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Voyage forward for Queensland: Unauthorised taking of photographs and making of film and its subsequent publication on the internet

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Abstract

In August 2005, the Standing Committee of Attorneys-General released a discussion paper entitled, 'Unauthorised photographs on the internet and ancillary privacy issues' as a result of the widespread use of mobile phone and digital cameras to film other members of the public, without consent. Some of the incidents have involved up-skirt filming, photographing topless female bathers at the beach and filming others whilst they are undressing, showering, or toileting. The victims of these acts are harmed because their privacy rights have been infringed. This infringement is exacerbated if the photographs or film are made available to a larger audience, for example, by publishing them on the internet.

There are no criminal laws in Queensland specifically prohibiting these acts. For example, in Queensland, these acts will often fall outside the scope of the offences on stalking,[1] indecent acts,[2] obscene publications,[3] public nuisance,[4] trespass,[5] indecent treatment of children,[6] and child exploitation material[7] because one or more of the elements is or are not satisfied. Consequently, the current offences are inadequate to protect privacy rights from voyeurs.

The voyage forward for Queensland is to introduce voyeurism offences specifically prohibiting these acts. The challenge will be to identify the boundaries of the voyeurism offences. In this regard, lessons may be learned from New South Wales, the United Kingdom and Canada, which introduced voyeurism offences in March 2004,[8] May 2004[9] and November 2005, [10] respectively. Further, New Zealand has proposed voyeurism offences[11] and these will provide a valuable insight for Queensland.

1. Recent incidents involving unauthorised photographs

The Standing Committee of Attorneys-General invited submissions from the public on the privacy issues relating to the use of unauthorised photographs and their subsequent publication on the internet because the community is concerned about a spate of recent incidents reported by the media. Some of these incidents include

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[1] *Criminal Code* (Qld), s 359E.
[2] *Criminal Code* (Qld), s 227.
[3] *Criminal Code* (Qld), s 228.
[4] *Summary Offences Act 2005* (Qld), s 6.
[5] *Summary Offences Act 2005* (Qld), s 11.
[6] *Criminal Code* (Qld), s 210(1)(f).
[7] *Criminal Code* (Qld), ss 228A-D.
[8] *Summary Offences Act 1988* (NSW), s 21G-H.
[9] *Sexual Offences Act 2003* (UK), s 67.
[10] *Criminal Code* (Can), s 162.
[11] Crimes (Intimate Covert Filming) Amendment Bill 2005 (NZ), which has not had its second reading.

disseminating covert photographs on the internet of children playing at South Bank Parklands,[12] disseminating covert photographs on the internet of school boys participating in sporting events,[13] using a mobile phone camera to take photographs of people undressing in communal change rooms at gyms,[14] covertly photographing topless female bathers at the beach,[15] and filming up the skirts of females at shopping centres.[16] In all of these incidents, the photographs were unauthorised because they were taken without the express consent or knowledge of the victims. Further these victims did not impliedly consent to being photographed.

For example, it cannot be argued that people undressing in a clothing store change room impliedly consent to being photographed. Even though such a changing room may be used by members of the public, it is a place where reasonable people have a reasonable expectation of privacy when the door is closed. Further, a reasonable person would have a reasonable expectation not to be visually recorded when they undress in a communal change room. If people wanted to impliedly consent to other people observing them undress, they would not have gone to the change room. They would have changed their clothes in the clothing store where other shoppers were free to observe them.

In addition, a topless female bather at a public beach does not impliedly consent to her body being photographed. She only impliedly consents to other people observing her on the basis that it is a public place and a reasonable person would expect other people to be present. Social rules indicate that it is acceptable to observe other people in public places, but that it is rude to stare at other people, particularly if it is done through binoculars or a camera.[17]

Similarly, a female wearing a skirt in public does not relinquish her privacy rights and impliedly consent to up-skirt filming or the publication of the film just because she has chosen to wear a skirt in public. She does not even impliedly consent to others observing up her skirt. Acceptance of this notion would be to place a legal dress code on women in that their privacy rights are only protected if they wear long pants or slacks.[18] In Australia, women have the choice of wearing, for example, a dress, skirt or long pants. If females wanted to impliedly consent to others observing their underwear, they would not wear outer clothes to cover up their underwear.

Further, it cannot be argued that a person undressing in a public change room, a topless female bather and a female wearing a skirt in public would have impliedly consented to being photographed when a reasonable person in these circumstances would not have consented to this. Where the subject of the photograph has not expressly or impliedly consented to being photographed, they are harmed because their privacy rights are infringed.

