



Legal Issues Bulletin

No. 35 reviewed November 2012

The use of mobile phones, portable computer games, recording devices and cameras in schools and TAFE NSW institutes

MOBILE PHONES

What approach should be taken in relation to the use of mobile phones generally?

The use of mobile phones in schools and institutes should not automatically be of concern. It is only if a mobile phone is used inappropriately that action may be necessary.

Inappropriate use of a mobile phone includes:

- using it in a way that disrupts or is likely to disrupt the learning environment or interfere with the operation of the school or institute
- bullying, intimidating or otherwise harassing others through SMS or text messaging or through photographic, video or other data transfer system available on the phone
- recording of conversations, including lessons, without the knowledge and permission of the teacher or those involved in the conversation [*refer also to the separate section on Recording and Other Listening Devices*]
- downloading or otherwise accessing inappropriate material on the internet such as child abuse or pornographic or other offensive material
- filming of fights or other criminal behaviour involving students that occur at school or the institute, during school or institute activities or while on the way to or from school or the institute
- using it in a way that threatens or is likely to threaten the safety or wellbeing of any person
- use that is in breach of any law.

Should I be concerned about students bringing mobile phones to the school or institute?

Mobile phones may provide students travelling to and from schools or institutes with a degree of security. TAFE students may also need mobile phones for business purposes. For this reason, a student bringing a mobile phone into the school or institute is usually not of itself enough to justify any action against the student. Blanket rules or policies that seek to ban students bringing mobile phones to the school or institute site must not be introduced.

It is important that all schools have an acceptable use of mobile phone policy that is clearly communicated to students and parents. Details of the potential consequences for students arising from inappropriate use of mobile phones should be included as part of the policy. Inappropriate use of mobile phones in institutes is covered by the existing [TAFE Student Discipline Policy](#).

I have heard of something called “Sexting” - what is that?

This involves sending sexually explicit or suggestive pictures to mobile phones or posting them on individual or inter-active websites such as Facebook. It is a popular practice amongst teenagers.

Are there any legal ramifications if students engage in this practice?

If the image is of a person under the age of 16 engaged in sexual activity or in a sexual context, it is likely to be regarded as child abuse material for the purposes of the *Crimes Act*. Any person who produces, sends, transmits, disseminates or possesses child abuse material is guilty of an offence and is liable to a maximum penalty of 10 years imprisonment.

Engaging in this behaviour is also likely to be a breach of the *Commonwealth Criminal Code* and carries a maximum penalty of 3 years imprisonment.

Is it illegal to use a mobile phone to take photographs of a person without his or her consent?

It can be depending on the nature of the photographs that are taken. Refer to the separate section in this bulletin dealing with “Cameras and Video Cameras”.

What action can I take if students use mobile phones inappropriately?

If students use mobile phones inappropriately, principals and institute managers have the right to take action.

Depending on the circumstances, action can include:

- banning students from using mobile phones during the course of the school or institute day
- confiscating mobile phones from individual students
- in the case of schools, requiring students to hand in their mobile phones to designated school staff at the beginning of the school day for collection when students go home
- applying student disciplinary provisions
- reporting the matter to the police.

What action should I take if I discover students have been sexting each other?

Principals and institute managers need to use their judgement based on the nature of the material in question. In some cases, it may be necessary to report the matter to the local police for further investigation. It may also be appropriate to confiscate mobile phones which have images on them and secure them until the police are able to view the material. In other instances, it may be more appropriate to have the student(s) involved delete the material from their phones.

If the offenders are school or institute students, principals and institute managers should also take appropriate action under the relevant student discipline policy.

If unsure about what action to take, contact should be made with the Safety and Security Directorate on 1300 363 778 or the Legal Services Directorate on 9561 8538.

Can I confiscate a student’s phone to view material on it to confirm whether or not the phone has been used inappropriately?

Yes. If school or institute staff have reasonable grounds to suspect that a student has inappropriate material on his or her phone, they may confiscate the phone for the purpose of confirming the existence of the material. Any viewing of the material should be undertaken in the presence of the student and should be limited to establishing that inappropriate material is on the phone. Staff need to be sensitive to other personal information of the student that may also be present on the phone.

When should phones be confiscated from students?

It is appropriate to confiscate phones from students when

- it is necessary to examine the phone when there are reasonable grounds to suspect inappropriate material may be on the phone
- material that falls within the meaning of sexting is found on the phone

- the phone has been used to record fights or other criminal activity involving students occurring at a school or institute, during school or institute activities or on the way to, or from, the school or institute.

