

**Unauthorised Photographs on the Internet  
And Ancillary Privacy Issues**

**Discussion Paper  
Standing Committee of Attorneys-General  
August 2005**

Note: This Discussion Paper does not necessarily represent the views of the Standing Committee of Attorneys-General or any individual Attorney-General.

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## 1 Summary of discussion questions

(1) Should the *taking* of unauthorised images of children be restricted, giving consideration to the competing interests of privacy versus freedom to take photographs in public places? and

- (a) If so, what form would those restrictions take; and
- (b) What exceptions, if any, would be required?

(2) Should the *use or publication* of unauthorised photographs/ images taken in *public places* be regulated?; and

- (a) If so, what is it about the use that makes it worthy of regulation?  
and
- (b) What types of 'use' should be regulated?

(3) Should consent be required for photographs used for particular purposes?

(4) In the event that an offence to deal with unauthorised photographs on the Internet is considered necessary, what features should it contain?

(5) Should there be some enforceable civil right in relation to the use of your image? If so, on what basis?

## 2 Introduction

1. At a meeting of the Standing Committee of Attorneys-General (SCAG) in August 2003, Ministers agreed that all State and Territory officers would work in consultation to develop options for reform to address the issue of unauthorised publication of photographs being made available on websites, including ancillary privacy issues associated with the practice.
2. A working party of State and Territory officers has been established to examine possible options for reform. The working party is led by Victoria and consists of representatives from each jurisdiction.
3. To progress Ministers' agreement at SCAG, this Discussion Paper undertakes to:
  - Identify the issues, including privacy issues, associated with unauthorised publication of photographs on the Internet;
  - Discuss the adequacy of existing State and Territory laws in their application to these issues; and
  - Identify legislative and non-legislative options to address these issues.
4. This Discussion Paper calls for submissions from interested parties by **14 October 2005**. Submissions should be forwarded to:

Director  
Civil Law Policy  
Department of Justice  
Level 4, 55 Andrews Place  
Melbourne VIC 3000

5. Submissions may also be sent electronically to:  
[legalpolicysubmissions@justice.vic.gov.au](mailto:legalpolicysubmissions@justice.vic.gov.au) or faxed to 03 9651 0577.
6. Following receipt and consideration of submissions, a final report will make recommendations regarding the development of an appropriate response.

## 2.1 Background

7. The issue of unauthorised photographs on the Internet was highlighted in 2002 when a number of unauthorised photographs of children were posted on voyeuristic websites. For instance, in February 2002 the media reported the discovery of a website containing photographs of teenage Melbourne school boys taken without consent. The website featured pictures of male students involved in a variety of sporting activities such as rowing and playing football.<sup>1</sup>
8. Shortly after the media coverage, the website in question advised that it had been shut down and that the site and pictures would not be relocated. The webmaster claimed that the site was never a “gay website” (as claimed in the press), and that the adult links had been placed on the site by hackers. Despite those assurances, a similar new site featuring photographs of young rowers and sportsmen appeared soon after, although this time there was a fee payable in order to access the photographs.
9. In April 2002, concerns were again raised when photographs featuring a 16 year old male surf lifesaver were discovered on a sports fetish website.<sup>2</sup> These photographs had been taken without consent. Web server Yahoo! shut down the site and advised the public to bring any further inappropriate material to their attention.
10. In June 2003, the media reported that the YMCA had banned mobile phones at its sports and aquatic centres in response to the potential for invasion of privacy with mobile phone camera technology being used to take photographs in swimming pools and change rooms.<sup>3</sup>
11. More recently, in Queensland, the media reported the discovery of a website containing hundreds of images of children, apparently taken covertly at South Bank Parklands and other recreational sites.<sup>4</sup>
12. The photos and the website were not indecent or unlawful, and the Police found no links from the site to any pornographic or paedophilic sites. The producer of the site shut it down following the media exposure. Despite this, the media reported on the community outrage at the fact that the

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<sup>1</sup> ‘USA: Vic gay website containing Melbourne schoolboys withdrawn’, *Australian Associated Press*, 22 February 2002; ‘Schoolboys counselled on net pics’, *MX Newspaper*, 21 February 2002; ‘Vic-Police powerless to act on gay website containing schoolboys’, *Australian Associated Press*, 22 February 2002.

<sup>2</sup> ‘Teen put on gay site may lead to camera ban’, *Herald Sun*, 3 April 2002, p 25.

<sup>3</sup> Michelle Rose, ‘Pools outlaw mobiles amid privacy fears’, *Herald Sun*, 11 June 2003.

<sup>4</sup> ‘Parents warned over online beach photos’, *The Age*, 27 January 2005.

photos had been taken surreptitiously and had been exposed to the world via the Internet.

13. The instances of unauthorised photographs outlined above caused distress to those involved and have made parents fearful of further occurrences.
14. At present, whether or not the law prohibits the taking of a particular image largely depends on the nature of the image (or what it depicts). Where the image of the child has been determined by the appropriate authority to be offensive, child pornography offences will prohibit the taking of or distribution of the image.
15. In some jurisdictions, there is also a prohibition on the taking of photos of “private activities” in “private places”. These are activities carried on in circumstances that may reasonably be taken to indicate that the parties to them desire to be observed only by themselves. They do not include activities carried on in any circumstances in which the parties to the activities ought reasonably to expect that they may be observed. The prohibition extends to the use of an image so obtained.
16. Some jurisdictions also specifically prohibit filming or photographing a person without their consent and for sexual gratification. The person being filmed must either be in a state of undress or engaged in a private act (eg using a toilet).
17. The photographs that prompted this reference and the more recent South Bank case were not perceived by the authorities to fall within any of the above categories, because they are photos that are not necessarily objectively offensive and were of activities occurring in public places. As such there were few, if any, avenues of redress available to victims of unauthorised photographs posted in the Internet.
18. However, it is important to note that the photographs that led to this discussion paper were not submitted to the Classification Board to determine if they were ‘prohibited content’ which could then be the subject of a take-down notice and removed from Australian websites. As such, the established system of classification of online content (using the National Classification Code) and removal of ‘prohibited content’ via take-down notices was not tested.
19. This Discussion Paper focuses on the use to which unauthorised images are put rather than the act of taking the photograph because it was the subsequent use (publication on the Internet) that prompted public attention and concern.

20. The issues to be explored in this Discussion Paper involve a number of intersecting areas of the law, i.e. criminal laws; privacy laws; Internet regulation; and censorship law. Enforcement of any measures designed to combat unauthorised photographs on the Internet will inevitably be difficult. Any jurisdictional based system of Internet regulation faces inherent enforcement difficulties. Ideally, international Internet regulation would be the optimal solution. However, as this is unlikely to occur in the foreseeable future, individual jurisdictions will have to continue to grapple with these difficult issues.
21. Central to the issue of unauthorised photographs on the Internet is the balance between privacy expectations on one hand, and freedom of expression on the other. While an individual's expectation of privacy may in some instances extend to controlling images of themselves, privacy is a concept which is not easily defined and hence boundaries are frequently blurred. The ability to communicate in a relatively free and open manner is an equally important consideration. Therefore, when considering the issue of unauthorised photographs on the Internet and whether further regulation may be required, it is important to first establish that the issues and concerns raised are of a sufficiently serious nature to warrant reforms which may ultimately encroach on freedom of expression.

### **3 Defining the issues**

#### **3.1 Nature of unauthorised photographs**

22. Most Australians have access to some form of photographic equipment. Photographs can be taken for wide variety of purposes in public and private circumstances. Many photographs taken in a public place will include subjects who have not consented to their photograph being taken.
23. Unauthorised photographs can take all manner of form. They can be photographs of public events or incidental shots where the focus of the photographer is on another subject or scene. They can also include specific photographs taken of a person not known to the photographer. This could be for an innocent, candid shot or for some inappropriate purpose.
24. The incidents that prompted this Discussion Paper primarily involved images of children taking part in sporting and recreational activities in public places. The photographs in the school-boy rowers, surf lifesavers and South Bank situations were not sexually explicit. However, the photographs of the school-boy rowers could be perceived as containing characteristics of sexual gratification. The photographs did not centre on the sports being played; rather they focused solely on the boys' physical attributes i.e. photographs of boys who had half removed their rowing suits. Additionally the photographs centred on close up shots of the boys' bodies in tight clothing (swim suits and rowing suits) rather than their faces or while actually playing sport.
25. Unauthorised photographs can also be of a more private nature, for example, those involving nudity, sexual activity, in toilets, and underneath clothing ("upskirting"). There have also been reports of mobile-phone cameras being used surreptitiously to take photographs in public change rooms and swimming pools.
26. The small size of many cameras and the advent of mobile-phone cameras makes it easier to take photographs without the subject's knowledge. This, in turn, heightens the risk/possibility that photographs will be used without the subject's consent.
27. The ease of publication may also be relevant. In the past, the need to seek professional assistance for the development of photographs may have discouraged people from taking certain types of unauthorised photographs. However, digital photographs can now easily be printed at home.

28. In addition, photographs taken on digital cameras or mobile phones can be sent live online or stored in personal computers, or forwarded on to other mobile-phone users. This allows photographs to be taken and transmitted quickly to a vast audience either by posting on the Internet or on-sending the photograph to a mobile-phone user. This is dramatically different to the traditional forms of publication, which are less accessible, slower, involve higher costs of entry, and involve fewer potential recipients.
29. The digital nature of these photographs also allows greater opportunity for an image to be altered. For example, an image of a person's head can be transposed onto the naked body of another person.

### **3.2 Conduct**

30. There are primarily two types of conduct that are at issue. That is, the act of *taking* the unauthorised image, and secondly the *use* to which the image is put.

#### **3.2.1 Taking unauthorised images**

31. Many photographs contain unauthorised images because the subject has not consented to, or may not even be aware that the photograph has been taken. This raises questions about consent and the state of knowledge of the subject. It also raises the question of whether different rules should apply depending on whether photographs are taken in a private or public place.
32. The issues highlighted by the school boys' incident illustrate the delicate balance between a person's expectation of privacy and control over their own image versus the freedom to take photographs in a public place. The question that arises is whether people should expect privacy in public places, or while engaging in public activities.
33. People present themselves differently in different public places. For instance, while a person might be comfortable wearing and being seen in a swimsuit at the beach, they might not be comfortable being seen in a swimsuit whilst shopping in a mall. While a person might be comfortable in presenting themselves in a particular way at a beach, a photograph, which facilitates a permanent image, provides a broader context for those images.
34. But for any society to function in a relatively free and open manner there could not realistically be a requirement for all photographs to be taken with consent. If there were such restrictions, candid shots could never be taken, and the media would be severely constrained in the images they show us. Freedom of expression and artistic expression would undoubtedly be adversely affected.

