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9 September 2019

RE: Submission to the QLRC review of Queensland's laws relating to civil surveillance and privacy

Introduction

Thank you for the opportunity to make a submission to the review by the Queensland Law Reform Commission (QLRC) on civil surveillance and privacy.

About the author

This submission has been prepared by Megan Prictor, PhD, a Research Fellow in health, law and emerging technologies at Melbourne Law School, The University of Melbourne. The author's specific interest in this area relates to audio recording of healthcare consultations. More information is available at https://law.unimelb.edu.au/about/staff/megan-prictor. The opinions in this submission are those of the named author, and should not be taken to represent the views of the University of Melbourne.

Summary of key points

- Recording of doctor-patient consultations by patients, or by patients and healthcare providers jointly, raises interesting legal questions and tensions regarding health information privacy, medico-legal liability, and the communication of private information with others.
- An analysis of surveillance legislation nationwide as it applies to recordings of doctor-patient consultations has revealed that, generally, a relationship exists between the extent to which one-party consent makes a recording lawful, with the extent to which the other party's consent is needed for communication of the recording to the world at large.
- In the NSW *Surveillance Devices Act 2007* this nexus is absent; a recording may lawfully be made by one party purportedly for their own use (without the other party's knowledge or consent), and subsequently shared with anyone else, without restriction. This leads to the possibility of an undesirable outcome in the context of recording a doctor-patient consultation.

A. Context relating to audio or audio-visual recordings of healthcare consultations

The proliferation of smartphones means that health professionals may often encounter patients making audio-recordings of their own consultations, either covertly or overtly. In some instances in Australia and overseas, healthcare organisations have provided or recommended mechanisms (usually apps) for consultation recording. There are tensions in this area about: the traditional privacy of the healthcare consultation and individuals' health information, the practical and emotional benefits for patients of being able to listen again to recordings and to share these with family members, providers' concerns about increased medico-legal liability and a breach of trust, and finally also concerns about the ease with which recordings may be distributed via social media, potentially to the detriment of their reputation. Surveillance devices (and related) legislation in Australian states and territories applies to this setting.

B. Outline of issues

There is generally an interaction between provisions addressing the making of a recording and sharing of a recording in each state and territory's legislation.

Making a recording of a private conversation

Three jurisdictions have a one-party consent approach, which means that patients can lawfully record their health consultation covertly in any circumstances (Vic, NT, QLD).

Three jurisdictions permit covert recording of a private conversation ((ie. one-party consent) in limited circumstances. One of these circumstances, particularly relevant to health care, is when recording is for a party's own use or to protect their lawful interests (NSW, Tas, ACT).

Two states require two-party consent (SA and WA) unless the recording is to protect a party's lawful interests.

Sharing a recording of a private conversation

The analysis of what makes the act of recording lawful, above, is important in determining when the sharing (communication or publication) of the recording can occur without one party's consent.

Of particular interest here is the situation in which person B has recorded their conversation with person A covertly (without consent), and then seeks to share the recording with others. This is not addressed by legislation in a uniform way across different jurisdictions.

Broadly speaking, in jurisdictions where covert recording by one party to a conversation is permitted for any purpose, sharing of the recording with others is restricted.

In QLD, Tasmania and the ACT, person B may lawfully record their private conversation covertly, and share the recording with their family or friends without the consent of person A. They can do this under a provision that exempts sharing of the recording with a person who has (or is believed on reasonable grounds to have) such an interest in the private conversation as to make the communication or publication reasonable under the circumstances. This is noted in the QLRC Consultation Paper (WP No. 77) at [3.202-3.204]. An example is found in section 45(2) of the *Invasion of Privacy Act 1971* (QLD).

Importantly, sharing of the recording with the public at large without person A's consent is not generally permitted in these jurisdictions, subject to a number of exceptions (see *Invasion of Privacy Act 1971* (QLD) s. 45(1); *Listening Devices Act 1991* (Tas) s. 10(1); *Listening Devices Act 1992* (ACT) s. 5(1)).

However, the operation of section 11 of the *Surveillance Devices Act 2007* (NSW) is problematic. In NSW, if person B covertly records their private conversation with person A, as long as person B's *original* intention was that the recording be for their own use ("not made for the purpose of communicating or publishing the conversation…to persons who are not parties to the conversation"), the recording is lawful (s. 7(3)(b)(ii)). Once it meets this threshold, it is not captured by section 11(1), which only restrains the unconsented sharing of *unlawful* recordings. Thus the recording covertly made by person B may be subsequently shared with *anyone* (not merely family and friends) entirely without person A's knowledge or consent.

C. Response to QLRC Consultation Paper (WP No. 77)

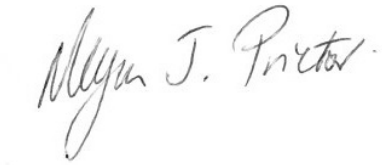
In relation to Questions 15 to 18: Across Australian jurisdictions there is generally a nexus between the extent to which one-party consent makes a recording lawful, with the extent to which the other party's consent is needed for onward communication of the recording. Two contrasting examples follow.

1. In the Victorian legislation, no provisions address recordings made by parties to a private conversation (ie.**one-party consent is lawful**), but further **communication or publication of the recording requires two-party consent** (*Surveillance Devices Act 1999* (Vic) s. 11(2(b)).
2. In the South Australian legislation, the **consent of both parties is (generally) required to record a private conversation** (*Surveillance Devices Act 2016* (SA) s. 4(1)(b) and (2)(a)(i)) but **no further consent is needed to share this (lawful) recording.** Two-party consent for the sharing is only needed in the case where the original recording was not lawful.

This nexus seems a useful protection against unconsented publication of recordings that have been made without the knowledge or consent of one of the parties. It is this nexus that is absent from the NSW *Surveillance Devices Act 2007*.

Thank you for the opportunity to make this submission. I am happy to provide further information or clarification on any aspect of it. I can be contacted by email at megan.prictor@unimelb.edu.au or by phone on 03 9035 9644.

Yours sincerely



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