If video recordings of fights or other criminal activity are located on a student's phone, principals and institute managers need to consider whether the nature of the event recorded warrants reporting to the police in addition to any potential action under the school or institute student discipline policy. Further advice on this issue may be sought the Safety and Security Directorate on telephone 1300 363 778 or the Legal Services Directorate on 9561 8538.

How should devices be confiscated from students?

Action must be taken to securely store any mobile phone confiscated from a student. Under no circumstances should mobile phones be left in unlocked desk drawers, on teachers' tables or in staffrooms.

Arrangements must be made to return the mobile phone to the student at the conclusion of the school or institute day. If this is not possible, it should happen as soon as practicable.

What should be done if the school requires students to hand in their phones each day?

Principals must consult with parents before bringing in a policy requiring students to hand in mobile phones to staff at the start of the school day. The circumstances of individual students also need to be taken into account when implementing such a system. Students may sometimes need to make or receive phone calls of an urgent nature during the course of the day. Providing access to a designated phone in the school may be one way of addressing such issues.

If a student's mobile phone is damaged or lost after being confiscated, is the school or institute liable to pay any compensation?

Students and parents should be reminded on a regular basis that students bring mobile phones to the school or institute at their own risk – schools and institutes will not accept any responsibility for loss or damage to mobile phones.

Once confiscated however, responsibility for the security and safe keeping of the mobile phone *does* rest with the school or institute. If a confiscated mobile phone is lost or destroyed while not having been properly secured by staff, the school or institute may be liable to compensate the student.

Principals and institute managers should also refer to [Legal Issues Bulletin No. 8 – Claims for Loss of or Damage to Personal Property and Use of Private Motor Vehicles by Staff, Parents and Students.](#)

PORTABLE TABLETS, COMPUTER GAMES, IPODS AND SIMILAR DEVICES

The procedures applying to the inappropriate use of mobile phones apply equally to the inappropriate use of tablets, portable computer games, iPods and similar devices, including the need to have a school policy regarding their inappropriate use. Inappropriate use of these devices in institutes is also subject to the existing [TAFE Student Discipline Policy.](#)

RECORDING AND OTHER LISTENING DEVICES

What is the law in relation recording private conversations?

Sometimes people being interviewed on school or institute premises seek to record the interview. Subject to certain exceptions, it is an offence for a person to use a listening device to record or listen to a private conversation to which the person is not a party or to record a private conversation to which the person is a party.

The *Surveillance Devices Act 2007* applies in this situation and defines a "private conversation" as anything said by one person to another or others in circumstances where it can reasonably be assumed that any of the persons involved desire the conversation to be heard only by those present or, with the consent of all present, some other person or persons.

It is not an offence to record a private conversation if:

- everyone involved in the conversation agrees either explicitly or impliedly
- any person involved in the conversation consents to the recording being made, provided the recording is reasonably necessary for the protection of the lawful interests of that person

- any person involved in the conversation consents to the recording and it is not made for the purpose of disclosing the conversation to others not involved.

Generally, if a person who has been involved in a private conversation records the conversation (with or without consent), he or she is prohibited from later communicating or publishing any record of the conversation to another person.

There are a number of exceptions to this rule, namely:

- the communication or publication is made to another person who was involved in the conversation or it is made with the consent of all people involved in the conversation
- the communication or publication is reasonably necessary for the protection of the lawful interests of the person making the communication or publication
- the communication or publication is made to a person who has or can reasonably be said to have such an interest in the private conversation as to reasonably justify the communication or publication being made.

Breaches of the *Surveillance Devices Act* attract penalties of up to \$11,000 or 5 years imprisonment or both.

Should I consent to an interview being recorded?

It is a matter for discretion in deciding whether to consent to an interview being recorded. There is no general requirement to consent to the request but refusal may result in adverse perceptions as to why the consent is not being given.

Any consent given should be subject to the other person agreeing, preferably in writing, to provide a copy of the recording made at the conclusion, or as soon as practicable after the conclusion, of the interview.

Should I record any interviews I hold by tape or other means?

Generally, principals and institute managers should not seek to record interviews held with parents, students or others. Such requests can appear heavy handed and may result in a reluctance to fully participate in the interview. If special circumstances exist which justify recording the interview, principals and institute managers should ensure the other person is aware the interview will be recorded and that a copy of the recording can be provided.