35. The difficulty is that while there may be legitimate circumstances when recording images should be restricted, it would not be practical or desirable to obtain consent from every person all of the time, for example, for use in television news file footage.
36. The issue of consent regarding photographs taken in a public place illustrates the difficulty in trying to find an appropriate balance between freedom of expression, and an individual's expectation of privacy.
37. The matter must also be kept in perspective as the vast majority of photographs of children are taken in appropriate circumstances and are used for acceptable purposes. Any prohibition would require a vast number of exceptions (for example: family, friends, media) and arguably these exceptions could be the most common source of abuse or misuse. It would also be necessary to define how consent might be given, that is whether it would need to be in writing, or implied from the circumstances. For these reasons, a prohibition of this nature would seem to be unenforceable and perhaps a disproportionate response to the issue sought to be addressed.
38. In the cases referred to above, none of the subjects had consented to the photographs being taken. It was not the taking of the photograph that raised the public's attention but rather how they were used.

### **3.2.2 Use of images**

39. The use to which an image is put is the central issue in the situations which have led to this Discussion Paper.
40. Publishing images of a person without their consent removes their freedom to choose how they present themselves to the world. Some may argue that consent is implicit because the activity is in a public place in full view of people. On the other hand, filming results in a permanent record that can be used in many ways. It is natural that where people are aware they are being filmed, they can adjust their behaviour accordingly. If a person has no knowledge they are being filmed they have no way of reducing the intrusion.
41. It is instructive to draw a distinction between consent for taking a photograph and consent for the use to which it is put. For example, while year 12 students at a formal might consent to a hired photographer taking photographs, they may not consent to those photographs being posted on the Internet for anyone to purchase or view.
42. Similarly, consent for the use to which photographs are put is of note because it is probable that while a person would not object to a

photograph being taken of themselves they may object to that same photograph being used to advertise cigarettes or perhaps as an illustration for a story about obesity.

43. With respect to the South Bank photographs, the collection of hundreds of photographs of children posted together was seen to be offensive by many parents. The presentation of the photographs in the form of a collection was seen by some as indicating that the photographs were being viewed for the purpose of sexual pleasure.
44. The purpose of the photographs or images, or similarly the use to which photographs are put, may be highlighted by the context of the photographs. For instance if the purpose of the photographs is for the sexual gratification or voyeurism of others, then this will frequently be apparent by the context in which the photographs appear. For example, there may be links to sexually explicit sites, or links to chat rooms which contain discussions with sexual themes.
45. Unauthorised images which are distributed on the Internet by and large become the object of others' viewing. The potential audience of Internet users is very large. When the particular image involves parts of the body only, objectification can increase and the use of the images for sexual gratification/voyeurism may become apparent. This is particularly the case with images of children or teens. Even though a picture may not be pornographic it may still be considered offensive because it could foster the notion of children as objects of adult sexual gratification.
46. The use of photographs is important because other factors such as consent may not be an issue if the use the photographs are put to is considered generally acceptable. For instance, if a school took photographs of their pupils competing in a rowing regatta (without the students' consent) and posted these on the school web site it is unlikely this would cause the same reaction or harm as the situation at hand. The purpose of these photographs might be to advertise the school's sporting activities, in which case, no harm to the students is likely to result. This example demonstrates the strong link between the purpose of the photographs, or the use to which they are put, and whether harm results.

### **3.3 Harm**

47. The taking of an unauthorised photograph would not normally cause immediate harm of itself. However, this may not be the case if the subject realises or is made aware that the photograph has been taken. For example, some cultural groups may object to being photographed.

48. Another example involves a man in NSW who took photographs of women sunbathing topless.<sup>5</sup> The harm being that the women may have taken offence and/or felt that their privacy had been invaded.
49. In other situations, it may be that the act of taking an unauthorised photograph will not, of itself, produce any immediate harm. For example, in the school boys rower and surf lifesavers scenarios, where the subjects of the photograph were not aware that the photographs were being taken.
50. Therefore, in examining this issue it is important to establish what it is about the use of the photographs, such as the posting of unauthorised photographs on the Internet, that causes harm to the people in the photographs.
51. There appear to be a number of common factors, for example:
- lack of consent (lack of control over one's own image in terms of both the taking of the photograph and the use to which it is put);
  - the nature of the photographs themselves (for example, objectification of the subject);
  - the context in which the photographs are displayed; (sexually explicit, or themes of objectification);
  - the purpose of the photographs (others' sexual gratification);
  - the permanency of recorded images (higher level of scrutiny); and
  - world wide audience.
52. The form of publication and context of the publication can affect the level of harm suffered by the subjects and their families. The context of the photographs in both the school boys and surf lifesaver situations were closely linked to the harm caused. In those reported incidents, websites provided the context. The websites in question contained links to pornographic sites and the content on the sites (although not in itself sexually explicit) suggested that the purpose of the websites was for others' sexual gratification or voyeurism. The sexual connotations caused by the context, coupled with the photographs themselves were directly connected with the harm caused.
53. The school boy rowers reportedly felt that some older men would view them as sexual objects by virtue of the website context. They reported a range of reactions, for example: feelings of anger, a sense of violation, anxiety about going out in public places, feelings of exploitation and invasion of privacy.
54. The permanent nature of recorded images (whether moving or still) allows close scrutiny, wide dissemination, and repeated viewing. This

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<sup>5</sup> 'Topless photos prove costly', *Herald Sun*, 2 December 2004.

permanency and opportunity for repeated viewing provides opportunity for ongoing objectification of the subject, and therefore ongoing harm.

### **3.4 Who should be protected?**

#### **3.4.1 Children**

55. In looking at this issue in terms of protection from harm it is instructive to look at those involved and whether there is any difference with respect to children (under 18) and adults, and their respective need for protection from harm.

56. In Victoria, where this issue first came to public attention, the people involved were young, specifically: school boys and young surf lifesavers. Children are undoubtedly more vulnerable than adults. By virtue of their age and inexperience they are less likely to be aware of people who would take photographs for undesirable purposes and hence less able to take precautions.

#### **3.4.2 Public figures**

57. Public figures, such celebrities and the like, may be concerned about the use of unauthorised photographs of themselves. However, their situation should be looked at in terms of the level of harm and whether additional protection is necessary. Celebrities often actively seek publicity to maintain their profile. Further, they will frequently have resources to protect their reputation and use of their image through defamation actions and trade practices actions. For example, footballer Andrew Ettingshausen succeeded in a defamation action which involved unauthorised publication (in a widely read magazine) of a photograph of him with his genitalia exposed.<sup>6</sup>

#### **Discussion Questions:**

(1) Should the *taking* of unauthorised images of children be restricted, giving consideration to the competing interests of privacy versus freedom to take photographs in public places? and

- (a) If so, what form would those restrictions take; and
- (b) What exceptions, if any, would be required?

(2) Should the *use or publication* of unauthorised photographs/ images taken in *public places* be regulated? and

- (a) If so, what is it about the use that makes it worthy of regulation; and
- (b) What types of 'use' should be regulated?

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<sup>6</sup> *Ettingshausen v ACP* (1991) 23 NSWLR 443.

(3) Should consent be required for photographs used for particular purposes?

## 4 Existing regulation

58. The States, Territories and Commonwealth all have an array of different laws that to some degree have a bearing on the issue of unauthorised images published on the Internet. For example, there are laws relating to surveillance devices, stalking, classification, and Internet content which are all of some relevance to this discussion. See **Appendix 1** for a table of relevant legislation in each jurisdiction.
59. Notions of privacy and protection of privacy are also central to the issues explored in this discussion paper. The meaning of 'privacy' is difficult to define with any precision. The simplest and most often quoted definition of 'privacy' is that advanced by Warren and Brandeis in 1890 as 'the right to be let alone'. A more recent definition advanced by Professor Alan Westin in 1967 is:
- 'the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated to others'.
60. Privacy protection is recognised in Article 17 of the International Covenant on Civil and Political Rights (1966) (ICCPR)<sup>7</sup>:
1. No one shall be subjected to arbitrary or unlawful interference with his [or her] privacy, family, home, or correspondence, nor to unlawful attacks on [ones'] honour and reputation.
  2. Everyone has the right to the protection of the law against such interference or attacks.
61. Statutes provide certain forms of privacy protection, for example: information privacy, privacy of communications via surveillance and telecommunications legislation. Some protection has also been obtained as an offshoot of other causes of action such as defamation, breach of confidence, trespass and nuisance. However, there may be gaps as identified below in respect of the school boys' scenario.
62. There is no absolute right to privacy in Australia. At the national level, Australia's statutory privacy regime, the *Privacy Act 1988*, protects 'personal information'. Personal information is defined in the Act as information or an opinion, whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion. For the Privacy Act to apply that personal information must be in the form of a 'record', which includes a document, database, photograph or other pictorial representation of a person.

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<sup>7</sup> Australia is a party to the International Covenant on Civil and Political Rights which is attached as a schedule to the Commonwealth *Human Rights and Equal Opportunity Commission Act 1986*.

63. The Act applies to Commonwealth agencies and private sector organisations. The eleven Information Privacy Principles (IPPs) in section 14 of the Act apply to Commonwealth and Australian Capital Territory government agencies and the ten National Privacy Principles (NPPs) in Schedule 3 of the Act apply to private sector organisations (with some exceptions set out in the Act - for example, small businesses that do not trade in personal information or collect sensitive health information are exempt). Both the IPPs and the NPPs establish standards for the collection, use, disclosure, quality and security of personal information. The privacy principles also allow for access to, and correction of, information by the individuals concerned.
64. One important exception is that the privacy principles do not apply to individuals who are not engaged in business but are merely conducting their personal, family or household affairs. As a result, the Privacy Act will generally not apply to an individual who takes photographs of another person without their consent.

## **4.1 Criminal law**

### **4.1.1 Surveillance devices**

65. A number of jurisdictions have legislation that governs listening and optical surveillance devices. For instance, in Victoria it is an offence to use an optical surveillance device (such as a camera or mobile phone camera) to record visually a “private activity” to which the person is not a party, without consent. Situations like the school boys rowing are not assisted by this offence, as rowing in a public place could not be considered a “private activity”.<sup>8</sup> The Northern Territory and Western Australia also have offences relating to surveillance devices, and these similarly do not apply to activities in public places.
66. Further, in Victoria, an activity “carried on outside a building” is not a “private activity” for the purposes of surveillance devices legislation.<sup>9</sup> As such, these provisions would not be of assistance where mobile phone cameras or other devices are used to take pictures up women’s skirts or of children on South Bank.