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[12] 'Parents warned over online beach photos', *The Age,* 27 January 2005.
[13] 'Vic-Police powerless to act on gay website containing schoolboys', *Australian Associated Press,* 22 February 2002.
[14] Michelle Rose, 'Pools outlaw mobiles amid privacy fears', *Herald Sun,* 11 June 2003.
[15] 'Topless photos prove costly', *Herald Sun,* 2 December 2004.
[16] 'Laws will ban filming in toilets', *Courier-Mail,* 6 November 2005.
[17] Naturist Photo Special Interest Group, (1997) *Free Beach Etiquette,* Steven S Sparks <http://www.sss.org/naturist/page2.html> available on 25 August 2005.
[18] Clay Calvert and Justin Brown (2000) 'Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace' 18 *Cardozo Arts and Entertainment Law Journal* 469, 495.

2. Infringement of privacy rights causes harm

Taking and using unauthorised photographs of other people in public places infringe on privacy rights at two points in time. The first infringement occurs when the photograph is taken, which involves an infringement of the "physical zone of privacy and the sense of security that comes with it".[19] This is commonly referred to as the "right to be let alone".[20] This argument was overlooked by the New South Wales Council for Civil Liberties when it made its submission to the Standing Committee of Attorneys-General in October 2005. In particular, they submitted that harm only occurs when the photograph is used or published and not when it is taken.[21]

The second infringement of privacy occurs when the photograph is used, particularly when it is disseminated to other contexts or to other or wider audiences,[22] for example, published on the internet. This dissemination to wider audiences intensifies the level of harm. This was the focal point of community concern, particularly in two of the incidents cited above, that is, when photographs of school boys participating in sporting events and children at South Bank, were published on the internet. A photograph does more than just observe what other people were free to observe at the time in question. It is a "permanent record memorializing the intrusion and facilitating repeated dissemination to a practically unlimited internet audience."[23] It also enables a different type of audience than was present at the time in question to see what happened. A photograph may be subjected to greater scrutiny and reveal more intricate details than what the photographer saw at the time of taking the photograph. "The ability to determine when, to what degree, to whom, and under what circumstances the body is exposed… is among the most fundamental aspects of the right to privacy and deeply tied to the concept of human dignity."[24] Unauthorised photographs represent an "affront to the individual dignity of the victim and may result in severe emotional distress, embarrassment, and a heightened sense of cynicism about the world."[25]

It is the harm that is caused to victims that makes the taking and use of unauthorised photographs worthy of regulation. Harm has been defined as a "thwarting, setting back, or defeating of an interest".[26] It makes a person's life worse, for example, "impairment of a person's opportunities to engage in worthwhile activities and relationships, and to pursue valuable, self-chosen, goals. In this sense, harm is

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[19] Ibid 488.

[20] Samuel Warren & Louis Brandeis, (1890) 'The Right to Privacy' 4 *Harv L Rev* 193, 193.

[21] New South Wales Council for Civil Liberties (2005) Submission of the New South Wales Council for Civil Liberties to the Standing Committee of Attorneys-General Discussion Paper on Unauthorised Photographs on the Internet and Ancillary Privacy Issues <http://www.nswccl.org.au/docs/pdf/internet%20photos%20submission.pdf> available on 21 November 2005 at 1.

[22] Andrew McClurg (1995) 'Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places' 73 *NC Law Review* 989, 990.

[23] Lance Rothenberg (1999-2000) 'Re-thinking Privacy: Peeping Toms, Video Voyeurs, and the Failure of Criminal Law to Recognise a Reasonable Expectation of Privacy in the Public Space' 49 *American University Law Review* 1127, 1157.

[24] Ibid 1158.

[25] Clay Calvert and Justin Brown (2000) 'Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace' 18 *Cardozo Arts and Entertainment Law Journal* 469, 488.

