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Unauthorised Photographs and the Justice and Other Legislation Amendment Bill 2005 (Qld)

*The Justice and Other Legislation Amendment Bill 2005 (Qld) (the Bill) was introduced into the Queensland Parliament on 8 November 2005 by the Minister for Justice and Attorney-General, the Hon Linda Lavarch MP. The Bill amends a number of Acts in order to improve the operation of the justice system. Among these changes is the introduction of new provisions into the Queensland **Criminal Code**. The new provisions will make it unlawful to covertly film or observe a person in places such as bathrooms, toilets and change rooms where a person would expect their privacy and modesty to be protected.*

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Research Brief No 2005/24

Queensland Parliamentary Library
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ISSN 1443-7902

ISBN 1 921056 24 X

NOVEMBER 2005

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EXECUTIVE SUMMARY

The **Justice and Other Legislation Amendment Bill 2005 (Qld)** (the Bill) was introduced into the Queensland Parliament on 8 November 2005 by the Minister for Justice and Attorney-General, the Hon Linda Lavarch MP. The Bill amends a number of Acts in order to improve the operation of the justice system. Among these changes is the introduction of new **sections 227A-227C** into the Queensland **Criminal Code**. The new provisions will make it unlawful to covertly film or observe a person in places such as bathrooms, toilets and change rooms where a person would expect their privacy and modesty to be protected: **page 1**.

In early 2005, new provisions were inserted into the Criminal Code to complement existing child pornography offences. These provisions contain specific offences concerning the involvement of children in, and making, distributing and possessing material that falls within the definition of, 'child exploitation material'. Other offences regarding obscene publications and matter, and taking indecent photographs of children also exist under the Criminal Code. Despite these laws, some gaps do remain. For example, problems arise with apparently innocent and inoffensive photographs of **children in public places** but which have been taken without consent or authorisation. In addition, it is quite doubtful whether a person who secretly photographs or video-records the private activities of another **adult**, such as undressing in a change room of a department store, without the person's consent, commits an offence: **pages 1-4**.

Two examples of recent incidents that have aroused community concern are provided to illustrate some of the **inadequacies** in the existing Queensland and Commonwealth legislation. The Queensland laws considered include provisions of the Criminal Code, the *Summary Offences Act 2005*, the *Invasion of Privacy Act 1971* and the Classification legislation: **pages 4-9**. The Commonwealth legislation considered includes the Commonwealth Criminal Code and the *Broadcasting Services Act 1992*: **pages 9-10**.

In August 2005, the Standing Committee of Attorneys-General (SCAG) released the '**Unauthorised Photographs on the Internet and Ancillary Privacy Issues**' *Discussion Paper* which provided background information about the issues involved in the unauthorised use of photographs on the Internet, examined existing state and territory laws, and considered various legislative and non-legislative ways of resolving the privacy issues raised, and called for public submissions: **pages 10-12**.

The **proposed new ss 227A-227C** inserted into the Criminal Code by the **Bill** seek to address existing anomalies and aim to –

- protect adults and children from being observed or filmed in private places (but not in a public place such as on a beach) or while engaging in private acts, without their consent;
- protect adults and children from the practice of 'up-skirting' and similar conduct in a private or a public place without their consent; and

- protect adults and children from the distribution, without consent, of visual recordings of their being in a private place, or engaging in a private act, or of their genital or anal region: **pages 12-15**.

1 INTRODUCTION

The Justice and Other Legislation Amendment Bill 2005 (Qld) (the Bill) was introduced into the Queensland Parliament on 8 November 2005 by the Minister for Justice and Attorney-General, the Hon Linda Lavarch MP. The Bill amends a number of Acts in order to improve the operation of the justice system. Among these changes is the introduction of new provisions (**proposed new ss 227A-227C**) into the Queensland Criminal Code.

The new provisions will make it unlawful to covertly film or observe a person in places such as bathrooms, toilets and change rooms where a person would expect their privacy and modesty to be protected. Until now, legislation has not adequately provided such protection.¹ The new offences will complement existing offences in the Criminal Code concerning indecent dealings with children under 16 years of age and those passed earlier in 2005 regarding involving a child in making child exploitation material.