### **4.1.2 Filming for indecent purposes**

67. New South Wales has recently enacted an offence for filming for indecent purposes.<sup>10</sup> The elements of the offence include filming a person (without

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<sup>8</sup> 'Private activity' means an activity carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be observed only by themselves, but does not include (a) an activity carried on outside a building; or (b) an activity carried on in any circumstances in which the parties to it ought reasonably to expect that it may be observed by someone else.

<sup>9</sup> Section 3.

<sup>10</sup> Part 3B, *Summary Offences Act 1988* (NSW).

consent) in a state of undress, engaged in a “private act” or in circumstances where a reasonable person would expect privacy. The purpose of the filming must be to provide sexual arousal, or sexual gratification.<sup>11</sup> “Engaging in a private act” is defined as a person engaged in using the toilet, showering or bathing, carrying on a sexual act of a kind not ordinarily done in public or any other like activity. Similarly to the surveillance devices offences above, the NSW indecent filming offence focuses on the protection of private activities.

68. The NSW offence requires the filming to be done for a sexual purpose or for sexual gratification. Given that the filmed act must be an intimate private act, such as using the toilet, showering or bathing, and the filming has occurred without consent, arguably those facts alone should render the conduct criminal, without the need to also establish a sexual purpose in the filming.
69. South Australia, as part of new legislation concerned with child pornography, has recently amended the *Criminal Law Consolidation Act* and created an offence (Section 63B) where “a person who acting for a prurient purpose makes a photographic, electronic or other record from which the image, or images, of a child engaged in a private act may be reproduced, is guilty of an offence”. It is no excuse if the acts alleged to constitute the offence occurred in private or in public, or with or without the consent of the child, or the child’s parent or guardian.
70. A “prurient purpose” is defined as “a person acts for a prurient purpose if the person acts with the intention of satisfying his or her own desire for sexual arousal or gratification or of providing sexual arousal or gratification for someone else.”
71. A “private act” means a sexual act; or an act involving an intimate bodily function such as using a toilet; or an act or activity involving undressing to a point where the body is clothed only in undergarments; or an activity involving nudity or exposure or partial exposure of sexual organs, pubic area, buttocks or female breasts.
72. Similar to the surveillance devices legislation, the restriction to “private acts” prevents its application in the school boys’ type situation, although these offences may have application to ‘upskirting’ and filming in toilets and the like.

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<sup>11</sup> Whether the sexual arousal or sexual gratification was for the person filming, or for a third person.

### **4.1.3 Offensive use of an Internet service**

73. The Commonwealth Criminal Code has recently been amended to include an offence of intentionally using a carriage service (including use of the Internet) in a way which would be regarded by reasonable persons as being, in all the circumstances, menacing, harassing or offensive (section 474.17). The new offence came into force on 1 March 2005.
74. Therefore, incidents akin to the school boys rowing may be covered by the new offence if the placing of these images on a particular website was considered to be use of an Internet service in a way that is offensive to reasonable persons. Similarly, posting more explicit pictures (without consent) such as up-skirting and those involving nudity may potentially be considered an offensive use of a telecommunications service. The judge in each case will decide whether particular material or a use of a carriage service would be regarded by a reasonable person as offensive. The 'reasonable persons' test allows community standards and common sense to be imported into a decision about whether conduct is in fact offensive. The maximum penalty for this offence is imprisonment for 3 years.
75. As this offence is relatively new, it is not clear yet the extent to which it will be applicable to the school boys type scenario.

### **4.1.4 Stalking**

76. Most jurisdictions have offences for stalking. It is possible that the taking of photographs could constitute stalking, where in taking the photographs the offender engages in a 'course of conduct'. However, the offence of stalking is ultimately of limited application as the requisite intention is unlikely to be present in a situation like the school boys rowing. For example, in Victoria the requisite intention is causing physical or mental harm to the victim or of arousing apprehension or fear in the victim.

### **4.1.5 Indecency and other offences**

77. A number of jurisdictions have 'indecent' offences. For instance in the Northern Territory an offence exists for publishing an 'indecent article' i.e. one that depicts, describes or represents in a manner that is likely to cause offence to a reasonable adult, a person (whether or not engaged in sexual activity) who is or looks like a child under 16. This offence would, however, appear to have a limited application in that an image of the school boys rowing or the surf life savers, may not be considered 'indecent'.
78. The Northern Territory also has an offence regarding indecent dealing with a child under 16 which includes taking or recording indecent visual images of a child under 16 (s 132 *Criminal Code* (NT)). Again it would

appear unlikely that this offence would extend to the school boys or surf lifesavers' situation.

79. Under section 210(1)(f) of the Queensland *Criminal Code*, it is an offence if a person, without legitimate reason, takes any indecent photograph or records, by means of any device, any indecent visual image of a child under the age of 16 years. Again, it would be unlikely to apply to the school boy rowers or South Bank situations.
80. Under section 227(1) (indecent acts) of the Queensland *Criminal Code*, it is an offence to (a) wilfully and without lawful excuse do any indecent act in any place to which the public are permitted to have access, whether on payment of a charge for admission or not; or (b) to wilfully do any indecent act in any place with intent to insult or offend any person.
81. This offence, and the offence in section 210(1)(f), was recently used to prosecute a man who had taken large numbers of photos of women at shopping centres. Generally, the conduct followed a particular course, in that he took a photo of the woman from a distance, then a closer photo and finished with a photo of the woman's underwear under her skirt. The photographs taken of the actual underwear of the complainants were 'indecent', therefore, the taking of those photographs could be charged under section 227(1)(a) of the Criminal Code. In relation to one of the images, it was obvious from other photographs that the subject was a juvenile therefore this was charged under section 210(1)(f) of the Criminal Code (recording an indecent visual image of a child under 16).
82. However, there was no criminal charge available to cover the remaining photographs of the women, as they could not be classed as "indecent".
83. Section 4 of the NSW *Summary Offences Act 1988* makes it an offence for a person to conduct himself or herself in an offensive manner in or near, or within view or hearing from, a public place or a school. While this provision has been used to successfully prosecute a person surreptitiously taking photographs of topless women on a Sydney beach<sup>12</sup>, it is unlikely to apply to the school boy rower situation. In general, offensive behaviour must be such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person.
84. In Tasmania, it is an offence to behave in an offensive or indecent manner in a public place and to insult, or annoy any person (s 13 of the *Police Offences Act 1935*). This section could be used to deal with the type

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<sup>12</sup> 'Topless photos prove costly', *Herald Sun*, 2 December 2004.

of situation that occurred in NSW in relation to taking photographs of women sunbathing topless on a beach. However, as the focus is on the behaviour of the person in public, it would also appear unlikely that this could be applied in the school boys or surf lifesavers' situation.

85. Section 6 of the Queensland *Summary Offences Act 2005* creates the offence of "public nuisance". A person commits a public nuisance offence if the person behaves in a disorderly way; an offensive way; a threatening way; or a violent way; and the person's behaviour interferes, or is likely to interfere, with the peaceful passage through, or enjoyment of, a public place by a member of the public.
86. To be applicable to the photography situation, this offence requires the person's conduct to be "offensive" or "threatening", and to be likely to interfere with public enjoyment of a public place. While it may have application to someone openly photographing children in a public place; it may not apply where the filming was surreptitious or covert, i.e. where the subject did not know they were being filmed.

#### **4.1.6 Child pornography**

87. Child pornography offences are common to all jurisdictions. In NSW the possession, production or dissemination of 'child pornography' is an offence. 'Child pornography' is defined as material that depicts or describes, in a manner that would in all the circumstances cause offence to reasonable persons, a person under (or apparently under) the age of 16 years either engaged in sexual activity, or in a sexual context, or as the victim of torture, cruelty or physical abuse (whether or not in a sexual context).
88. New federal Internet child pornography offences were introduced by the Australian Government last year and came into force on 1 March 2005. These make it an offence to intentionally access, transmit or make available child pornography using the Internet. They also cover possession, production or supply of child pornography with the intention of making it available on the Internet. The definition of 'child pornography' includes depictions of a person under 18 engaged in a sexual pose or sexual activity, and material, the dominant characteristic of which is the depiction for a sexual purpose of a sexual organ, the anal region or the breasts (in the case of a female) of a person under 18. In each case the material must be something that a reasonable person would consider to be offensive.

## 4.2 National regulatory schemes

### 4.2.1 National classification scheme

89. The national classification scheme is a co-operative arrangement between the Commonwealth, States and Territories. The scheme was established by the *Classification (Publications, Films and Computer Games) Act 1995* of the Commonwealth. This legislation provides for a specialist body, the Classification Board ('the Board'), to classify films, computer games and certain publications. As such, the Classification Board is the expert body in bringing community standards to the classification of material. The States and Territories enforce classification decisions with offences mainly relating to sale and exhibition under their respective enforcement legislation. Members of the Board are appointed with a view to ensuring that they broadly represent the Australian community.
90. The Board and Classification Review Board ('the Review Board') make decisions in accordance with the National Classification Code ('the Code') which names and broadly describes the classification categories for classifiable material. The classification guidelines are a tool used by the Board to assist in applying the criteria in the Code by describing the classification categories and setting out the scope and limits of material suitable for each category. When making classification decisions, the Board and Review Board are also obliged to take into account matters set out in section 11 of the *Classification (Publications, Films and Computer Games) Act 1995* of the Commonwealth. These include standards of morality, decency and propriety generally accepted by reasonable adults [see **Appendix 2**].
91. The Commonwealth, State and Territory Ministers with censorship responsibilities approve the Code. Films which are classified RC (Refused Classification) include films that 'describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, under 18 (whether the person is engaged in sexual activity or not)'. [see **Appendix 3** for full descriptions]. The RC classification is also of relevance to the regulation of online content which will be discussed shortly.
92. The RC classification is broad and encompasses material involving minors that are depicted in a way that would be offensive to a reasonable adult. As such, it is possible that innocuous pictures of children, for example pictures of children in underwear from a department store catalogue, could be RC in particular circumstances or context. For example, a photograph of a child in underwear on its own might be inoffensive, but it may become offensive to a reasonable adult in the form of a collection of such images. In addition, the Classification Board has previously classified an inoffensive image of five year old

child fully clothed on a web page with an offensive url as RC ('prohibited content').