[26] AP Simester and GR Sullivan (2003) Criminal Law Theory and Doctrine. Oxford, Hart Publishing, 10.

prospective rather than backward-looking: it involves a diminution of one's opportunities to enjoy or pursue a good life."[27]

The society is harmed where the unauthorised photographs or images only depict body parts and the victim cannot be specifically identified because it may be construed as a "gesture of dehumanisation".[28] This is likely to be the situation for incidents of up-skirt filming, where the victim is unlikely to be unidentifiable unless they have a distinguishing tattoo, piercing or birthmark. "Humans have a fundamental belief in the right to personal autonomy which stems from dignity and individuality. When the sphere of autonomy is consistently violated, the shell of humanity erodes. If whenever an individual peers out a window, he sees a sign stating "Big Brother is Watching You," society has become what George Orwell imagined. Perhaps the Big Brother reference has become a cliché, but citizens will undoubtedly become chilled from performing daily activities…Privacy is a basic human necessity, and it cannot simply be shed like some unneeded sweater on a warm day at the front door of a home."[29]

Further, in the incidents of unauthorised photographs cited above, the victims were females or children, whereas the perpetrators were male. This conclusion is consistent with Canadian studies, which have suggested that women and children are usually the victims of voyeurism.[30] Consequently, proposed criminal laws on this topic should protect the privacy rights of adults as well as children.

3. Inadequacy of the *Criminal Code* (Qld) to protect privacy rights from voyeurs

3.1. Offences against morality

The offences against morality that are most likely to capture the unauthorised taking of photographs and publishing them on the internet are indecent treatment of children under the age of 16 years,[31] indecent acts,[32] obscene publications[33] and making child exploitation material.[34]

Section 210(1)(f) of the *Criminal Code* (Qld) prohibits a person from taking an indecent photograph or visual image of a child under the age of 16 years, without a legitimate reason. This offence only protects children. It does not protect adults and the literature suggests that the main victims of voyeurism are adult females and children.[35] A further drawback with this offence is that it contains the term

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[27] Ibid.

[28] Clay Calvert and Justin Brown (2000) 'Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace' 18 *Cardozo Arts and Entertainment Law Journal* 469, 501.

[29] Quentin Burrows (1997) 'Scowl because you're on Candid Camera: Privacy and Video Surveillance' 31 *Valparaiso University Law Review* 1079, 1125.

[30] Department of Justice Canada (2002) Voyeurism as a Criminal Offence: A Consultation Paper <http://canada.justice.gc.ca/en/cons/voy/part1-context.html> available on 13 July 2005 at 4.

[31] *Criminal Code* (Qld), s 210(1)(f).

[32] *Criminal Code* (Qld), s 227.

[33] *Criminal Code* (Qld), s 228.

[34] *Criminal Code* (Qld), s 228A-D

[35] Department of Justice Canada (2002) Voyeurism as a Criminal Offence: A Consultation Paper <http://canada.justice.gc.ca/en/cons/voy/part1-context.html> available on 13 July 2005 at 4.

"indecent", which is not defined in the *Criminal Code* (Qld). This nebulous term has been subjected to judicial interpretation, which is discussed in more detail below.

The term "indecent" is also an element of the indecent acts offence provided in s 227(1)(a) of the *Criminal Code* (Qld). This offence requires an indecent act in a public place, irrespective of whether the public is required to pay an admission fee. A similar offence is provided in s 227(1)(b) of the *Criminal Code* (Qld), which applies to a person who has committed an indecent act in any place with the intent to insult or offend. This offence will be difficult to prove in the context of voyeurism because perpetrator is unlikely to have the intent to insult or offend the victim. The intent of the voyeur is usually sexual gratification or to boast about their ability to take sneaky photographs and film.[36]

As mentioned above, the term "indecent" is not defined in the *Criminal Code* (Qld) and has been subjected to judicial interpretation. In *Crowe v Graham,*[37] Windeyer J asserted that the "adjective 'indecent' has long been used in law to describe multifarious forms of offensive or objectionable conduct. In this general sense it sometimes denotes lewd forms of misbehaviour, but not always". This nebulous term was also examined by Lord Reid in *R v Knuller (Publishing, Printing and Promotions) Ltd. and Ors,*[38] where His Honour stated that, "Indecency is not confined to sexual indecency: indeed it is difficult to find any limit short of saying that it includes anything which an ordinary decent man or woman would find to be shocking, disgusting and revolting." The term "indecent" in the context of s 227 of the *Criminal Code* (Qld) has been held not to "punish mere lapses of taste or of good manners simply because they may be thought by some members of society, who may constitute the jury, to be "unbecoming" or "offensive to common propriety"."[39]

The offence of obscene publications provided in s 228(1)(a) of the *Criminal Code* (Qld) requires more than indecency. It requires obscenity. The High Court of Australia has affirmed that "obscenities are always indecent but all indecency is not obscene".[40] This offence punishes the public sale, distribution or exposure for sale of a photograph if it is obscene. Similarly, s 228(1)(b) of the *Criminal Code* (Qld) prohibits the exposure of obscene photographs to view in any place, irrespective of whether people are required to pay to see the obscene photographs. The term obscene depends on contemporary community standards.[41] The test is whether to the average decent-minded person, "the dominant theme of the material taken as a whole appeals to prurient interest".[42] It would be more difficult to capture voyeurs under this offence because the test for obscenity is more stringent than the test for indecency.