School & TAFE video-conferencing facilities

Video conference facilities are now commonplace in schools and TAFE institutes. In many instances they will be located in rooms which are used for multiple purposes. If it is not possible or practicable to turn off the video-conferencing facilities or lock them away when not in use, users of the room should be advised.

CAMERAS AND VIDEO CAMERAS

Is it illegal to film or photograph a person without their consent?

Generally no, though it is an offence to film for indecent purposes. The *Crimes Act 1900* provides that a person will be guilty of an offence if he or she films or attempts to film, for the purposes of sexual gratification:

- another person who is engaged in a private act knowing the person being filmed does not consent to being filmed for that purpose
- another person's private parts knowing the person being filmed does not consent to being filmed for that purpose.

"Private act" means a state of undress, using the toilet, showering or bathing or engaged in another like activity in circumstances where the person would reasonably expect to be afforded privacy. "Private parts" means the genital or anal area of someone whether or not it is bare or covered by underwear.

It is also an offence to install a device to facilitate filming for indecent purposes. The indecent filming provisions of the *Crimes Act* also apply to mobile phones with image capabilities.

Incidents of this nature that occur in schools or institutes should be reported to the police. If a staff member is involved, it should also be reported to the Department's Employee Performance and Conduct Directorate.

Principals should also refer to [Privacy Bulletin No. 7 – School Photographs and Videos and Other Media](#) (intranet only) for related issues involving the use of cameras and videos on school sites.

Can photographs or videos be taken in schools and institutes?

Sometimes people want to take photographs or videos in schools and institutes. Generally, taking photographs or videos on departmental premises should not occur unless the principal or institute manager is satisfied there is good reason. Where applicable, staff and parental or student permission should be obtained.

What if a person is taking photographs or videos from outside the school or institute?

Principals and institute managers have no power to prevent people from taking photographs or videos from outside the school or institute.

If concerns are held, inquiries should be made with the person involved and, where appropriate, he or she should be asked to stop. If the person refuses the request and the principal or institute manager has continuing concerns, the police should be contacted. While there is no general law against taking photographs, such behaviour may, depending on the circumstances, be considered as harassment, intimidation or threatening. It may also be possible, again depending on the circumstances, to make a complaint to the Federal Privacy Commissioner for a breach of Commonwealth privacy legislation.

What if students use cameras inappropriately in the school or institute?

If students bring cameras or video cameras into the school or institute and use them:

- in a way that interferes with the learning environment or the efficient operation of the school or institute
- in way that threatens or is likely to threaten the safety or wellbeing of any person
- to bully, intimidate or otherwise harass others
- to record lessons without the knowledge and permission of the teacher
- to film fights or other criminal behaviour involving students that occur at school or the institute, during school or institute activities or while on the way to or from school or the institute
- in breach of any law,

the school student discipline and welfare policy should be invoked and the procedures and issues referred to in relation to inappropriate use of mobile phones should be applied. Principals should ensure that inappropriate use of cameras and video cameras is clearly spelt out in any student welfare and policy documents.

Inappropriate use of cameras and video cameras in institutes is subject to the existing [TAFE Student Discipline Policy](#).

How should cameras be confiscated from students?

The same issues and procedures as outlined previously in relation to the confiscation of mobile phones apply.

If a student's camera is damaged or lost, is the school liable to pay any compensation?

The same issues and procedures as outlined previously in relation to mobile phones apply.

About Legal Services

Legal Services provides legal support and advice to staff in schools, colleges, regions, state office directorates and specialist boards and authorities. It arranges for the Department to be represented before a range of courts and tribunals and assists with the preparation of legal documents. It is also available to provide legal advice in respect of any departmental policies or procedures that may have a legal complexion.

The Legal Services Directorate can provide legal advice to departmental staff only. It is not able to provide legal advice or assistance to parents, students or members of the public.

The Legal Services Directorate posts a large amount of information on the Department's intranet. This includes:

- all current Legal Issues Bulletins
- questions the Legal Services Directorate most frequently encounters
- information about the Government Information (Public Access) Act
- links to other related legal websites
- other information for the use of schools and TAFE

The Legal Services Directorate continues to offer its telephone advice service to DEC personnel.

The service is available between **9.00am to 5.00pm** weekdays.

Telephone **9561 8538** to log your call for the legal officer on duty. Your call should be dealt with or returned within one business day.

Alternatively contact us by fax **9561 8543** or by email on **legal@det.nsw.edu.au**