain organisations, such as contractors to the Australian government and those involved in public-private partnerships may be obliged to comply with both the Information Privacy Principles and the National Privacy Principles.²²

As noted above, the *Privacy Act* is limited in scope: it does not regulate State or Territory agencies, except for the ACT, and only regulates some private sector organisations. All States and Territories therefore have their own privacy or information protection laws that regulate the collection, use and disclosure of personal information.²³ In Western Australia, the *Freedom of Information Act 1992*, for example, regulates the collection and use of personal information and defines personal information as:

information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead whose identity is apparent or can reasonably be ascertained from the information or opinion; or who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample.²⁴

Other state information privacy laws adopt similar definitions.²⁵ In addition to state information legislation, some States, Territories and agencies may also have a privacy code.²⁶ As such, Australian laws protecting the collection and use of personal information

18 Effectively an organisation is bound by the National Privacy Principles set out in the *Privacy Act 1988* (Cth) if it meets certain criteria as to annual turnover or if it meets certain other conditions, such as being a health service provider: see *Privacy Act 1988* (Cth) sch 3.

19 *Privacy Act 1988* (Cth) s 6.

20 Australian Government, Office of the Privacy Commissioner, *Information Privacy Principles* <<http://www.privacy.gov.au/law/act/ippm>> at 25 August 2009.

21 Australian Government, Office of the Privacy Commissioner, *National Privacy Principles* <<http://www.privacy.gov.au/law/act/ippm>> at 25 August 2009

22 Australian Law Reform Commission, *ALRC Privacy Inquiry: Simplifying and harmonizing privacy law and practice* (Media Briefing Note 1, 11 August 2008) <<http://www.alrc.gov.au/media/2008/mbn1.pdf>> at 25 August 2009.

23 *Privacy and Personal Information Protection Act 1998* (NSW); *Information Privacy Act 2000* (VIC); *Freedom of Information Act 1992* (QLD); *Freedom of Information Act 1992* (WA); *Freedom of Information Act 1991* (SA); *Personal Information Protection Act 2004* (TAS); *Information Act 2002* (NT); *Privacy Act 1988* (ACT).

24 Glossary sch 2 of the *Freedom of Information Act 1992* (WA). Similar definitions are found in legislation in other jurisdictions: *Privacy and Personal Information Protection Act 1998* (NSW) s 4; *Information Privacy Act 2000* (VIC) s 3; *Personal Information Protection Act 2004* (TAS) s 3; *Information Act 2002* (NT) s 4; *Privacy Act 1988* (ACT) s 6.

25 See for example the *Information Privacy Act 2009* (QLD) s 11; *Information Privacy Act 2000* (VIC) s 3 and *Personal Information Protection Act 2004* (TAS) s 3.

26 For example the Privacy Code of Practice for the New South Wales Department of Education and Training made under pt 3, div 1 of the *Privacy and Personal Information Protection Act 1998* (NSW). See also, codes of practice developed pursuant to s123 of the *Broadcasting Services Act 1992* (Cth) and Media Entertainment and Arts Alliance (Australian Journalists' Association) Code of Ethics at article 11 'Respect private grief and personal privacy. Journalists have the right to resist compulsion to intrude.'

are complex and haphazard, with little uniformity across States and Territories. The application of the federal and state privacy laws to schools that wish to take, store and use student photographs, and the application of such laws to the posting of images and other personal data on social networking sites, is considered further below.

III. THE TAKING AND USE OF IMAGES OF STUDENTS FOR SCHOOL PURPOSES

Over time schools collect a vast amount and range of personal data on students that relate to matters such as enrolment, family, health, academic progress, assessment, grades, disciplinary matters, meetings with parents, sporting activities, cultural events and so forth, and which might include videos and photographs. Photographs have traditionally been used for school magazines, promotional material, newsletters, class photographs and student identification. Nowadays many schools also include pictures of children and school activities on a school website. Some schools even have a ‘photo gallery’ on their website that includes images of children which are capable of being downloaded, copied, altered and manipulated, unless tools are used to disable the copying function. Moreover, teachers are increasingly using social networking sites as educational tools that might require students to post information about themselves and their work. At least one school in the UK uses a Facebook-style social networking site to enable students to study from home and to ‘take part in lessons by logging on to a website that allows them to share their thoughts, comment on books and trade photos and videos’.²⁷