2 BACKGROUND

In early 2005, new provisions were inserted into the Queensland Criminal Code to complement existing child pornography offences. These provisions contain specific offences concerning the involvement of children in, and making, distributing and possessing material that falls within the definition of ‘child exploitation material’. Other offences regarding obscene publications and matter, and taking indecent photographs of children also exist under the Criminal Code, and will be considered later in this Brief.

Despite the above laws, some gaps do remain. For example, problems arise with apparently innocent and inoffensive photographs of **children in public places** but which have been taken without consent or authorisation. A photograph will only constitute ‘child exploitation material’ if it is likely to cause offence to ‘a reasonable adult’. A number of recent incidents have highlighted the problem –

- in January 2005, it was discovered that a 52 year old Brisbane man had been covertly taking photographs of children in wet clothes and swimming costumes at Brisbane’s South Bank Parklands and uploading many pictures onto the Internet. He possessed 7,000 such images. However, no charges were laid

¹ Hon LD Lavarch MP, Minister for Justice and Attorney-General, Justice and Other Legislation Amendment Bill 2005 (Qld), Second Reading Speech, *Queensland Parliamentary Debates*, 8 November 2005, pp 3745-3748, p 3745.

against the man when a search of his computer did not reveal any child pornography.² An Australian Federal Police investigation also resulted in no prosecution being brought because the photographs were not in breach of Commonwealth legislation banning the publication of ‘demeaning images’ of children on the Internet. At all times, the man has maintained that the photographs were innocent pictures of happy children;³

- in 2002, photographs of Victorian schoolboys involved in various sporting activities, including rowing, were found on websites that contained voyeuristic images. The taking of the photographs was not authorised;
- also in 2002, photographs of a 16 year old male surf lifesaver were discovered on a sports fetish website. Web server Yahoo! shut down the site; and
- in March 2005, a semi-professional Brisbane photographer specialising in ‘fairy photos’ pleaded guilty to four counts of indecent treatment of children under the age of 12 for having taken photographs of children, including one of a naked four year old girl wearing fairy wings astride a motorbike. Although the girl’s mother had brought her to the studio (adjoining the man’s house) along with her sisters for photographs, the mother had been occupied caring for an 18 month old sister during the photo shoot and had not realised the nature of the photographs until she was given them. The man would have escaped a correctional order on those matters but he had also video recorded the sisters in his change room and had an image of an 11 year old girl naked from the front. He was given a 12 month intensive care order for the latter incidents. The man claimed the camera was placed in the change room to protect himself from claims of acting improperly with clients.⁴

As the law presently stands, it is doubtful whether a person who secretly photographs or video-records the private activities of another **adult**, such as undressing in a change room of a fitness centre or a department store, without the other person’s consent, commits an offence. Recent cases include –

- in early 2005, a Brisbane podiatrist was caught secretly filming clients of a physiotherapist next door to his rooms through a crack in the wall. While he had earlier been convicted in the District Court of indecently dealing with and

² Michael McKenna, ‘Child Snapper clicks back on to web’, *Courier Mail*, 29 April 2005, p 1.

³ Nicolette Burke & Rosemary Odgers, ‘Net photos of children face legal blackout’, *Courier Mail*, 10 August 2005, p 5.

⁴ Mark Oberhardt, ‘Images of kids tread a fine line’, *Courier Mail online*, 24 March 2005.

videotaping a 15 year old girl in 2004, he was not charged with the secret video-recording of the women in the physiotherapist's rooms;⁵

- in October 2004, a man pleaded guilty to using a mobile phone to photograph women in change rooms in a fashion store in New South Wales;
- in December 2004, a man pleaded guilty to using a mobile phone to photograph women engaging in topless sunbathing at Coojee Beach in Sydney.

The Queensland Attorney-General, the Hon Linda Lavarch MP, commented that the inability to prosecute in the above situations was because the present laws only covered children, not an adult, from being photographed in offensive or demeaning situations.⁶ Thus, there is no legal impediment to covertly photographing an adult in places such as change rooms and toilets where one would expect one's privacy and modesty to be protected.

The opportunities for voyeuristic behaviour have been enhanced by the availability of increasingly difficult to spot tiny mobile phones, digital cameras and the Internet. There have been some media reports of mobile phone cameras being used to covertly photograph people in public change rooms and trained up women's skirts on stairs and escalators ('up-skirting'). It has been pointed out that digital technology, which enables photographs to be taken and uploaded onto a computer for printing off at home or emailing to others, makes it much easier to engage in unauthorised use of photographs.⁷ One does not have to go to photographic processors to have films developed where the nature of the subject matter might be exposed to other people or, at the very least, cause embarrassment to the photographer. This is similarly the case with mobile phone cameras which allow photographs to be transmitted to other mobile phones.