The offences in ss 228A–D of the *Criminal Code* (Qld) do not encompass an element of indecency or obscenity. They punish perpetrators who have involved a child in child exploitation material and the making, possessing and distributing of child

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[36] New Zealand Law Commission, 'Intimate Covert Filming Study Paper' (2004) Chapter 2 at 8 <http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_105_265_SP15.pdf> available on 21 November 2005.
[37] (1967 - 1968) 121 CLR 375, 390.
[38] [1973] AC 435, 458.
[39] *R v Bryant* [1984] 2 Qd R 545, 552 per McPherson J.
[40] *Crowe v Graham* (1967) 121 CLR 375, 392.
[41] *Crowe v Graham* (1967) 121 CLR 375, 399.
[42] *Crowe v Graham* (1967) 121 CLR 375, 399.

exploitation material. The definition of child exploitation material includes material that would cause offence to a reasonable adult and depicts someone who is or apparently is a child under 16 years in a sexual context (for example, engaging in a sexual activity), an offensive or demeaning context, or subjected to abuse, cruelty or torture.[43] There are several defences including a genuine artistic, educational, legal, medical, scientific or public benefit purpose.[44] The main drawback with this offence is that it only protects children.

As discussed above, the offences against morality are inadequate to protect people from other people taking unauthorised photographs and publishing them on the internet because they either contain nebulous terms, for example, indecent and obscene; or the scope of the offence is limited to protecting child victims.

3.2. Unlawful stalking

Unlawful stalking is defined in s 359B of the *Criminal Code* (Qld). It requires the stalked person, reasonably arising in all the circumstances to apprehend or fear violence to property, themselves or another person. Alternatively, the definition requires detriment. This is defined to include serious mental, psychological or emotional harm; prevention or hindrance from doing a lawful act; and compulsion to do an act that a person is lawfully entitled not to do.[45] The victim's apprehension, fear and detriment is assessed at the time that the photograph or film is taken.[46] This offence is inadequate and will not protect the victims of unauthorised photographs or film because they are unaware that they have been covertly photographed or filmed. Thus, the element of apprehension, fear or detriment will not be satisfied.

3.3. Offences about quality of community use of public places

Public nuisance and trespass are provided for in the *Summary Offences Act 2005* (Qld) and relate to the quality of community use of public places. These offences are inadequate to protect the victims of unauthorised photographs and film for the reasons discussed below.

The public nuisance offence provided in s 6 of the *Summary Offences Act 2005* (Qld) does not specifically prevent a person from covertly photographing or filming another person. The provision requires the perpetrator to be disorderly, offensive, threatening or violent. It also requires the perpetrator to interfere or be likely to interfere with the peaceful passage or enjoyment of a public place by another member of the public. This offence will not protect a victim if they are unaware that another person has photographed or filmed them, at the time it is taken or made.

The offence of trespass provided in s 11 of the *Summary Offences Act 2005* (Qld) relates to dwellings, places used for business or commercial purposes, and their surrounding yards. The term "dwellings" includes caravans, boats and tents used as dwellings.[47] This offence is inadequate to protect the victims of voyeurism because

[43] *Criminal Code* (Qld), s 207A.
[44] *Criminal Code* (Qld), s 228E.
[45] *Criminal Code* (Qld), s 359A.
[46] *R v Davies* [2004] QDC 279.
[47] *Summary Offences Act 2005* (Qld), Schedule 2.

most instances of voyeurism occur in public places where the perpetrator has a right to be.

As a result, the current offences provided in the *Criminal Code* (Qld) are inadequate because they do not specifically catch the unauthorised taking or use of photographs. To address the community concerns and protect the victims of voyeurism, specific offences need to be added to the existing patchwork of offences in Queensland.