93. The Classification Board is a specialist body that has been established to make these difficult decisions. As such, it is important to note the important function of the Classification Board and the broad application of the RC classification in respect of depictions of children that is currently in place.
94. However, while the Classification Board is able to take context into account there may be a gap to the extent that website links may be taken into account as context in respect of a child's image. For example, an innocent photograph of a child with a link titled 'sex with boys pics' would be classified RC by the Classification Board as the image of the child in the context of the words would be likely to offend a reasonable adult. However, if that same innocent photograph of a child on a web page with a link titled 'more pics' (which was actually a website containing child pornography) were to come before the Classification Board – they would not be able to take the content of that linked web page into account. The Classification Board could only take into account the actual context visually apparent with the image of the child.

#### **4.2.2 Online regulation - Broadcasting Services Act 1992 (BSA)**

95. The Australian Communications and Media Authority (ACMA) administers a co-regulatory scheme to deal with Internet content. The aim of the scheme is to address community concerns about offensive and illegal material on the Internet. The scheme is established under Schedule 5 of the *Broadcasting Services Act 1992*. Some of the ACMA's functions in administering the scheme include:
  - Investigation of complaints about Internet content;
  - Encouraging development of codes of practice for the Internet industry, registering and monitoring compliance with such codes;
  - Providing advice and information to the community about Internet safety issues, especially those relating to children's use of the Internet; and
  - Liaising with overseas bodies.
96. Members of the public can make complaints about Internet content to the ACMA, if it is, or would be prohibited content under the BSA as described below.
97. The Scheme relies on the classification decisions of the Classification Board which is supported by the Office of Film and Literature Classification.

#### **4.2.2.1 Prohibited content**

98. The following categories of Internet content<sup>13</sup> are prohibited:
- Content which is (or would be) classified RC or X 18+ by the Classification Board; and
  - Content hosted in Australia which is classified R 18+ and not subject to a restricted access system which complies with the criteria determined by the ACMA.
99. See **Appendix 3** for full descriptions of RC, X 18+ and R 18+.

#### **4.2.2.2 Prohibited content hosted in Australia**

100. Where content is hosted in Australia and is prohibited, or is likely to be prohibited, the ACMA will direct the Internet Content Host (ICH) to remove the content from their service. The legislation does not make it an offence for an ICH to host prohibited content. However, if the ACMA directs an ICH to take-down prohibited or potential prohibited content, the ICH must comply with this direction and failure to do so may amount to an offence.

#### **4.2.2.3 Take-down notices**

101. The ACMA can direct an ICH to remove prohibited and potential prohibited content. It does this by issuing a take-down notice. In the case of prohibited content, a final take-down notice is issued, directing the ICH not to host the content concerned at any time. In the case of potential prohibited content, an interim take-down notice is issued, directing the ICH not to host the content until it has been classified by the Classification Board.

#### **4.2.2.4 Compliance**

102. An Internet Content Host must comply with the various 'take-down' notices as soon as practicable, or in any event by 6pm the next business day. A person is guilty of an offence if they contravene an online provider rule - i.e. a take-down notice. The penalty is 50 penalty units. The ACMA may apply to the Federal Court for an order that the person cease supplying Internet carriage services or cease hosting Internet content.

#### **4.2.2.5 Prohibited content not hosted in Australia**

103. If the content is not hosted in Australia and is prohibited, or is likely to be prohibited, the ACMA will notify the content to the suppliers of approved filters in accordance with the Internet Industry Association's code of practice. If the content is sufficiently serious (for example child

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<sup>13</sup> The law defines 'Internet content' as information which is kept on a data storage device and is accessed, or available for access, using an Internet carriage service. But does not include ordinary electronic mail or information that is transmitted in the form of a broadcasting service. It may include material on the World Wide Web, postings on newsgroups and bulletin boards, and other files that can be downloaded from an archive or library.

pornography), the ACMA may refer the material to the appropriate law enforcement agency in that particular jurisdiction.

### **4.2.3 Codes of practice**

104. Codes of practice are currently utilised in a number of industries, including the Internet industry. If Internet industry codes are not developed, the ACMA can determine an industry standard. Codes have a number of valuable functions in that they can set a standard of behaviour that the public can expect to receive from an industry. Codes can assist in bringing order and confidence to an industry in a way which minimises administrative costs, and avoids the need for stringent government regulation. Codes can be used to address disputes between individual industry participants and the public by providing complaint handling procedures.

#### **4.2.3.1 Internet industry codes of practice**

105. The development of Internet codes of practice is underpinned by the legislative powers of Schedule 5 of the *Broadcasting Services Act 1992* (BSA). The codes apply to Australian ISPs and ICHs only. Compliance with an industry code is voluntary unless the ACMA directs a particular participant in the Internet industry to comply with the code.
106. The ACMA also has a reserve power to make an industry standard if there are no industry codes or if an industry code is deficient. Compliance with industry standards is mandatory.
107. The BSA prescribes the matters that must be dealt with by industry codes and industry standards including such issues as procedures to prevent online accounts being provided to children; providing parents and responsible adults with information about how to supervise and control children's access to Internet content; and procedures to assist customers to make complaints.
108. The Australian Broadcasting Authority (now ACMA) registered three codes of practice developed by the Internet Industry Association (IIA) in consultation with the community and industry which took effect on 1 January 2000 following consultation with the community, industry and the community advisory body, NetAlert.
109. The ABA registered new codes of practice on 27 May 2005. The new codes respond to the May 2004 Report on the Review of the operation of the Online Content Co-regulatory Scheme, established under Schedule 5 of the BSA. The new codes of practice are available for download at <http://www.ii.net.au>.

110. As the IIA codes are underpinned by the legislative powers of Schedule 5 of the BSA, which in turn refer to decisions of the Classification Board, procedures to assist members of the public to make complaints about content rely on the existing classification system. However, as previously noted, the images of the school boys were not submitted to the Classification Board for classification under the existing regulatory framework.

#### **4.2.3.2 Privacy codes**

111. While co-regulatory codes of practice regulate industry behaviour, for example Internet content, privacy codes provide organisations and industries with the option of developing their own privacy standards. As previously discussed, the *Privacy Act 1988* regulates the collection, holding, security, use and disclosure of personal information by many private sector organisations. Section 18BB of the Privacy Act allows private sector organisations and industries the flexibility of developing and enforcing their own privacy codes. These codes must be, at least, equivalent to the standard established by the NPPs in that once the code has been approved by the Federal Privacy Commissioner, it then replaces the obligations established by the NPPs. Only organisations that consent to be bound by an approved privacy code are, or will be, bound by it.

112. The IIA has submitted a draft privacy code to the Privacy Commissioner for approval. While this draft Code may have some application to the publication of unauthorised photographs on the Internet, it does not directly deal with this issue.

### **4.3 Civil law**

#### **4.3.1 Common law tort of invasion of privacy**

113. In Australia, the 1937 decision of the High Court in *Victoria Park Racing and Recreational Grounds Co Ltd v Taylor*<sup>14</sup> has been considered an authority for the view that there is no common law right to privacy in Australian law. Nevertheless in 2001, in the case of *ABC v Lenah Game Meats Pty*<sup>15</sup> some High Court judges left open the possibility of the development of a tort of privacy that would provide a cause of action for invasion of privacy.

114. In September 2003, the Queensland District Court, in the case of *Grosse v Purvis*<sup>16</sup> recognised a tort of privacy although there were other heads of damage that supported the plaintiff's claim. However, this case has not been followed in recent superior court decisions.

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<sup>14</sup> (1937) 58 CLR 479.

<sup>15</sup> (2001) 54 IRR 161 at 250.

<sup>16</sup> [2003] QDC 151.

115. In *Giller v Procopets*<sup>17</sup> the Victorian Supreme Court considered that the law in Australia had not developed to the point where it recognised an action for breach of privacy. Similarly, the Federal Court in *Kalaba v Commonwealth of Australia*<sup>18</sup> held that the weight of authority at the moment led to the conclusion that there was no tort of privacy in Australian law.
116. Given the reluctance of superior courts to recognise a tort of privacy, it is unlikely that this cause of action will be successful in providing protection in the near future against privacy threats posed by rapidly developing information, communication and surveillance technology<sup>19</sup>.

## **4.4 International approaches**

### **4.4.1 New Zealand voyeurism offence**

117. Over the last few years a number of jurisdictions have examined the issue of voyeurism. The reoccurring theme is that advances in technology are increasing the ease and opportunity for voyeurism. In particular the New Zealand approach is discussed below, while an outline of other international approaches can be found at **Appendix 4**.
118. The New Zealand Law Commission released a study paper entitled *Intimate Covert Filming* in June 2004. This study paper described contemporary voyeurism (or covert intimate filming) as the act of a person observing others covertly as they undress, undertake intimate bodily functions (such as using a toilet or showering), or engaging in sexual activity, for the purpose of deriving sexual gratification.<sup>20</sup>
119. The NZ study paper proposed a new offence to deal with intimate covert filming. The issue of intimate covert filming has come to light in response to invasions to privacy such as ‘up-skirt’ filming. The paper considered that covert filming of people in intimate situations, and distribution and possession of the resultant images, are fundamental invasions of privacy, dignity and autonomy<sup>21</sup>.
120. The offences proposed include: making a voyeuristic recording; publishing a voyeuristic recording; and possession of a voyeuristic

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<sup>17</sup> [2004] VSC 113.

<sup>18</sup> [2004] FCA 763.

<sup>19</sup> Caldwell J, ‘Protecting Privacy Post Lenah: Should the Courts Establish a new Tort or develop breach of confidence?’, (2003) 26 *UNSW Law Journal* (No 1) 90 at 124.

<sup>20</sup> New Zealand Law Commission, *Intimate Covert Filming Study Paper* (2004) at p 1.

<sup>21</sup> *Ibid*, at p 13.

recording. The proposed penalty for the offences of making and publishing a voyeuristic recording is 3 years imprisonment. The offence of possession has the lesser penalty of 12 months imprisonment. The key elements of the offence of making a voyeuristic recording include:

- Intentionally or recklessly making a visual recording of a person without their knowledge or consent, in circumstances where that person would reasonably expect privacy, and they are:
  - Nude or partially exposed;
  - Engaged in explicit sexual activity; or
  - Engaged in an intimate bodily activity such as using a toilet.
  
- Intentionally or recklessly making a visual recording of another person (without their knowledge or consent) under their clothing for the purposes of viewing their sexual organs, pubic area, buttocks, breasts or underwear in circumstances where it is unreasonable to do so.