The Internet, in particular, makes dissemination easy, extremely broad, and very difficult for authorities to control. The Internet crosses jurisdictions and local legislation stops at the border of the enacting state, territory or country. This impacts on the ability of Australian law enforcement bodies to detect and prosecute offences such as child pornography on the Internet, although a number of international law enforcement links have been established for investigating child

⁵ Malcolm Cole & Margaret Wenham, 'Crackdown on covert cameras', *Courier Mail*, 24 August 2005, p 11.

⁶ Malcolm Cole & Margaret Wenham; Hon Linda Lavarch MP, Minister for Justice and Attorney-General, 'Beattie Government to help prevent secret filming of adults in private places', *Media Statement*, 23 August 2005.

⁷ The Standing Committee of Attorneys-General (SCAG) 'Unauthorised Photographs on the Internet and Ancillary Privacy Issues' *Discussion Paper*, August 2005, p 8.

pornography offences (although not for placing other types of photographs of persons on websites).⁸

Some local governments and sporting bodies have tried to address the issue at the grassroots level. For example, in June 2003, it was reported in the media that the YMCA had banned mobile phones at its centres because of the possibilities for invasion of privacy if the camera in the phone was used to take photographs at swimming pools and change rooms. In February 2005, the Waverly Council in Sydney voted to ban cameras from council operated change rooms at places such as beaches.⁹

At the same time, if some jurisdictions pass laws that tackle the taking and use of unauthorised photographs in particular ways, photographic businesses that operate in more than one state or territory may have difficulty in ensuring that they comply properly with the law in each place. This suggests a need for a national approach to the issue.

3 SHORTFALLS IN EXISTING LAWS

Queensland is not alone in experiencing difficulty in controlling the taking and use of unauthorised photographs of children (where offensive or sexual images are not involved) and of adults. However, given the focus on Queensland of this Research Brief, only Queensland and Commonwealth legislation will be considered in determining what laws exist in this area and why they are inadequate to cover situations of the type illustrated above.¹⁰ Only a very brief overview will be provided due to the constraints of this paper.

Two of the examples given above will be used to illustrate the incomplete coverage of existing State and Commonwealth legislation. Those are the South Bank example of the ‘happy children’ at play in their swimsuits; and, in respect of photographs of adults, the situation where the podiatrist covertly filmed women through a crack in the wall as they visited a neighbouring physiotherapist.

⁸ SCAG *Discussion Paper*, p 31.

⁹ ‘Beach camera ban fails’, *Daily Telegraph*, 3 February 2005, p 3.

¹⁰ SCAG *Discussion Paper*, discussed below, contains a Table of Legislation of all jurisdictions in Appendix 1.

3.1 QUEENSLAND LEGISLATION

3.1.1 Criminal Legislation

As noted above, in early 2005, the Queensland **Criminal Code** was amended to include **sections 228A-228D** which make it an offence to involve a child in, and making, distributing and possessing material that falls within the definition of ‘child exploitation material’. An offender can be liable to 10 years imprisonment for involving a child in the making of child exploitation material and a maximum of five years imprisonment for knowingly possessing such material. ‘Child exploitation material’ is material that depicts someone who is, or apparently is, under 16 years in a sexual context (e.g. engaging in a sexual activity), or in an offensive or demeaning context, or being subjected to abuse, cruelty or torture. In the South Bank example, the photographs of the children were, on the face of it, inoffensive and did not depict them in a sexual situation, or in an offensive or demeaning context. As for the ‘podiatrist’ example, these laws would not apply as the women photographed were not under 16 years.