4. Voyage forward for Queensland: introducing voyeurism offences

On 8 November 2005, the Queensland Attorney-General and Minister for Justice introduced the Justice and Other Legislation Amendment Bill 2005 (Qld) into the Queensland Parliament. Section 55 of this Bill delineates the boundaries of two proposed offences to be inserted into the *Criminal Code* (Qld) to address voyeurism. The first proposed offence is headed s 227A Observations or recordings in breach of privacy and the second proposed offence is headed s 227B Distributing prohibited visual recordings. After analysing these proposed Queensland offences and the content of the voyeurism laws in New South Wales, the United Kingdom[48] and Canada and the proposed ones in New Zealand, it is evident that Queensland has drawn on the provisions in these jurisdictions. Arguably, Queensland could benefit further by drawing more comprehensively on the laws or proposed laws in these jurisdictions. The proposed Queensland offences are discussed below and linkages are made with the provisions in New South Wales, the United Kingdom, Canada and New Zealand.

4.1. Observing and recording

The proposed s 227A(1) of the *Criminal Code* (Qld)[49] makes it a misdemeanour to observe or visually record another person, without their consent, in a private place or engaging in a private act. The Bill provides a very wide definition for the term "observe". It "means observe by any means".[50] This is arguably consistent with the Canadian approach, which specifically states that "observes" includes "mechanical and electronic means".[51] As a result, this will include mechanical observations, for example, using binoculars to observe a female undressing in a communal change room or looking through a peephole in a wall to observe someone showering. It also captures electronic observations, for example, voyeurs who watch images in real time on a television or website using digital streaming. Similarly, the United Kingdom voyeurism offence punishes voyeuristic observations, but does not provide any framework for interpreting the term "observe". In contrast, the New Zealand proposed provisions and the New South Wales equivalent offence[52] do not apply to observations. Presumably, the New South Wales and proposed New Zealand offences focus on visually recording rather than observing because it would be easier to catch perpetrators where there is a permanent record in the form of a visual recording.

[48] *Sexual Offences Act 2003* (UK), s 67.
[49] Justice and Other Legislation Amendment Bill 2005 (Qld), s 55.
[50] Justice and Other Legislation Amendment Bill 2005 (Qld), s 54.
[51] *Criminal Code* (Can), s 162(1).
[52] *Summary Offences Act 1988* (NSW), s 21G.

In the proposed Queensland provisions, the term "visually record" is defined to mean record or transmit by any means, and applies to moving and still images.[53] Even though one of the examples provided in the Queensland proposals refers to a mobile phone camera, the proposed offences are technology neutral because they apply to moving and still images. The definition of "visually record" also indicates that the images may be of the person or part of the person.[54] It recognises that in some incidents the victim is not recognisable and that some images may, for example, zoom in on female breasts or photograph under a female's skirt. The Queensland proposed definition is comparable with the New South Wales definition of "films another person",[55] which also applies to one or more still or moving images.

The Canadian equivalent does not specifically refer to moving and still images, but includes "photographic, film or video recording made by any means".[56] This is analogous with the proposed New Zealand provision, which provides the examples of a photograph, videotape, digital image that is made in any medium using any device.[57]

The United Kingdom counterpart leaves the term "recording" open to judicial interpretation. However, it does refer to "image" and thus prescribes that a sound recording is insufficient to be brought within the realm of the voyeurism offence. Presumably, it has not defined the concept of "recording" so that the law can keep pace with advances in technology.

4.2. Purpose of the perpetrator

The purpose of the perpetrator in the proposed Queensland provisions is irrelevant. This can be contrasted to the position in New South Wales where the offence of filming for indecent purposes is anchored on the perpetrator having the purpose of "sexual arousal" or "sexual gratification".[58] It is difficult to perceive why these two phrases are used in the New South Wales legislation because surely if a person is sexually aroused, they are sexually gratified. In any event, the United Kingdom voyeurism offence only refers to "sexual gratification". This purpose may prove to be a difficult element to prove. The New Zealand proposals attempt to overcome this difficulty as they are not hinged around "sexual gratification" or "sexual arousal". They require the perpetrator to act "intentionally or recklessly".[59] This would potentially capture a perpetrator, who is not necessarily motivated by "sexual gratification", but has the purpose of, for example, commercial benefit, harassment, humiliation or some other purpose. This is similar to the Canadian approach, which expressly applies to the purpose sexual gratification,[60] but is not limited to that purpose and applies to other purposes.

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[53] Justice and Other Legislation Amendment Bill 2005 (Qld), s 54.
[54] Justice and Other Legislation Amendment Bill 2005 (Qld), s 54.
[55] *Summary Offences Act 1988* (NSW), s 21G.
[56] *Criminal Code* (Can), s 162(2).
[57] Crimes (Intimate Covert Filming) Amendment Bill 2005 (NZ), s 3.
[58] *Summary Offences Act 1988* (NSW), s 21G.
[59] Crimes (Intimate Covert Filming) Amendment Bill 2005 (NZ), s 3.
[60] *Criminal Code* (Can), s 162(1)(c).