121. See **Appendix 4** for the proposed NZ offences in full.

122. While these voyeurism offences parallel some of the issues in this Discussion Paper, the significant difference is that the circumstances of the visual recording involve: nudity or partial exposure of sexual organs, pubic area, buttocks, breasts; or involves engagement in sexual activity or intimate bodily activity - such as using the toilet. Clearly, there is a higher level of intimacy (or expectation of privacy) present in these situations when compared to the school boy rower situation.

123. The NZ study paper elected not to widen the scope of the proposed offence to include surreptitious filming of people in public or in non-intimate circumstances (other than filming under their clothing) even if done for the purposes of sexual gratification.<sup>22</sup>

#### **4.4.2 Dutch copyright law**

124. Dutch lawmakers have devised copyright offences to deal with the trade in videos depicting naked children.<sup>23</sup>

125. The Dutch Government sought to eradicate the trade in videotapes showing children on beaches and nudist beaches. These video recordings are made without the parent's or child's consent. The recordings were copied and then distributed through the retail trade or informal networks.<sup>24</sup> Furthermore, consent was not given for the copying

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<sup>22</sup> Ibid, at p 39.

<sup>23</sup> United Nations, *Initial reports of States parties due in 1997 : Netherlands (1997)* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.51.Add.1.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.51.Add.1.En?OpenDocument) at 7 July 2005.

<sup>24</sup> Ibid.

and distribution of the tapes. The videotapes in question do not contain child pornography under the Dutch Criminal Code.<sup>25</sup>

126. The Dutch Copyright Act contains both civil and criminal responses to this issue. Firstly, the civil approach is located in section 21 of the Dutch Copyright Act, which provides that the publication of a portrait made without a commission (which is what these video images are) is not permitted if this would be contrary to the reasonable interests of the person shown in the portrait.<sup>26</sup> Clearly, the children featured in the videotapes have a reasonable interest in preventing publication of the tapes.<sup>27</sup> The next step under the Dutch approach involves the children and or their legal representatives applying to the civil courts for an injunction to restrain publication of the tapes and to order their destruction.<sup>28</sup> Penalties apply for breach of such an injunction. However, difficulties arise in that the publication may not always come to the attention of the injured party until many copies have already been distributed. As such, the injured party may be faced with a multitude of distributors.<sup>29</sup>
127. Section 35 of the Dutch Copyright Act contains the criminal offences, whereby publicly exhibiting or otherwise publishing a portrait without being entitled to do so, is a summary offence. The public prosecutions service will then have to prove that there is a reasonable interest in preventing publication. However, as this sort of proof would normally come from those featured in the tapes this can be problematic where the identity of those persons is not known.<sup>30</sup> For these reasons the public prosecutions service in Amsterdam suggest that the public prosecutions service itself should be able to institute civil proceedings independently on behalf of the injured parties.<sup>31</sup>
128. The Dutch approach is of interest in respect of the concept of protecting the 'reasonable interests' of the person photographed. However, copyright law may not be an appropriate vehicle in Australia. Copyright protects the intellectual property in creative endeavour, and therefore can only provide remedies for acts that are connected to infringements of intellectual property rights. However, the concept of protecting the 'reasonable interests' of a person in a photograph could be captured in a form outside copyright law.

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

#### 4.4.3 Quebec charter of rights

129. A further international comparison occurs in the form of the Quebec Charter of Human Rights and Freedom. Section 5 of the Charter guarantees every person a 'right to respect for his private life'.
130. The Canadian case *Aubry v Editions Vice-Versa*<sup>32</sup> provides a useful illustration of the Supreme Court of Canada's application of s 5 of the Quebec Charter. In this case a photograph of Ms Aubry, a 17 year old girl sitting on a step outside a building in Montreal, was published in an arts magazine. The photograph was taken in a public place without Ms Aubry's consent. Ms Aubry sued the photographer and the magazine on the basis that the unauthorised publication of the photograph violated her right to privacy guaranteed by s 5 of the Charter (i.e. every person has a right to respect for his or her private life). Ms Aubry claimed she had been subjected to ridicule following publication.
131. The Court found in favour of Ms Aubry, and held that the right to one's image falls within the right to respect one's private life in s 5. As such, the publication of a photograph of an identifiable individual (without consent) is a violation of that right.
132. However, the Court did indicate that there are cases where the public's right to be informed, or freedom of expression (also provided for in the Charter) will prevail over the individual's right to privacy. The Court provided some qualifications as to when taking photographs of a person would not be a violation of his or her s 5 rights. For example, consent would not be required from those photographed in a crowd scene or those whom are in public life.

#### 4.4.4 Summary

133. In summary, the criminal law focuses on prohibiting the taking and use of particular images of children. Generally, the sorts of images that are prohibited are those images of children which are objectively offensive to a reasonable adult. Some of these criminal offences are quite prescriptive and narrow in that many refer to specific body parts or require a purpose of 'sexual gratification'.
134. Additionally, the criminal law in a number of jurisdictions provides protection in respect of filming private activities in the private sphere. However, there may be a gap to the extent that people have expectations of privacy in public places (i.e. 'upskirting').
135. The new Commonwealth offence of offensive use of an Internet service may have application to the scenarios which gave rise to the Discussion

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<sup>32</sup> [1998] SCR 591.

Paper. However, until a number of prosecutions have been completed it is difficult to undertake a full assessment in respect of its coverage of the scenarios raised.

136. The national classification scheme and online regulation provide an established system of identification and removal of prohibited content from the Internet. It is again noted that the scenarios that gave rise to this reference were not submitted to the Classification Board for classification and as such it is difficult to conclude with any certainty whether or not the images would have been classified Refused Classification (i.e. 'prohibited content' and subject to take-down' notices). However, it should be acknowledged that the RC classification is already broad and covers any depictions of children that are likely to offend a reasonable adult. There is no requirement that the children be naked or involved in sexual activity to meet this offensiveness test.
137. However, it may be argued that there is a gap to the extent that the existing system of online regulation (which relies on the National Classification Code) can take into account the content of linked websites when determining if an image of a child constitutes 'prohibited content'.

## 5 Jurisdictional issues

138. Jurisdictional issues are unavoidable where the Internet is concerned. Websites displaying pictures of Australian children may be based overseas as was the case with the schoolboy rowers. Following the Olympic Games in Sydney there were many photographers from around the world in Australia and they took unauthorised photographs and then published them on the Internet by uploading them from their home country. The majority of material published on the Internet originates from the United States. As such, there are clearly limitations on the application of any Australian legislative response.
139. As Justice Kirby has remarked, privacy is a global topic and technology laughs at paltry attempts to make them subject to purely local laws.<sup>33</sup> These difficulties have been highlighted in the defamation case of *Dow Jones v Gutnick*<sup>34</sup> where the alleged defamatory material was uploaded in the United States of America, but subsequently downloaded in Victoria where the action was initiated. The Internet blurs the relevance of jurisdictional boundaries.
140. The end result is that where Internet material is involved, our law enforcement agencies are limited to material posted in Australia, although they may work with other law enforcement bodies from around the world. Child pornography on the Internet is dealt with in this manner, as most countries have equivalent offences. It would be somewhat less likely that other countries would have equivalent offences for unauthorised photographs on the Internet (that are not child pornography). Therefore it is less certain that assistance from overseas law enforcement agencies would be a priority compared to more serious offences involving child pornography.
141. A primary concern of any options for reform will be the jurisdictional limits of any offence or measure. State based offences may be criticised for being unenforceable given material uploaded on the websites may come from destinations far and wide. As previously outlined, the Commonwealth currently provides a complaint based scheme for the regulation of certain types of Internet content through the *Broadcasting Services Act 1992*. The nature of the Internet will always make enforcement problematic. A federal approach would reduce these enforcement issues somewhat, however given the Internet's international nature, and the extent of material uploaded overseas, a federal approach

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<sup>33</sup> Kirby M, '25 years of evolving information privacy law', (2003) *FOI Review* (No 105) at 34.

<sup>34</sup> [2002] HCA 56.

will not necessarily be enforceable in all cases (especially where the content is not illegal in the country of posting).

## 6 Options for Reform

142. Reform to address the issue of unauthorised photographs being used on the Internet may or may not be desirable depending on the discussion and submissions received on the above. It may be considered that there is no gap in existing law that requires further regulation. However, if the submissions lead to the view that this is a problem warranting action, then the following legislative and non-legislative options may require exploration and comment.
143. It is noted that, at the time of writing, a review of the regulation of content delivered over convergent communication devices is currently being undertaken by the Commonwealth Department of Communications, Information Technology and the Arts. This review is examining convergent devices, including 2.5G and 3G mobile phones which are capable of receiving and delivering audio-visual services. The review is looking at issues regarding the nature of commercial content services, application of existing regulatory frameworks, and whether existing approaches are adequate to restrict access to unsuitable content and address issues of child safety. A report is expected to be issued in 2005.

### 6.1 *Legislative reform options*

#### 6.1.1 Criminal law

##### 6.1.1.1 **Create a new criminal offence to deal with unauthorised use of photographs of children**

144. The formulation of a new offence to specifically address the issue at hand requires further detailed consideration. However in the interests of facilitating discussion, this paper will outline two alternate possible new offences which could be created to address the posting of unauthorised photographs of children on the Internet.
145. For example, an offence could be created which would capture images of children (taking into account the context in which they appear) that a reasonable adult is likely to consider:
- (a) exploitative; or
  - (b) offensive; or
  - (c) for the purpose of sexual gratification.
146. Alternatively, an offence could be created which applies to:
- the posting of unauthorised photographs of children (taking into account the context in which they appear) that are intended or (apparently intended) to excite or gratify sexual interest.

147. The second proposed criminal offence focuses on the sexual gratification element, whilst the first proposed offence is much broader in that each of the elements (exploitation, offensiveness or for the purpose of sexual gratification) on their own are enough to prove the offence.

**Discussion Question:**

(4) In the event that an offence to deal with unauthorised photographs on the Internet is considered necessary, what features should it contain?

**6.1.1.2 Create a criminal offence to deal with voyeurism where an expectation of privacy exists**

148. Similar to the NZ, UK, Canadian and US approaches to address voyeurism, a specific offence could be created which applies to the taking and publishing of voyeuristic images which do not fall within existing offences. Consideration would also need to be given to the issues of destruction and forfeiture.
149. The offence could apply to the use of voyeuristic/ offensive images made without the subject's consent in circumstances where the subject would have a reasonable expectation of privacy. The offence could specifically include (but not be limited to) visual images of sexual organs, pubic area, buttocks, breasts, as well as images taken under a person's clothing where they would reasonably expect privacy i.e. upskirting.
150. It is noted that this option does not specifically address the South Bank and school boys situations as there is less likely to be an expectation of privacy given they were in public and were not engaged in what would likely be considered private activities. However, this option would provide a dedicated offence to deal with 'upskirting' and the like which may not be comprehensively addressed by existing offences.