When collecting, recording, using and disclosing personal information, government and private schools are required to comply with privacy or information protection laws. Government schools are generally covered by state freedom of information legislation, whilst private schools are subject to the federal *Privacy Act* and must comply with the National Privacy Principles.²⁸ As noted above, the definition of ‘personal information’ under both the *Privacy Act* and the [state] privacy legislation is similar: essentially information will be regarded as personal if it enables an individual to be identified. Therefore, a video or photograph of students constitutes personal information where their identity is obvious or is able to be established.

Under the relevant legislation, private and government schools have an obligation to ensure that personal information, including images, is collected, recorded and used for authorised purposes only. In particular, schools must obtain consent before using personal information. Generally it is expected that parents would need to give consent to their children being photographed or videoed and for the images to be published. According to the Western Australian Department of Education and Training, for instance, ‘Principals must gain written permission from the student or their parent if the student is under 18 years of age, before publishing video recordings, photographs or comments relating to their students’.²⁹ Such consent may be express or implied. Express consent is given explicitly, either orally or in writing, whereas implied consent arises where consent may be inferred from the circumstances. However, in order to ensure legal certainty and clarity, consent should preferably be express and in writing. In some schools a ‘blanket’ consent to the collection or use of personal data, including images, is gained from parents upon

27 Sian Griffiths, ‘School’s out as pupils learn at home on ‘Facebook’ site’, *TimesOnline*, (UK), 26 July 2009,

< http://www.timesonline.co.uk/tol/life_and_style/education/article6727709.ece > at 25 August 2009.

28 The exception would be a private school with an annual turnover of less than A\$3 million and one that does not collect or hold health information about its students. In practice, most private schools, even if under the turnover threshold, will hold health information in some form or another.

29 Government of Western Australia, Department of Education and Training, *Students Online* (effective date 19 March 2008)
<http://policies.det.wa.edu.au/our_policies/ti_view?uid=2bb65f69216a7c52fd13a4160804635d&iview=su
mmmary_view> at 24 June 2009.

enrolment, whereby parents are informed about the school's policy on the collection, storage and use of personal data and provided with an 'opt out clause' if they do not agree to the use of images of their children in accordance with that policy. It is also possible in certain circumstances for students themselves to give consent and the *Privacy Act* does not specify an age at which individuals can make their own privacy decisions.³⁰ The ALRC advocates that children of 15 years of age should be assumed to have the capacity to make decisions under the *Privacy Act* and that consent from children of this age or over can be built into consent forms.³¹ In a report by the Standing Committee of Attorneys-General it is further suggested that a distinction must be drawn between students giving consent for *taking* a photograph and consent for its *use*: 'year 12 students at a formal might consent to a hired photographer taking photos, they may not consent to those photographs being posted on the Internet for anyone to purchase or view'.³²

Aside from principles relating to the collection of information, other principles established by the relevant legislation require an organisation to take reasonable steps to make sure personal information is accurate, complete and up-to-date and to ensure it is not misused.

IV. SCHOOLS' RIGHTS TO REGULATE THE TAKING AND USE OF STUDENTS' IMAGES BY OTHERS

The extent to which schools are able to regulate and control the activities of its students and third parties, including parents, depends to a great extent on whether the activities take place on school grounds, or away from them. In relation to a school's ability to control when or whether photographs or videos are taken of students by other students, or by third parties such as parents, it is therefore necessary to consider where the image is captured.