Section 210(1)(f) of the **Criminal Code** operates to prohibit the photographing or recording indecent visual images of a child under the age of 16 years. Again, the law applies only to a child under 16 years (eliminating the ‘podiatrist’ case) and, even then, it is necessary for the image to be ‘indecent’ which would not have seemed to be the case in the South Bank example. The term ‘indecent’ (not defined in the Code) appears to have been interpreted quite narrowly as requiring some sexual connotation.¹¹ It needs a person to act in a ‘base or shameful manner’ and conduct which is ‘lewd or prurient and an offence against morality’.¹² The South Australian Court of Criminal Appeal has held that a video of boys undressing and urinating was not inherently indecent.¹³

Section 227 of the **Criminal Code** makes it unlawful for a person to do any indecent act in public places or any indecent act in any place with intent to insult or offend any person. Again, there would be difficulties charging the photographer in the South Bank example because the act of taking the photographs was probably not an ‘indecent act’ nor had it any intention of insulting or offending anybody. In terms of the ‘podiatrist’ case, it is possible that the podiatrist may have been committing an indecent act by filming the women but it may depend upon their state of undress at the time or whether they were photographed in positions that

¹¹ See, for example, *R v Harkin* (1989) 38 A Crim R 296; *R v BAS* [2005] QCA 097.

¹² See *R v Bryant* [1984] 2 Qd R 545 per McPherson J and per Sheahan J.

¹³ *Phillips v Police* (1994) 75 A Crim R 480.

revealed their underwear. The scope for laying charges is unclear. A man was recently prosecuted for taking a photograph of a woman's underwear under her skirt (i.e. up-skirting) but there was no charge that would cover his taking pictures of the same woman at a distance fully clothed.¹⁴

In addition, s 228 of the **Criminal Code** makes it an offence for a person to knowingly, without lawful justification or excuse, publicly sell, distribute, or expose for sale any obscene book; other obscene printed or written matter; obscene computer-generated image; obscene picture, photograph, drawing, or model; or any other object tending to corrupt morals. In addition, if the matter, image or other material depicts a child under 16, the offender is liable to five years imprisonment and to 10 years imprisonment if the child is under 12 years. The definition of 'computer generated image' is any electronically recorded data capable, by way of an electronic device, of being produced on a computer monitor, TV screen, liquid crystal display or similar medium as an image. In the South Bank example, the photographs of the children would not appear to be obscene nor were they displayed or sold in public. For matter to be 'obscene' it must have the tendency to deprave and corrupt, taking into account more modern approaches to questions of sex and the like.¹⁵ In the 'podiatrist' example, it is not clear whether the photographs of the women were to be publicly sold or displayed and, even if this was so, whether they would be regarded as 'obscene' in the sense just described.

Unlawful stalking is an offence under s 359E of the **Criminal Code** carrying a penalty of up to five years in prison. The difficulty is that the type of conduct involved in the issues being examined here would rarely amount to 'unlawful stalking' as the term is defined in s 359B. While the act is constituted by loitering near, or watching, or approaching a person and so on, the situations described in the context of this paper are not ones that would cause the stalked person to experience apprehension or fear or detriment because they are usually unaware they are being photographed.

The *Summary Offences Act 2005 (Qld)* is also unlikely to provide much assistance, particularly where the photographing occurs in a private place. Section 6 prohibits the creation of a public nuisance which will occur if a person behaves in a disorderly, offensive, threatening or violent way and the person's behaviour interferes with the peaceful passage or enjoyment of a public place by a member of the public. It is possible that if, in the South Bank example, the man was photographing the children in the open he could be in breach of this provision but he was taking the pictures covertly and neither the children nor their parents were

¹⁴ Example provided in the SCAG *Discussion Paper*, p 19.

¹⁵ *R v Hicklin* (1868) LR 3 QB 360 at 371; *R v Martin Secker Warburg Ltd* [1954] 2 All ER 683.

aware they were being photographed. In the ‘podiatrist’ case, the filming took place in private rooms.

3.1.2 Privacy – Legislation and Common Law

Many people would assume that filming persons in private places and contexts would be in breach of a law. However, there are many situations which are not protected by legislation. Indeed, the Commonwealth has a *Privacy Act 1988* and most states have privacy laws that apply to regulate the collection, use, disclosure, security and access to ‘personal information’ (which includes a photograph or other pictorial representation of a person). However, the laws apply only to government agencies and business organisations. It would not seem to apply in situations given in the examples here of a private individual taking photographs of other people without their consent.¹⁶

Section 43 of the *Invasion of Privacy Act 1971 (Qld)* makes it an offence (unless specified exceptions apply) for a person to use a listening device (i.e. an instrument, apparatus, equipment or device) to overhear, record, monitor, or listen to a private conversation to which the person is not a party. It is also an offence, under s 45, for a party to the conversation to communicate or publish any record of the conversation which they have used a listening device to record. These provisions would not enable the perpetrators of the acts in the above examples to be charged with an offence because the *Invasion of Privacy Act 1971* only applies to the use of ‘listening devices’. It would not appear to cover visual surveillance equipment such as optical devices, cameras, or visual recordings as were employed in the examples used here.