**6.1.1.3 Clarify existing RC classification for the purposes of online content regulation**

151. As discussed earlier, the National Classification Scheme already provides for the Classification Board to classify offensive material involving children. Schedule 5 of the BSA then permits the ACMA to take action to remove this material in some circumstances.
152. The Classification Board determines whether images involving children are offensive (and therefore RC) by objectively examining the image and determining if it would be likely to offend a reasonable adult. The Classification Board does not consider issues such as the purpose of the images, privacy of the persons portrayed in any images or address issues

around how the images were obtained, and it may be inappropriate to suggest this sort of role.

153. It is difficult to suggest any reform to the National Classification Code when it was not utilised in the instances that led to this discussion paper. In particular, it has been noted earlier that the RC classification is already very broad in respect of capturing offensive images of children.
154. However, a small gap has arisen regarding the classification of Internet content in respect of images of children and website links. As previously discussed, currently the text or image of a link itself on the page containing the child's image would be required to be offensive. To address this issue, provision could be made to specifically allow the Classification Board to take into account this slightly broader 'context' in determining whether it is a depiction of a child likely to offend a reasonable adult.
155. It is noted that any attempt to try and address the issue of links will be challenging. In broadening the context that the Classification Board may take into account, consideration will need to be given to intention and control over links and their content.

#### **6.1.1.4 Take down notices**

156. If a new offence (6.1.1.1 or 6.1.1.2) is the preferred approach there will need to be a mechanism for removal of the images in question from the Internet. As previously outlined Schedule 5 of the Commonwealth *Broadcasting Services Act 1992* regulates certain aspects of the Internet industry. Under this legislation an Internet Content Host must comply with the various 'take down' notices as soon as practicable, or in any event by 6pm the next business day. A person is guilty of an offence if they contravene the online provider rules (i.e. take down notice). The penalty is 50 penalty units. The take down notice approach is only relevant to material stored on servers located in Australia.

### **6.1.2 Civil law**

#### **6.1.2.1 Dutch 'reasonable interests' approach**

157. Central to the Dutch approach is the 'reasonable interests of the person shown in the portrait'. The Dutch Copyright Act provides that the publication of a portrait without commission is not permitted if this would be contrary to the reasonable interests of the person shown in the portrait.
158. While the Dutch approach is not considered appropriate in the context of Australian copyright law, the central idea of a persons 'reasonable interests' could be adopted in another form. For example, some jurisdictions have bodies which oversee children's rights (i.e.

Commissioner for Children or similar) which may be able to adopt the role of protector of a child's reasonable interests regarding the use of unauthorised photographs. The child's 'reasonable interests' would encompass protecting the child from exploitation. However, it is noted that a 'reasonable interests' test could equally be applied to adults as well as children.

**Discussion Question:**

(5) Should there be some enforceable civil right in relation to the use of your image? If so, on what basis?

## **6.2 Non legislative reform options**

### **6.2.1 Education campaign**

159. This discussion paper has highlighted that an existing scheme of online regulation which utilises the National Classification Code already exists to catch images of children a reasonable adult would be likely to consider offensive. As such, an education campaign could be used to increase community and police awareness of the existing mechanisms for making complaints about Internet content with an emphasis on the fact that an image of a child may be 'prohibited content' (RC) without necessarily being sexually explicit or involving nudity.
160. A further education campaign focusing on the appropriate use of mobile phone cameras may also be beneficial in light of the increase in ownership and use of small digital cameras.

### **6.2.2 Other remedies**

161. A process could be established whereby individuals may request that their image be recovered from a website. For instance, if the person in question objects to the context. For example, it might be personally offensive to be associated with a product that an individual finds objectionable - such as tobacco or alcohol. This would give some control to individuals if they wish to exercise it but removes the need for consent in every situation.

## 7 Reference List

### Cases

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**Appendix 1: Table of legislation**

VIC Legislation	Section	Offence	Application
Surveillance Devices Act 1999 (Vic)	S 7	Use an optical surveillance device (such as a camera or mobile phone camera) to record visually a 'private activity' to which the person is not a party, without their consent.	The incident involving school boys rowing was not assisted by this offence as rowing outdoors in a public place could not be considered a "private activity". The Act provides that an activity carried on outside a building is not a "private activity".
	S 11	Communicate or publish a recording of a 'private activity' made with an optical surveillance device.	As above
Crimes Act 1958 (Vic)	S 21A	Stalk a person (eg where in taking photographs the offender engages in a 'course of conduct').	Limited application as requisite intention of causing physical or mental harm to the victim or of arousing apprehension or fear in the victim is unlikely to be present.
	S 68-70	Produce, procure or possess 'child pornography' (i.e. a film, photograph or publication depicting children under 18 (or who appear under 18) either engaging in sexual activity, or depicted in an indecent sexual manner or context.	Child pornography offences would have limited application as the image of the minors (or context) would need to be "indecent".
Classification (Publications, Films and Computer Games) Enforcement Act 1995 (Vic)	S 57A	Use an online information service to publish, transmit etc objectionable material that 'describes or depicts a... minor... in an indecent sexual manner or context'	As above.
Summary Offences Act 1966	S 17	Any person who is in or near a public place and behaves in a riotous indecent	For this offence to apply to the act of 'taking' unauthorised

		offensive or insulting manner is guilty of an offence.	photographs, the behaviour must be 'riotous indecent offensive or insulting'.
NSW Legislation	Section	Offence	Application
Summary Offences Act 1988 (NSW)	Part 3B	Any person who films, or attempts to film, another person to provide sexual arousal or sexual gratification, whether for himself or herself or for a third person, where the other person: (a) is in a state of undress, or is engaged in a private act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy, and (b) does not consent to being filmed, is guilty of an offence.	The incident involving school boys rowing was not assisted by this proposed offence as it is unlikely rowing in a public place could be considered a 'private act'.
Summary Offences Act 1988 (NSW)	S 4(1)	Offensive Conduct - A person must not conduct himself or herself in an offensive manner in or near, or within view or hearing from, a public place or a school.	
Crimes Act 1900 (NSW)	S 562AB	Stalk or intimidate with the intention of causing the other person to fear physical or mental harm. 'Intimidate' means conduct amounting to harassment or molestation or ... any conduct that causes a reasonable apprehension of injury to a person ...	Limited application - as requisite intention of causing physical or mental harm to the victim, or of arousing apprehension of fear in the victim - is unlikely to be present.
	S 91G	Produce or disseminate or possess child pornography (material that depicts or describes, in a manner that would in all the circumstances cause offence	The school boys incident was not considered child pornography as the image of the minors or context within the image was not indecent.

		to reasonable persons, a person under (or apparently under) the age of 16 years: (a) engaged in sexual activity, or (b) in a sexual context, or (c) as the victim of torture, cruelty or physical abuse (whether or not in a sexual context)).	Also many of the boys would have been between 16-18 years of age.
Classification (Publications, Films and Computer Games) Enforcement Act 1995 (NSW)	S 6	Sale or public exhibition of unclassified, RC or X films prohibited. Note that images on a computer hard drive meet the definition of 'film'. Question whether the availability of material on the Internet meets the definition of 'public exhibition'.	As above.
<b>Queensland Legislation</b>	<b>Section</b>	<b>Offence</b>	<b>Application</b>
Invasion of Privacy Act 1971 (QLD)	S 43	Prohibits a third party from using a listening device to overhear, record, monitor, or listen to a private conversation. (Some limited exceptions).	No application to photographs or visual recordings (except the sound component of the recording). Only listening devices are covered by the Act, not visual surveillance.
Invasion of Privacy Act 1971 (QLD)	S 45	Prohibits party to the conversation who used a listening device from communicating or publishing any record of the conversation. (Exceptions include with consent, public interest etc).	As above
Criminal Code (QLD)	S 210(1)(f)	Indecent treatment of children under 16 - without legitimate reason takes any indecent photograph or records, by means of any device, any indecent visual image of a child under the age of 16 years.	Requires the image to be "indecent".

Criminal Code (QLD)	S 218A	Using internet etc. to procure children under 16 - using electronic communication with intent to procure a person under the age of 16 years, or a person the adult believes is under the age of 16 years, to engage in a sexual act, or expose, without legitimate reason, a person under the age of 16 years, or a person the adult believes is under the age of 16 years, to any indecent matter.	Requires either intent to procure child to engage in sexual act; or expose child to “indecent matter”.
Criminal Code (QLD)	S 228	Obscene publications and exhibitions – knowingly, and without lawful justification or excuse publicly sells, distributes or exposes for sale any obscene book or other obscene printed or written matter, any obscene computer generated image or any obscene picture, photograph, drawing, or model, or any other object tending to corrupt morals. Higher penalties apply to material depicting a child under 16 or under 12.	Requires the material to be “obscene”.
Criminal Code (QLD)	Sections 228A to 228D	New child exploitation material offences - involving a child under 18 in the making of child exploitation material, making child exploitation material, distributing child exploitation material and possessing child exploitation material	To be “child exploitation material” the material must, in a way likely to cause offence to a reasonable adult, describe or depict someone who is, or apparently is, a child under 16 years – In a sexual context, including for example engaging in a sexual activity; or In an offensive or demeaning context; or Being subjected to abuse cruelty or

			torture. Defences exist for material that is classified other than RC.
Criminal Code (QLD)	S 359B	Stalking (i.e. conduct that is intentionally directed at another person and is engaged in on any 1 occasion if the conduct is protracted or on more than 1 occasion). Conduct includes - watching a person; contacting a person in any way (through use of any technology); watching a place where a person lives work or visits; and an intimidating, harassing or threatening act against a person, whether or not involving violence or a threat of violence.	The conduct must cause the stalked person apprehension or fear, reasonably arising in all the circumstances, of violence to or against property of the stalked person or another person; or must cause detriment, reasonably arising in all the circumstances, to the stalked person or another person. Detriment includes - apprehension or fear of violence; serious mental or psychological or emotional harm; prevention or hindrance from doing an act lawfully entitled to do; or compulsion to do an act lawfully entitled to abstain from doing.
Summary Offences Act 2005 (QLD)	S 6	Public nuisance - A person commits a public nuisance offence if – (a) the person behaves in – (i) a disorderly way; or (ii) an offensive way; or (iii) a threatening way; or (iv) a violent way; and (b) the person’s behaviour interferes, or is likely to interfere, with the peaceful passage through, or enjoyment of, a public place by a member of the public.	Requires the person’s conduct to be “offensive” or “threatening”, and to be likely to interfere with public enjoyment of a public place. While it may have application to someone openly photographing children in a public place; it would probably not apply where the filming was surreptitious/covert, i.e. where the subject did not know they were being filmed.