A. On School Grounds

Schools are able to exercise a fair amount of control over the photographing or videoing of students when this is carried out on school property, including during activities such as school plays, sporting events and awards ceremonies. The legal basis of this control is two-fold. Firstly, schools owe a duty of care to students to take reasonable steps to ensure that they are protected from harm and this includes harm arising out of the publication of images on the Internet, even if the images themselves are not offensive or unlawful. For example, in Western Australia a primary function of the principal of a government school is to have responsibility for the day to day management and control of the school, including all persons on the school premises. Principals are also required 'to ensure the safety and welfare of student on the school premises; and away from the school premises but on school activities, so far as that can reasonably be done'.³³ Moreover, a school principal may give a direction, either generally or in a specific case, concerning the procedures to be observed by persons on the school's premises in order to manage and control the school and persons on the school's premises; to maintain good order on the school's premises; and to ensure the safety and welfare of persons on the school's premises.³⁴ Additionally, there is a common law understanding that when a person enters

30 Although guidelines to the National Privacy Principles provided by the Federal Privacy commissioner state that, as a general rule, 'a young person is able to give consent when he or she has sufficient understanding and maturity to understand what is being proposed'.

31 Australian Law Reform Commission *Particular Privacy Issues Affecting Children and Young People* (2008) [69].

32 Commonwealth, Standing Committee of the Attorney General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* (2005) <[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~8+AugInternetPhotosFinalPaperAugust05.pdf/\\$file/8+AugInternetPhotosFinalPaperAugust05.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~8+AugInternetPhotosFinalPaperAugust05.pdf/$file/8+AugInternetPhotosFinalPaperAugust05.pdf)> at 21 June 2009.

33 *School Education 1999* (WA) s 63.

34 *School Education Regulations 2000* (WA) reg 69.

private land they consent to any requirements that the owner of the property may impose in them. This may apply to private and state schools. Although government schools are ‘public spaces’ they are not open to the public at large. Government schools are the property of the state and fall under the control of the school principal, as noted above. Thus, a parent who insists upon taking photographs of children on the school premises against an instruction to the contrary could be asked to leave the premises and, if they refused to do so, school representatives would be within their right to use reasonable force to evict them.

Many schools will have rules regarding the use of mobile phones and other technologies on school property, and will regulate who is permitted to take photographs within the school. According to an article in the *Sunday Times* (Western Australia) published in July 2009, following a number of incidents where telephones had been used to encourage bullying by the filming of incidents involving bullying or fights between students, the head of the Western Australian Education Department had ‘written to every government school principal to ensure they had a mobile phone policy...This had to include a statement of the consequences students could expect for using mobile phones inappropriately’.³⁵ However, in order to protect students’ safety and privacy, some schools have gone much further and some have even gone so far as to ban parents from taking photographs at school and school sponsored events.³⁶ In one case parents of a group of soccer students had been banned from taking pictures of the children for fear that a student who was at the centre of a custody order would be recognised.³⁷ In another case it has been reported that a private Melbourne girls’ school had even ‘banned - on “privacy” grounds - its year 6 students from wearing in public a sweatshirt emblazoned with the names of all class members’.³⁸ Reports such as these raise questions as to the extent of a school’s authority in respect of the actions of its students and others when away from school premises. As noted by the Queensland Commission for Children and Young People and Child Guardian³⁹ the extent to which a school’s authority reaches beyond the school gate and into the ‘private sphere of homes’ is very limited.

B. Beyond the School Gate

Generally, just as a school’s duty of care applies equally to those students on school premises and those who are engaged in school activities away from the school premises, the school’s authority to make and enforce regulations will likewise extend to those students who are engaged in activities such as sports carnivals and school camps away from school. Schools will therefore be within their rights to apply school rules in such situations, including a rule that restricts photographs or, as with the mobile phone situation referred to above, to apply disciplinary sanctions to students in breach of such regulations. This is not to say that the enforcement of school rules will always provide satisfactory redress – in situations where a student posts photographs of another student on a personal webpage, such as on their Facebook site, for example, the extent of the school’s control will be limited. Even if the photograph was taken during school time and in breach of school rules as to the use of cameras or mobile phones, the school is unlikely to be able to

35 Anthony Deceglie, ‘Police clamp put on cyber-bullies’, *The Sunday Times* (Western Australia), 5 July 2009, 1.

36 See for example Laura Clark, ‘Parents banned from taking photos of their own children at school sports day’, *Mail Online* (United Kingdom), 17 June 2009 <<http://www.dailymail.co.uk/news/article-1193697/Parents-banned-taking-photos-children-school-sports-day.html>> at 24 June 2009.