The possibility of being able to bring a **civil action** for the tort of invasion of privacy was left open by some members of the High Court in the 2001 case of *ABC v Lenah Game Meats Pty Ltd*,¹⁷ where it was indicated that there may be some room for hearing arguments about liability for invasion of the privacy of an individual. In the Queensland District Court case of *Grosse v Purvis*, Skoien J considered *Lenah Game Meats* and found that a tort of invasion of privacy did exist in Australia. His Honour considered that it was established in the case before him, where the plaintiff was seeking damages against a defendant who had stalked her for a long period, and awarded the plaintiff damages.¹⁸ However, more superior courts have yet to fully recognise the existence of such a tort. Moreover, as the tort

¹⁶ SCAG *Discussion Paper*, p 16.

¹⁷ (2002) 208 CLR 199.

¹⁸ [2003] QDC 151.

was defined by Skoien J, it requires an act of the defendant to not only intrude upon the privacy of the plaintiff but that it also be in a manner that would be considered highly offensive to a reasonable person of ordinary sensibilities.

3.1.3 Classification Legislation

It is also unlikely, in this context, that **classification legislation** provides assistance. Under the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (the Commonwealth Act), the Commonwealth Classification Board classifies publications, films and computer games as part of the National Classification Scheme. Those classifications are picked up by relevant State and Territory legislation and, in Queensland, comprise the *Classification of Computer Games and Images Act 1995* (Qld), the *Classification of Films Act 1991* (Qld), and the *Classification of Publications Act 1991* (Qld) (the Classification Acts). Thus, the Commonwealth Act might classify a computer game as “R” (Restricted) and it then has a R classification under the Queensland *Classification of Computer Games and Images Act*.¹⁹

The RC (Refused Classification) category is quite broad and the Commonwealth Classification Board can classify a film, computer game or certain publications RC if they depict a person under 18 years in a way likely to cause offence to a reasonable adult. The Board will usually take into account the context in which the depiction is set but there are anomalies. Thus, an innocent photograph of a child placed on a webpage where there is a link to ‘sex with boys photographs’ would be likely to receive a RC by the Board but if the same photograph was on a webpage which had a link to ‘more photographs’ which in fact led to a site containing child pornography, it may pass muster. This is because the Board can only consider the actual context visually apparent with the picture of the child, not the content of the linked site.²⁰ Note, however, that it is unlikely that the photographs in the scenarios provided in the above examples would be submitted to the Board for classification.

Each of the Queensland Classification Acts establish offences regarding possession of objectionable material (computer games, films, publications, photographs, depending on the legislation). For example, it is an offence to possess a child abuse publication or photograph or to procure a minor for a child abuse publication or photograph.²¹ ‘Objectionable’ means a photograph, publication etc. that depicts matters of sex, drugs, crime, cruelty, violence, or revolting or abhorrent phenomena

¹⁹ See *Classification of Computer Games and Images Act 1995* (Qld), s 4(1A).

²⁰ SCAG *Discussion Paper*, p 22.

²¹ *Classification of Publications Act 1991* (Qld), see ss 12-18.

in a way that offends standards of morality, decency and propriety generally accepted by reasonable adults. It also means the depiction of a person who is apparently a child under 16 years of age in a way likely to cause offence to a reasonable adult. A 'child abuse' photograph or publication is one that depicts a person apparently under 16 years in a way likely to cause offence to a reasonable adult.

Note that the offence provisions are directed at making, producing or copying the prohibited types of material in order to produce a gain. The laws seem aimed at commercial activities where public sale is intended. The sort of context in which the 'South Bank' photographs of children were taken did not seem one where they were intended for commercial gain even if some public exposure on the Internet was intended. In the 'podiatrist' example, it is not clear if either profit or public exposure of the photographs was envisaged. The fact that the photographs would have to be such as to cause offence to a reasonable adult creates the same difficulties as where 'indecent' or 'obscene' images must be shown to exist when charging a person under the Criminal Code.