		It is not necessary for a person to make a complaint about the behaviour of another person before a police officer may start a proceeding against the person for a public nuisance offence.	
Classification Acts - Offences relating to the production, sale and possession of "child abuse" material are contained in the Classification of Computer Games and Images Act 1995, the Classification of Films Act 1991 and the Classification of Publications Act 1991.	Various sections in 3 Acts	"Child abuse" material means any photographs, films, publications or computer generated images which describe or depict a person who is or appears to be under 16 years, in a way that is likely to cause offence to a reasonable adult. It is not necessary for the child to be depicted as engaging in sexual activity.	Material must be likely to cause offence to a reasonable adult.
<b>ACT Legislation</b>	<b>Section</b>	<b>Offence</b>	<b>Application</b>
Crimes Act 1900 (ACT)	S 35	Stalking – person must not stalk with intent to cause apprehension, fear, harm or harass.	The stalking provisions have limited application because the offence requires the element of intent and the person must be aware that they are being stalked
	S 60	Act of indecency without consent – to find the offence a person must commit an act of "indecency"	Limited application as the offence requires an act of indecency to be committed. (In the incident involving the schoolboys rowing there was no act of indecency to find the offence.
	S 61	Acts of indecency with young people – a person must not commit an act of indecency with (a) a person under the age of 16.	As in s 60 the offence requires an act of indecency to find the offence. In addition the offence is only applicable to children.

	S 65	Possession of child pornography - a person knowingly has in his or her possession a film, photograph, drawing audiotape, videotape or any other thing depicting a young person engaged in an act of a sexual nature....a depiction or representation that would offend a reasonable adult person.	The incident of the school boys rowing was not child pornography as the images did not depict acts of a sexual nature nor were the images of a nature that would offend a reasonable person.  The offence only applies to people under the age of 16.
	S 66	Using the Internet etc to deprave young people - must not use electronic means to suggest to a young person to watch or take part in an act of a sexual nature	The offence is concerned primarily with protecting minors in relation to material of a sexual nature being sent over the Internet.
Classification (Publications, Films and Computer Games)(Enforcement) Act 1995 (ACT)		Refers to indecency and child pornography.	As above
Public Baths and Public Bathing Act 1956 (ACT)	S 29	Offences in relation to public bathing conveniences - creates an offence for loitering without reasonable excuse in a public bathing convenience etc.	Limited application. Does not capture privacy issues or issue of capturing a persons image when a person is using public baths.
TAS Legislation	Section	Offence	Application
Classification (Publications, Films and Computer Games) Enforcement Act 1995 (Tas)	Ss 71-74	Make, reproduce, or possess 'child abuse product' (i.e. a publication, film, or computer game describing or depicting a person under 16 (or who appears to be under 16), whether or not engaging in sexual activity, in a manner likely to cause offence to a reasonable adult. Procuring a child to 'be concerned with	The school boys incident might fit into this category - the depiction of the boys in a particular context might be considered offensive to a reasonable adult. However whether anyone could be charged would depend on how 'reproduction' is interpreted. If

		making a child abuse product' is also an offence.	dissemination over the Web qualifies there might be a viable offence. Provision not tested in this way. Gap in relation to children 16-18 years of age.
Police Offences Act 1935	S 13	It is an offence to behave in an offensive or indecent manner in a public place and to insult, or annoy any person.	
Northern Territory	Section	Offence	Application
Surveillance Devices Act		This Act only regulates the surveillance of private activity	The images in question all appear to involve activities in public places
Criminal Code	S125B	Possession of child abuse material – It is an offence to possess, distribute, produce, sell or offer or advertise for distribution or sale child abuse material. 'Child abuse material' means material that depicts describes or represents in a manner that is likely to cause offence to a reasonable adult, a person who is or appears to be a child – engaging in sexual activity; in a sexual offensive or demeaning context....	Appears to have a wider application than offences relating to "child pornography". Thus may apply in limited circumstances. May depend on presentation or context of image. However it is unlikely that simple images or boys engaging in sporting activities would be covered.
	S 125C	A person who publishes an indecent article is guilty of an offence.  An 'indecent article' means an article that...depicts, describes or represents, in a manner likely to cause offence to a	This offence is wider than 125B in that it covers material that is not necessarily sexual or abusive. This section may be applicable depending on context.

		<p>reasonable adult – a person (whether or not engaged in sexual activity) who is a child who has not attained the age of 16 years or who looks like a child who has not attained that age...</p> <p>"publish" would cover dissemination on the internet.</p>	
	S 125E	<p>The new offence of "Using child for production of child abuse material or pornographic or abusive performance" - Provides that it is an offence to use, offer or procure a child or a person who appears to be a child for the "production of child abuse material or for a pornographic or abusive performance". "Pornographic or abusive performance" covers performances of</p> <p>(a)engaging in sexual activity,  (b) in a sexual , offensive or demeaning context; or  (c) being subject to torture, cruelty or abuse,  that is likely to cause offence to a reasonable adult.</p>	<p>The application of this offence would also depend on the context but it is very unlikely that it would apply to the situation of school boy sporting activities.</p>
	S 132	<p>Indecent dealing with child under 16 years, including taking or recording indecent visual images or child under 16 years.</p>	
	S 189	<p>Stalking – eg repeatedly engaging in conduct such as keeping a person under surveillance or loitering</p>	<p>Very limited application – there must be an intention of causing mental or physical harm or</p>

South Australia	Section	Offence	Application
Criminal Law Consolidation Act 1935	S 62	<p>Child pornography is defined as material:</p> <p>(a) that-</p> <p>(i) describes or depicts a child engaging in sexual activity; or</p> <p>(ii) consists of, or contains, the image of a child or bodily parts of a child (or what appears to be the image of a child or bodily parts of a child) or in the production of which a child has been or appears to have been involved; and</p> <p>(b) that is intended or apparently intended –</p> <p>(i) to excite or gratify sexual interest; or</p> <p>(ii) to excite or gratify a sadistic or other perverted interest in violence or cruelty;</p> <p>Possessing, producing or disseminating child pornography are offences.</p>	<p>arousing fear and the conduct must actually have that result.</p> <p>Depending on the context in which the photographs are placed there is the possibility that the South Australian definition of child pornography could cover the situation of schoolboy rowers, if they were placed in a context that indicated that they were intended to excite or gratify sexual interest.</p>
Criminal Law Consolidation Act 1935	S 63B	<p>Creates an offence where “a person who acting for a prurient purpose makes a photographic, electronic or other record from which the image, or images of a child engaged in a private act may be reproduced, is guilty of an offence”.</p>	<p>The offence is limited to filming a private act which includes a sexual act, intimate bodily function, undressing, or nudity. Specifically covers images of a child.</p>
Criminal Law Consolidation Act 1935	S 68	<p>Prohibits the use of children in commercial sexual services. Use includes employ, engage, cause or permit.</p>	<p>Limited to ‘commercial’ services provided for payment, but does cover the use or display of the</p>

			body...‘for the sexual gratification of another’.
Summary Offences Act 1953	S 33	Makes it an offence to produce, sell, exhibit etc. indecent or offensive material.	Limited to indecent and offensive material wouldn’t cover innocent pictures being used for pornographic purposes.
Classification (Publication, Films and Computer Games) Act 1995	S 75C	Make available, or supply, by means of an on-line service objectionable matter.	Limited to objectionable matter. Objectionable matter means content of a film that is (or would be) classified X, or a film or computer game that is classified RC, or an advertisement for either of the above.
Summary Offences Act 1953	S 23 Indecent behaviour and gross indecency	<b>23.</b> (1) A person who behaves in an indecent manner – (a) in a public place, or while visible from a public place, or in a police station; or (b) in a place, other than a public place or police station, so as to offend or insult any person, is guilty of an offence.	Limited to a person behaving in an indecent manner, a recent prosecution where someone had installed a camera device in a shower didn’t test the evidence so it is unclear whether this provision would catch such behaviour.
Summary Offences Act 1953	S 7 Offensive Behaviour	<b>7.</b> (1) A person who, in a public place or a police station – (a) behaves in a disorderly or offensive manner; or ... is guilty of an offence.	Offensive behaviour has to take occur in a public place, this could be problematic in circumstances where a camera is installed in a private bathroom.
Commonwealth Legislation	Section	Offence	Application
Criminal Code	474.17	Intentionally using a carriage service (including use of the Internet) in a way which would be regarded by reasonable	The incident involving school boys rowing would only be covered by this proposed offence,

		persons as being, in all the circumstances, menacing, harassing or offensive.	if the placing of these images on a gay website was considered to be use of an Internet service in a way that is offensive to reasonable persons.
	474.19	New offence dealing with intentionally accessing or making available Internet child pornography.	This proposed offence would not apply to the school boys incident, because the definition will only cover images that are objectively pornographic.
Classification (Publications, Film and Computer Games) Act 1995	Whole Act	Establishes a classification regime which works in conjunction with State and Territory classification enforcement legislation.	
Broadcasting Services Act 1992	Schedule 5, Online Services	Schedule 5 regulates online content by imposing obligations on Internet Service Providers. The regime is established in conjunction with State and Territory laws and section 85ZE of the <i>Crimes Act 1914</i> which prohibits the improper use of carriage services. Breach of the regime set out in Schedule 5 attracts a penalty of up to 50 penalty units.	
WA Legislation	Section	Offence	Application
Censorship Act 1996	S 60	Sale, display or possession of "child pornography" (i.e. an article that describes or depicts a person who is, or who looks like, a child under 16 years of age (whether the person is engaged in sexual activity or not.)  Use a computer service to transmit,	

	S 101	obtain possession of, or demonstrate an article knowing it to be "objectionable material" (child pornography; RC material; promotion of crime or violence; necrophilia; bestiality etc.)	
	S 102	Use a computer service to transmit or make restricted material available to a minor.	
Criminal Code 1913	S 320(6)	A person who indecently records a child under 13 is guilty of a crime and is liable to imprisonment for 10 years.	
	S 321(6)	A person who indecently records a child of or over 13 and under 16 is guilty of a crime and liable to the punishment in section 321(8).	
	S 322(6)	A person who indecently records a child of or over 16 who is under his or her care, supervision, or authority is guilty of a crime and is liable to imprisonment for 5 years.	
Surveillance Devices Act 1998	S 6	Use of an optical surveillance device (an instrument, apparatus, equipment, or other device capable of being used to record visually or observe a private activity) to record a "private activity" without the consent of a person.	Many incidents would not be covered as they would not be "private activities".
		Communicate or publish a recording of a	Many incidents would not be

	S 9	"private activity" made with an optical surveillance device.	covered as they would not be "private activities".
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## **Appendix 2: Classification (Publications, Films and Computer Games) Act 1995 (Commonwealth)**

### **Section 11 - Matters to be considered in classification**

The matters to be taken into account in making a decision on the classification of a publication, a film or a computer game include:

- (a) the standards of morality, decency and propriety generally accepted by reasonable adults; and
- (b) the literary, artistic or educational merit (if any) of the publication, film or computer game; and
- (c) the general character of the publication, film or computer game, including whether it is of a medical, legal or scientific character; and
- (d) the persons or class of persons to or amongst whom it is published or is intended or likely to be published.