37 Confidential personal communication, 3 July 2009.

38 Liz Porter, ‘Malice in Wonderland’, *theage.com.au* (Melbourne), 10 August 2008, <<http://www.theage.com.au/news/technology/malice-in-wonderland/2008/08/09/1218139163632.html>> at 25 August, 2009.

39 Queensland Commission for Children and Young People and Child Guardian, *Tips for parents on photography of children and young people: Fact Sheet 3* <<http://www.ccypcg.qld.gov.au/pdf/publications/brochures/children-and-the-media/Corporate-Fact-Sheet3.pdf>> at 20 June 2009.

enforce the removal of the photograph from the site unless the image is inherently offensive or private.⁴⁰

Although schools do generally have authority to make rules regulating the conduct of students engaged in school activities off the school premises, their authority in relation to parents and others is more limited. It seems that whilst a school may in certain circumstances be required to enforce bans on photography and videos as a corollary of their duty of care to students (discussed above), their ability to enforce such bans against anyone who is not either a member of staff or a student is more limited. This is because, once away from school premises, a school loses its right, as the occupier or owner of property, to evict a person who insists on flouting conditions of entering or remaining on the land. Once in public there is no law, per se, that prohibits the taking of photographs or videos. Neither the *Privacy Act* nor state information legislation applies to an individual acting in their personal capacity, and in *R v Sotheren*⁴¹ Dowd J noted that 'A person in our society does not have a right not to be photographed...'. It is therefore not illegal for parents or students to take photos of their children whilst taking part in activities outside of the school in public places and whilst it may not be in accordance with school policy, there is little that can be done to enforce this policy. That said, many 'public places' these days such as sports clubs, leisure centres and swimming pools do ban cameras or even the use of mobile phones and would be entitled to compliance with them as a condition of a person entering or remaining on the property, in the same way as schools are able to enforce such rules for those on their grounds. The ALRC in its most recent report on privacy notes that whilst the banning of cameras and photographs 'has become typical in change rooms and private gyms, where people expect an element of privacy, [this...] has been more controversial when applied to public events and places such as life saving and sports carnivals, or public swimming pools'.⁴²

Even though there is no right not to be photographed, this is not to say that there is no protection against the unauthorized and unlawful taking of and use of photographs and images, as this conduct may be covered by criminal, defamation and copyright laws. For instance, criminal laws, which differ somewhat from state to state, mostly make it an offence to take or use images of inherently private activities or which are inherently offensive, indecent or pornographic.⁴³ Without exception, however, these laws do not apply to images which are inherently non-offensive or decent, even if these are later used in a way which may be considered offensive or indecent.⁴⁴ However, where the Internet is used in a way which would be considered 'menacing, harassing or offensive to reasonable persons', this will contravene the *Commonwealth Criminal Code 1995* (Cth): these provisions may apply, for instance, when images, even if inherently non-offensive, are

40 There are complex rules which govern the publication of images which are offensive or private. These rules differ from State to State. In Western Australia, for example, it may be an offence under the *Surveillance Devices Act 1998* (WA) to record or use an image, without consent, if it shows a private activity and was captured by a surveillance device (which can include a camera or mobile phone). Such rules are unlikely to apply when the photograph depicts a child in a public place, such as at school. The *Commonwealth Criminal Code 1995* (Cth) includes an offence of intentionally using a carriage service (including the Internet) in a way that would be menacing, harassing or offensive to a reasonable person (*Criminal Code 1995* (Cth), s 474.17). Various state laws prohibit the publication of 'indecent' or offensive material. In addition, website hosts may agree to the removal of offensive material if a complaint is lodged but this is usually within their discretion and allows for subjectivity in the interpretation of what is 'offensive'. Even non-offensive photographs which appear on internet sites may be classified as 'prohibited content' in some circumstances and removed by the issue of a 'take down' notice, but the effectiveness of take-down notices will depend on the jurisdiction in which the web-site host is located: many are situated outside of Australia and enforcement will be more of an issue.

41 *R v Sotheren* [2001] NSWSC 204, 25 (Dowd J).