The courts have tended to punish those convicted for offences under the classification legislation with fines rather than imprisonment.²²

3.2 COMMONWEALTH

A range of new offences inserted into the Commonwealth **Criminal Code** regarding using the Internet to facilitate or exploit child sexual abuse took effect in March 2005. It is an offence to access, transmit and make available child pornography and child abuse material and to possess and produce such material with the intention of placing it on the Internet. An offender is liable to a maximum of 10 years in prison. In the South Bank example, it seems that the photographs would not constitute 'child pornography' (i.e. depictions of persons under 18 years engaged in a sexual pose or activity, and material, the dominant characteristic of which is the depiction for a sexual purpose of a sexual organ etc. of a person under 18) or 'child abuse material'. The photographs of adult women in the 'podiatrist' example would not be covered.

It is also an offence under the Criminal Code to use a carriage service (including the Internet) in a way that would be regarded by reasonable persons as being, in all the circumstances, menacing, harassing or offensive. The offence carries a penalty of up to three years in prison.²³ It may be difficult to show, in the South Bank

²² *R v Reid and Attorney-General of Queensland* [2000] QCA 218.

²³ Criminal Code (Cth), s 474.17.

example, that the posting of the photographs of the children on the website would be offensive to reasonable people in all of the circumstances. In the case of the ‘podiatrist’, the offence would apply only if the photographs were placed on the Internet and then they would have to be shown to be offensive.

The *Broadcasting Services Act 1992 (Cth)*, Schedule 5, establishes a co-regulatory scheme to regulate online content and imposes obligations on Internet Service Providers (ISPs). It is administered by the Australian Communications and Media Authority and works alongside state and territory legislation. If the Authority receives a public complaint about Internet content and its investigation finds that it is offensive, it can order a ‘take down’ notice if the host of the content is an Australian ISP. In more serious cases where the content is not hosted by an Australian ISP, the Authority can notify the Australian Federal Police and will notify the content to suppliers of approved Internet filters.²⁴

4 STANDING COMMITTEE OF ATTORNEYS-GENERAL DISCUSSION PAPER

In August 2005, the Standing Committee of Attorneys-General (SCAG) released the ‘Unauthorised Photographs on the Internet and Ancillary Privacy Issues’ *Discussion Paper* following an agreement by the Attorney-Generals at the July 2005 SCAG meeting to do so. This *Discussion Paper* provided background information about the issues involved in the taking and use of unauthorised photographs, examined existing state and territory laws, and considered various legislative and non-legislative ways of resolving the privacy issues raised by the unauthorised use of photographs on the Internet and called for public submissions. A working party of state and territory officers, led by Victoria, was established to examine reform options.

The Queensland Attorney-General tabled the *Discussion Paper* in the Queensland Parliament on 9 August 2005 and asked for public input regarding how the issue should be dealt with.²⁵

The *Discussion Paper* essentially concentrated on the use to which the unauthorised photographs are put rather than the actual taking of the photographs

²⁴ Codes of Practice are also used in industries such as the Internet industry and the Internet codes of practice apply to Australian ISPs and content hosts.

²⁵ Hon LD Lavarch MP, Minister for Justice and Attorney-General, ‘Unauthorised photographs on the Internet’, Ministerial Statement, *Queensland Parliamentary Debates*, 9 August 2005, pp 2177-2178.

as it tends to be the former that causes community concern.²⁶ It was noted that it may be quite difficult to restrict the taking of photographs to where consent is given as it may intrude too far on freedom of expression and of artistic expression by stopping the taking of candid shots and media photographs (e.g. news footage). So many exceptions would have to be created that the law would become impractical.²⁷

The unauthorised use of photographs is of more concern as it removes a person's freedom to choose how they present themselves to the world given that a photograph is a permanent record that can be used in many ways. For example, a person may not object to their photograph being taken and shown to family members but would no doubt object if it was used in a 'before' shot for a weight loss commercial.²⁸ Context can be important too. The collection of hundreds of photographs of children playing at South Bank posted together on the webpage was offensive to many parents because they could be regarded as being collected and posted for viewing for the purpose of sexual gratification. In addition, if a webpage on which a photograph is placed has links to pornographic sites, the use of the photograph for sexual gratification may be quite apparent.²⁹

Unauthorised use of a person's photograph can also cause harm, even if the actual taking of it does not. A person might feel angry and/or violated. They might feel anxious about going out into the public. They might feel exploited or that their privacy has been invaded.