## Appendix 3: National Classification Code

The Classification Board and Classification Review Board must make classification decisions in accordance with the *National Classification Code* ('the Code') which names and broadly describes the classification categories for classifiable material.

The *Guidelines for the Classification of Films and Computer Games* are a tool used by the Board to assist them in applying the criteria in the Code by describing the classification categories, and setting out the scope and limits of material suitable for each category.

See [www.oflc.gov.au](http://www.oflc.gov.au) for the *Guidelines for the Classification of Films and Computer Games* and the Code. The Code is also set out in full below.

### *National Classification Code*

1. Classification decisions are to give effect, as far as possible, to the following principles:
  - (a) adults should be able to read, hear and see what they want;
  - (b) minors should be protected from material likely to harm or disturb them;
  - (c) everyone should be protected from exposure to unsolicited material that they find offensive;
  - (d) the need to take account of community concerns about:
    - (i) depictions that condone or incite violence, particularly sexual violence; and
    - (ii) the portrayal of persons in a demeaning manner.

### *Publications*

2. Publications are to be classified in accordance with the following table:

Item	Description of publication	Classification
1	Publications that: <ol style="list-style-type: none"><li>(a) describe, depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified; or</li><li>(b) describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not); or</li><li>(c) promote, incite or instruct in matters of crime or violence</li></ol>	RC

<b>Item</b>	<b>Description of publication</b>	<b>Classification</b>
2	Publications (except RC publications) that: (a) explicitly depict sexual or sexually related activity between consenting adults in a way that is likely to cause offence to a reasonable adult; or (b) depict, describe or express revolting or abhorrent phenomena in a way that is likely to cause offence to a reasonable adult and are unsuitable for a minor to see or read	Category 2 restricted
3	Publications (except RC publications and Category 2 restricted publications) that: (a) explicitly depict nudity, or describe or impliedly depict sexual or sexually related activity between consenting adults, in a way that is likely to cause offence to a reasonable adult; or (b) describe or express in detail violence or sexual activity between consenting adults in a way that is likely to cause offence to a reasonable adult; or (c) are unsuitable for a minor to see or read	Category 1 restricted
4	All other publications	Unrestricted

### *Films*

3. Films are to be classified in accordance with the following table:

<b>Item</b>	<b>Description of film</b>	<b>Classification</b>
1	Films that: (a) depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified; or (b) describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not); or (c) promote, incite or instruct in matters of crime or violence	RC

<b>Item</b>	<b>Description of film</b>	<b>Classification</b>
2	Films (except RC films) that: (a) contain real depictions of actual sexual activity between consenting adults in which there is no violence, sexual violence, sexualised violence, coercion, sexually assaultive language, or fetishes or depictions which purposefully demean anyone involved in that activity for the enjoyment of viewers, in a way that is likely to cause offence to a reasonable adult; and (b) are unsuitable for a minor to see	X 18+
3	Films (except RC films and X 18+ films) that are unsuitable for a minor to see	R 18+
4	Films (except RC films, X 18+ films and R 18+ films) that depict, express or otherwise deal with sex, violence or coarse language in such a manner as to be unsuitable for viewing by persons under 15	MA 15+
5	Films (except RC films, X 18+ films, R 18+ films and MA 15+ films) that cannot be recommended for viewing by persons who are under 15	M
6	Films (except RC films, X 18+ films, R 18+ films, MA 15+ films and M films) that cannot be recommended for viewing by persons who are under 15 without the guidance of their parents or guardians	PG
7	All other films	G

### *Computer Games*

4. Computer games are to be classified in accordance with the following table:

<b>Item</b>	<b>Description of computer game</b>	<b>Classification</b>
1	Computer games that: (a) depict, express or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified; or (b) describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not); or (c) promote, incite or instruct in matters of crime or violence; or (d) are unsuitable for a minor to see or play	RC

<b>Item</b>	<b>Description of computer game</b>	<b>Classification</b>
2	Computer games (except RC computer games) that depict, express or otherwise deal with sex, violence or coarse language in such a manner as to be unsuitable for viewing or playing by persons under 15	MA 15+
3	Computer games (except RC and MA 15+ computer games) that cannot be recommended for viewing or playing by persons who are under 15	M
4	Computer games (except RC, MA 15+ and M computer games) that cannot be recommended for viewing or playing by persons who are under 15 without the guidance of their parents or guardians	PG
5	All other computer games	G

## Appendix 4: International approaches to voyeurism

### Canada

Incidents involving voyeurism and modern technology have received public attention and generated concern in Canada. In response, a Bill containing an offence for voyeurism has been introduced into the House of Commons. Clause 6 of the Bill C-20 inserts a new offence of voyeurism into Part V (Sexual Offences) of the Criminal Code. The offence targets voyeurism as both a sexual offence and a privacy offence. For instance, section 162(1)(c) will make it an offence to “surreptitiously” observe or make a visual recording of a person “in circumstances that give rise to a reasonable expectation of privacy”, where that is done “for a sexual purpose”.

Additionally, section 162(1) makes the same surreptitious observation or recording an offence if the person being observed or recorded is (a) in a place in which they can “reasonably be expected” to be nude; to expose their genital organs, anal region or breasts; or to be engaged in explicit sexual activity, or (b) in such a state or engaged in such activity and the observation or recording is done for the purposes of seeing or recording it. It is intended that voyeurism could be prosecuted as an offence against privacy, whether undertaken for commercial profit, to harass the complainant, or for some other non-sexual purpose.<sup>35</sup>

### United Kingdom

The UK Parliament has addressed the issue of voyeurism through the *Sexual Offences Act 2003*. A report entitled *Setting the Boundaries: Reforming the Law on Sex Offences*<sup>36</sup> proposed the offence after a number of instances of voyeurism causing considerable distress were brought to the attention of Members of Parliament and the police. The law offered no remedy unless the proceedings were recorded and could be considered as indecent or obscene material. This report recommended that there should be an offence of voyeurism where a person in the interior of a building or other structure has a reasonable expectation of privacy and is observed without their knowledge or consent.<sup>37</sup> In response to that recommendation the Act creates the following new offence.

#### **Section 67 (Voyeurism) of the Sexual Offences Act 2003 provides:**

- (1) A person commits an offence if-
  - (a) for the purpose of obtaining sexual gratification, he observes another person doing a private act, and
  - (b) he knows that the other person does not consent to being observed for his sexual gratification.

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<sup>35</sup> Legislative summary - Robin MacKay, Marilyn Pilon, Law and Government Division January 2003.

<sup>36</sup>United Kingdom Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (London: 2000).

<sup>37</sup> Id, at Recommendation 55:

(2) A person commits an offence if-

- (a) he operates equipment with the intention of enabling another person to observe, for the purpose of obtaining sexual gratification, a third person (B) doing a private act, and
- (b) he knows that B does not consent to his operating equipment with that intention.

(3) A person commits an offence if-

- (a) he records another person (B) doing a private act,
- (b) he does so with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at an image of B doing the act, and
- (c) he knows that B does not consent to his recording the act with that intention.

(4) A person commits an offence if he installs equipment, or constructs or adapts a structure or part of a structure, with the intention of enabling himself or another person to commit an offence under subsection (1).

(5) A person guilty of an offence under this section is liable-

- (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
- (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years.

### **s 68 -Voyeurism: interpretation**

(1) For the purposes of section 67, a person is doing a private act if the person is in a place which, in the circumstances, would reasonably be expected to provide privacy, and-

- (a) the person's genitals, buttocks or breasts are exposed or covered only with underwear,
- (b) the person is using a lavatory, or
- (c) the person is doing a sexual act that is not of a kind ordinarily done in public.

(2) In section 67, "structure" includes a tent, vehicle or vessel or other temporary or movable structure.

### **New Zealand**

The New Zealand Law Commission's study paper *Intimate Covert Filming*<sup>38</sup> recommended that the following provisions be inserted in the Crimes Act 1961:

#### **Making a voyeuristic recording**

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<sup>38</sup> NZLC SP15

R1 It is an offence for anyone to intentionally or recklessly:

(a) Make a visual recording of another person without the knowledge or consent of that person when the person is in circumstances that would reasonably be expected to provide privacy, and is:

- nude or has his or her sexual organs, pubic area, buttocks, or her breasts exposed or partially exposed; or is
- engaged in explicit sexual activity; or is
- engaged in an intimate bodily activity such as using the toilet.

(b) Make a visual recording of another person without the knowledge or consent of that person under that person's clothing for the purpose of viewing their sexual organs, pubic area, buttocks, breasts or underwear in circumstances where it is unreasonable to do so.

The maximum penalty for this offence is three years' imprisonment.

### **Publishing a voyeuristic recording**

R2 it is an offence for anyone:

- to print, copy, publish, distribute, sell, advertise or make available a recording; or
- to have possession of a recording for such purposes-

Knowing that, or being reckless as to whether, the recording was made in the circumstances described in paragraphs (a) or (b) of the offence of making a voyeuristic recording, whether or not the recording was made intentionally or recklessly.

The maximum penalty for this offence is three years imprisonment.

### **Possession of a voyeuristic recording**

R3 It is an offence for anyone:

to, without reasonable excuse, possess a recording – knowing that the recording was obtained through the commission of the offence of making a voyeuristic recording, or distributed through the offence of publishing a voyeuristic recording.

The maximum penalty for this offence is twelve months' imprisonment.

### **Destruction and forfeiture**

R4 Upon conviction for any of the above offences, the Court has the power to order that the images be destroyed and any equipment, goods, or other thing used in the commission of the offence be forfeited to the Crown.