42 Australian Law Reform Commission, *Particular Privacy Issues Affecting Children and Young People* (2008) [69.125].

43 See *R v Sotheren* [2001] NSWSC 204, 25 (Dowd J).

44 However, note the possible use of take-down notices in respect of online content that is not offensive: Australian Law Reform Commission, above n 42.

used for purposes of harassment, bullying and so forth. Moreover, child protection legislation prohibits the publication of information which identifies a child who is subject to a child protection order.⁴⁵

V. CONCLUSIONS AND RECOMMENDATIONS

Schools are obliged to ensure they comply with laws and regulations that govern the collection and use of personal information, which includes photographs and images of students. To this end, schools may regulate how, when and by whom children may be photographed whilst at school. Whilst some schools have elected to ban parents and others from taking photographs altogether, even during school activities such as school plays and sports events, a more balanced approach is advocated. After all, one is hard pushed to find a school website or school publication that does not include images of students. Schools, parents and students should be able to take photographs and record videos so that they can capture and record memorable moments and celebrate achievements. In the UK the Office of the Information Commissioner has issued good practices notices to this effect noting that parents and family should not be put off taking photographs for fear of breaching legislation which does not apply to private individuals. The Commissioner notes that ‘a common sense approach suggests that if the photographer asks for permission to take a photograph, this will usually be enough to ensure compliance’.⁴⁶ Similarly, the Queensland Commission for Children and Young People and Child Guardian notes that ‘[a] common sense approach needs to be taken in these situations to ensure everyone can have their child’s achievements documented photographically’.⁴⁷

Finally, whilst the concern of parents over the publication of images of their children on the Internet may be warranted, it is submitted that these concerns should not be allowed to obscure the reality of the world in which we live. It is quite possible; even likely, that images of children exist on the Internet without the knowledge of the children depicted or their parents. Rather than focus attention exclusively on efforts to prevent images being taken and published on the Internet, therefore, we suggest that schools and parents should accept that this practice will occur and take steps to minimise the potential harm posed to children by it. To this end creating awareness about cybersafety, the protection of personal privacy and related issues must form part of every school’s education of its students and, ideally, of its parents. The good news is that this is already happening in many schools and, according to a recent Australian Communications and Media Authority report, children do have a ‘high level of awareness of cybersafety risks and the key messages for staying safe online.’⁴⁸

Nevertheless, as noted above, there still exists much confusion around the taking and use of images of children and about what is acceptable and what is legal. This being so, schools need to make effective use of school policies to ensure compliance, and consistency across schools should be sought so to avoid unnecessary confusion and conflict. All schools are expected to have a privacy policy that sets out how personal information is collected and for what purpose, how it is stored and how it may be accessed. Schools should also have ‘Acceptable Use’ policies in place that govern the use of

45 See for example, *Child Protection Act 1999* (Qld) s 189.

46 Information Commissioner’s Office, UK, *Data Protection Good Practice Note Taking Photographs in Schools* (December 2005)
<http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/taking_photos_in_schools.pdf> at 11 August 2009.

47 Queensland Commission for Children and Young People and Child Guardian, *Tips for parents on photography of children and young people: Fact Sheet 3* <<http://www.ccydpcg.qld.gov.au/pdf/publications/brochures/children-and-the-media/Corporate-Fact-Sheet3.pdf>> at 20 June 2009.

48 Australian Communications and Media Authority, ‘*ACMA Media Release 84/2009: Australian Children Getting Smarter about Online Risks Says ACMA research*’ (8 July 2009)
<http://www.acma.gov.au/WEB/STANDARD/pc=PC_311798> at 26 August 2009.

technology, including social networking sites. These policies should provide teachers, parents and students with clear guidelines and information on protecting personal information and using technology safely and responsibly. Even where policies do exist, it is our experience that many parents are not aware of them and remain confused as to the conduct expected of them or of others. This can lead to conflict and may have the result that 'unauthorised' images of children are posted to the Internet, by other students or parents, without the knowledge or consent of those depicted. As noted by the ALRC: 'It is clear...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.' It is submitted that schools should take an active role in this process by expressly informing students and parents, through newsletters or other means, of the guidelines and policies they have in place, as well as of the legal position regarding the taking and use of photographs.