The *Discussion Paper* said that a primary concern for any reform options was jurisdictional limitations of any offence provisions and that a national approach was needed to reduce issues of enforcement throughout Australia (even if not likely to do so where offences have an international dimension).³⁰

In terms of options for reform, the *Discussion Paper* considered that feedback from submissions could reveal that there is no gap in existing laws but if they led to the view that there is a need for action, then legislative and non-legislative options could be considered.

²⁶ SCAG *Discussion Paper*, p 6.

²⁷ SCAG *Discussion Paper*, pp 9-10.

²⁸ SCAG *Discussion Paper*, pp 10-11.

²⁹ SCAG *Discussion Paper*, p 11.

³⁰ SCAG *Discussion Paper*, p 31.

The legislative reform options outlined in the *Discussion Paper* were the establishment of a new offence to deal with the unauthorised use of photographs of children, particularly posting on the Internet; or the creation of an offence to deal with taking and publishing voyeuristic images where the subject would have a reasonable expectation of privacy and this could include ‘up-skirting’. The latter approach appears to be the one adopted by the Queensland Bill. The latter offence would not solve the ‘South Bank’ type situation which occurs in a public place but would address situations where a child or adult is undressing in a change room or showering.

Another possible legislative reform involved closing some gaps in classification legislation. It was also suggested that an approach adapted from the Dutch Copyright Act could be taken to protect the reasonable interests of adults and children in the publication of their photographs, which would enable protection of people from exploitation.

Non-legislative reforms suggested in the *Discussion Paper* included education campaigns to increase community and police awareness of existing laws and the appropriate use of technology.³¹

5 THE JUSTICE AND OTHER LEGISLATION AMENDMENT BILL 2005

The gaps and anomalies in existing laws will be remedied by the new Justice and Other Legislation Amendment Bill 2005 (Qld), introduced into the Queensland Parliament on 8 November 2005. Among the 30 pieces of legislation the Bill amends, it introduces new offences into the Criminal Code to deal with secret recordings of persons in private places or engaging in private activities. The new laws are in addition to existing provisions of the Code, such as s 210(1)(f), considered earlier, and complement the recent reforms that protect children from being involved in the making of child exploitation material under ss 228A-228D. The laws will protect adults as well as children.

A **proposed new s 227A** of the Criminal Code will create three offences applying to a person who observes by any means, or visually records (defined as recording or transmitting moving or still images of a person, or part of, a person) another person in specified situations without the other person’s consent in circumstances where a reasonable adult would expect to be afforded privacy.

The first (in **new s 227A(1)(a)**) is where the other person is in a **private place** such as a bathroom, toilet, bedroom or change room and the person need not be actually

³¹ SCAG *Discussion Paper*, pp 33-36.

engaged in a private act at the time. An offender is liable to up to two years imprisonment.

The second situation where an offence may be committed (**new s 227A(1)(b)**) is where the person under observation or being recorded is engaging in a **private act** and the observation or visual recording is made for the purpose of observing or recording a private act. An offender is liable to up to two years imprisonment. A 'private act' is defined as showering/bathing; using a toilet; an activity when a person is in a state of undress; or an intimate sexual activity. A 'state of undress' means the person is naked or the genital or anal region is bare or, if female, the breasts are bare; is only wearing underwear; or is wearing only some outer clothing so that some underwear is exposed. The need for the observation or recording to be for the purpose of observing or visually recording the private act eliminates situations of inadvertent recording or observation such as where a security camera may accidentally film a couple engaged in a sexual act.³²

The examples given in the Bill of circumstances in which a reasonable adult would expect to be afforded privacy are changing in a communal change room at a swimming pool where one would expect observation by other people also changing but would not expect to be visually recorded doing so.

The third offence created by **proposed new s 227A(2)** is designed to combat 'up-skirting'. It is an offence to observe or visually record another person's genital or anal region (whether covered or bare), without the other person's consent, in circumstances where a reasonable adult would expect to be afforded privacy in relation to that region. Again, the offender may face up to two years imprisonment. The example provided in the Bill is using a mobile phone camera in a public place to take photographs of women's underwear under their skirt without their consent. Note that the observation or recording does not have to be in a private place but could be in a public place such as on an escalator in a shopping centre.

