Data protection and the prank callers

By Mark Warby QC

The suggestion covered in our news report, that the Australian broadcasters' prank call could be an offence under English law raises some interesting questions about s 55 of the Data Protection Act, and in particular the sentencing regime for offences of this kind, and the territorial application of s 55.

Section 55

Section 55(1) and (3) create an offence which is committed by anyone who "knowingly or recklessly, without the consent of the data controller" obtains or discloses "personal data, or the information contained in those data", or who "procure[s] the disclosure to another person of the information contained in personal data", unless one of a number of defences specified in s 55(2) applies. These are that the conduct in question was

- Necessary for preventing or detecting crime or
- Required or authorised by law or order of a court
- Undertaken in the reasonable belief that the person was entitled to do it, or that the data controller would have consented, had they known
- "in the particular circumstances … justified as being in the public interest"

The Australian prank callers seem to have sought and obtained personal information about the Duchess, her health and well-being, without her consent or that of the hospital or the nurses in question, who were clearly deceived as to the identity of the callers.

A question might well arise as to whether the information obtained was "personal data" or "information contained in personal data". It is not at all clear at the moment whether that is so. If it was one or the other, however, then on the face of it what happened here was the obtaining and disclosure (broadcast) by the callers of such data or information. It would seem that the callers also or alternatively procured the disclosure of the information to other persons (by broadcast).

Again, a question might arise as to who exactly was or were the data controller(s) in this context. It does not seem to matter much, however, because it is clear that none of the candidates gave true consent.

Most lawyers would advise that none of the available defences could even arguably apply.

Clearly, therefore, this prank call and its broadcast could amount to a s 55 offence if it had been carried out by journalists in the UK. Might it be an offence, even though the journalists were in Australia? It is certainly well arguable that it could.

Territoriality

A statute may spell out the territorial limits of its application. The DPA does set territorial limits to its operation in civil law, but does not limit the territorial scope of the s 55 offence. As a rule, at common law, the UK courts do not exercise jurisdiction over acts which are performed entirely outside the UK, and have no harmful consequences here. However, they do exercise jurisdiction over some conduct which has a foreign element. At common law a crime is justiciable in England if its *actus reus*, or a "substantial measure of the activities that constitute" it, take place here, or there are harmful consequences here: see Archbold 2013.

This prank call was not an exercise that took place wholly outside the UK, nor could it be said that it had no harmful consequences here. Admittedly, the broadcast took place in Australia. It did not end

there, but was repeated elsewhere, of course. But at the time of writing I am not clear to what extent other broadcasts included any personal data or information about the Duchess. However, the request for the information was made to people in the UK, about a person in the UK. It succeeded because the caller pretended to be in the UK, and the information was transmitted from the UK in response to the request. The intention of the person transmitting the information presumably was to convey it to a person in this jurisdiction.

There is of course considerable learning in various contexts on the question of where an act takes place for legal purposes when it involves the communication of information by a person in country A to a person in country B. In the factual circumstances of this prank call, though, there does seem to be a viable argument that the obtaining of the information, at least, took place in England.

Maximum sentence

Currently, the maximum sentence for the s 55 offence is a fine. However, after his reports 'What Price Privacy?' and 'What Price Privacy Now?' the Information Commissioner urged an increase in the penalty, and amendments to increase the maximum sentence on indictment to two years imprisonment were enacted by the Criminal Justice and Immigration Act 2008.

The new sentencing provisions are not in force as yet. The legislation that enacted them provided that they could not come into force until after statutory consultation. A consultation paper was issued in 2009 but the process seems to have ended there. Lord Justice Leveson comments in his report, "It does not appear that the responses to that consultation exercise have been published by the Ministry of Justice".

However, The Leveson Inquiry has recommended that "the necessary steps should be taken to bring into force" the amendments: Vol III, Part H, Chapter 5, paras 2.93 -2.94.

Prison and the media

Many in the media have suggested that it is inappropriate for there to be any prison sentences for this offence, and that it would certainly be wrong for a journalist ever to be jailed rather than fined, if they committed the offence.

One of the main problems with that argument is that s 55 is not tailored to fit journalists or the media, or aimed at them (at least, not exclusively). So a regime that exempts journalists from the risk of prison by avoiding even the possibility of a prison sentence for this offence would also let others off the hook, who do not have the freedom of expression argument to rely on.

An alternative argument would be that the prison sentence should be enacted, but the media should be exempted from the risk of having such a sentence imposed on them. When that was put to the Information Commissioner on behalf of News International during the Leveson Inquiry he exploded:

> "How much of a good deal do you guys want? Excuse me, sir, for being heated about this, but you fought everyone to a standstill back in 2006/7. You did it again in 2009/10. You've got so many privileges and exemptions … It sounds to me as if the representatives of the press want to be somehow above the law."

Lord Justice Leveson was a little less outspoken, but he did say this (vol III, Part H, Chapter 5, para 2.85):

> "The only reason which has been cited to the Inquiry for failure to commence the provisions for increasing the maximum potential sentence is the potentially damaging effect that it would have on journalism. These are not considerations which, in my view, can reasonably [be] argued to be persuasive, let alone determinative."

He went on to describe the argument that the prospect of custody would have a “chilling” effect on journalism as one that it was “barely respectable” for the media to advance, as it was “an argument for criminal impunity” including “a plea for indemnity from the otherwise universal application of criminal penalties” (para 2.88). He was “entirely unpersuaded” by the “chilling effect” argument and concluded that the public interest favoured “no further delay” in implementing the new sentence regime (para 2.93).

An important factor in his reasoning was, however, that there will at the same time be an enhanced defence for public interest journalism. Amendments to strengthen and clarify that defence were also enacted by the CJIA 2008. Leveson LJ considered those changes to be adequate protection for public interest journalism carried on in good faith; and he did not consider that there was any real evidence that journalism would be “chilled” by fear of a prison sentence, if journalists knew that they had available to them a public interest defence strengthened in this way. See ibid paras 2.89-2.90, 2.94.