The requirement that the observation or recording must be in circumstances where a reasonable adult would expect to be afforded privacy ensures that the offending conduct must be such that would objectively breach accepted notions of privacy and is consistent with a new offence in Part 3B of the New South Wales *Summary Offences Act 1988* which prohibits the filming of a person for an indecent purpose.³³

Under the Queensland provisions, the motivation of the observer is irrelevant. It is immaterial whether or not the observation or recording is to provide sexual arousal or gratification for the observer or for a third person. However, under the NSW

³² Justice and Other Legislation Amendment Bill 2005 (Qld), *Explanatory Notes*, p 21.

³³ *Explanatory Notes*, p 21.

Summary Offences Act 1988, to show ‘indecent purpose’, the purpose of the filming must be for sexual arousal or gratification. Changes were recently made to the South Australian *Criminal Law Consolidation Act 1935* to make it unlawful for a person, acting for a ‘prurient purpose’, to make a photographic or other record from which an image of a child engaged in a private act may be reproduced. However, again, a ‘prurient purpose’ requires that the observer has acted with the intention of satisfying his or her own desire for sexual arousal or gratification or of providing such for a third person.³⁴

A **proposed new s 227B** of the Code makes it an offence to **distribute** a visual recording of any of the above situations known as ‘a prohibited visual recording’ (i.e. a person in a private place or engaging in a private act, or of a person’s genital or anal region) where the person distributing it has reason to believe it to be a prohibited visual recording, without the other person’s consent. The maximum penalty is up to two years imprisonment. Note that an offence may still be committed where a person distributes a recording in circumstances where **new s 227A** does not apply – for example where a person is accidentally filmed while engaging in a private act and the person who has done the filming then decides to distribute the image.³⁵

The definition of ‘distribute’ is designed to mirror that in s 228C of the Criminal Code regarding the distribution of child exploitation material. It includes communicating, exhibiting, sending, supplying or transmitting to others; making available for access; and entering into an agreement to do either of these things. It also covers an attempt to distribute.

Proposed new s 227C sets out **exceptions** to the offence provisions in **new ss 227A-227B**. A law enforcement officer will not be criminally responsible for an offence against those provisions if the officer is acting in the course of the officer’s duties and the officer’s conduct is reasonable in the circumstances for the performance of the duties. A ‘law enforcement officer’ is defined in **proposed new s 207A**. Also, a person will not be criminally responsible for an offence against those provisions in relation to an observation or visual recording of another person who is in lawful custody (such as in an authorised mental health service or high security unit) or subject to a supervision order (such as a post-prison community based release order or an intensive drug rehabilitation order) and the person’s conduct is reasonable in the circumstances. Examples given in the Bill of the types of situations engaged by **new s 227C** are law enforcement officers undertaking legitimate surveillance operations; or surveillance of a prison

³⁴ *Criminal Law Consolidation Act 1935* (SA), s 63B.

³⁵ *Explanatory Notes*, p 22.

bathroom for suicide watch; or observing a person required to provide a urine sample in accordance with a drug rehabilitation order.

Thus, the new provisions inserted into the Criminal Code by the Bill –

- will protect adults and children from being observed or filmed in private places or while engaging in private acts without their consent. It will not protect them from being observed or filmed in a public place such as on a beach. This is similarly the case in the Northern Territory where the unauthorised use of an optical surveillance device is an offence but the definition of such a device only covers recording of private activities.³⁶ In Victoria, it is an offence to use an optical surveillance device to observe a private activity without the consent of the parties involved but a ‘private activity’ does not include an activity outside a building.³⁷ Many activities may not be covered under the Western Australian legislation where a ‘private activity’ is defined as one that would not reasonably be expected to be observed;³⁸
- will protect adults and children from the practice of ‘up-skirting’ and similar conduct in a private or a public place without their consent;
- will protect adults and children from the distribution, without their consent, of visual recordings of their being in a private place, or engaging in a private act, or of their genital or anal region.

³⁶ *Surveillance Devices Act 2000* (NT), s 3 (definition), s 5.

³⁷ *Surveillance Devices Act 1999* (Vic), s 3 (definition), s 7.

³⁸ *Surveillance Devices Act 1998* (WA), s 3 (definition), s 6.

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