4.3. Consent

The Queensland, New South Wales, the United Kingdom, Canada and New Zealand voyeurism offences apply where the subject of the image has not consented to being visually recorded. In none of these jurisdictions, has the term "consent" been defined for these purposes in the legislation or proposed legislation. Requiring express written consent would be impractical to photographers, particularly if there are numerous subjects portrayed in one image. On the other hand, express written consent protects the photographer from frivolous criminal charges. The courts may judicially interpret the term "consent" as encompassing express, implied or tacit consent, which is the approach taken in Queensland for the assault offences.[61] To gain some clarity on the scope of "consent", perhaps the term should be defined in the *Criminal Code* (Qld), in a similar manner to that in s 348 of the *Criminal Code* (Qld), which applies to the rape and sexual assault offences. Essentially, it requires free and voluntary consent by a person who has the cognitive capacity to give it. It is not free and voluntary if it is given by force, threat or intimidation, fear of bodily harm, exercise of authority, false or fraudulent representations about the act and mistaken belief. This is likely to be a useful starting point in devising the extent of the consent.

It is interesting to note that the New Zealand proposed offences require the subject of a recording to have a lack of "knowledge or consent".[62] However, the word "knowledge" is worthless because if a person has knowledge, they may not necessarily consent to being visually recorded. Further, if a person has no knowledge of being recorded, they cannot expressly consent and there is a strong argument that they cannot impliedly consent.

4.4. Private place and private act

The Queensland proposed provision applies to when a person is in a "private place" or engaged in a "private act".[63] It defines the term "private place" to mean a place where a person might reasonably be expected to be engaging in a private act.[64] A further definition is provided for "private act", which means showering, bathing, toileting, another activity that involves being in a state of undress and an intimate sexual activity that is not usually done in public.[65]

This in turn forwards the interpreter to the definition of "state of undress", which essentially requires that a person is naked or has exposed their genital or anal region, or female breasts. It is also met when a person is only wearing underwear or only wearing some outer garments and is exposing undergarments. This will not apply to a female who is wearing underclothes on her hips higher than her outer clothes. The New South Wales equivalent provision also refers to "state of undress", but unlike the Queensland provision, it does not provide a definition for this term.

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[61] *Kimmorley v Atherton; Ex parte Atherton* [1917] Qd R 117, 133 per Hoare J.
[62] Crimes (Intimate Covert Filming) Amendment Bill 2005 (NZ), s 3.
[63] Justice and Other Legislation Amendment Bill 2005 (Qld), s 55.
[64] Justice and Other Legislation Amendment Bill 2005 (Qld), s 54.
[65] Justice and Other Legislation Amendment Bill 2005 (Qld), s 54.

The Queensland approach is similar to the New South Wales filming for indecent purposes offence, which refers to "private act"[66] and applies to toileting, showering, bathing or carrying on a sexual act that is not ordinarily done in public or similar activities.[67] Similarly, in the United Kingdom, the term "private act" is defined to include where a person is in a place and in circumstances that would reasonably be expected to provide privacy and a person's genitals, buttocks or breasts are exposed or covered only with underwear.[68] A private act includes using a toilet and doing a sexual act that is not usually done in public.[69] This is consistent with the Canadian approach, which specifically applies where the victim is in a place where a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity.[70] The Canadian provision also protects the victim who is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation is done for the purpose of observing or recording a person in such a state or engaged in such an activity.[71] The proposed New Zealand provision protects a victim, who is in a place and in circumstances that would reasonably be expected to provide privacy and the person is naked; exposing genitals, pubic area, buttocks, female breasts; or these body parts are clad solely by undergarments; engaged in an intimate sexual activity; showering, toileting or undressing.[72]

Further, apart from Queensland, none of the other jurisdictions examined in this paper expressly refer to "private place". They refer to the word "place" and "circumstances" and focus on the activity viewed. However, this drafting disparity will result in the same outcome as the other jurisdictions because the Queensland definition of "private place" applies to places that could be described as public-private places in the sense that they are able to be accessed by members of the public, for example, a public toilet.

All jurisdictions require a "reasonable expectation of privacy". Interestingly, the Queensland proposals refer to this being a test of a "reasonable adult", [73] whilst the other jurisdictions examined in this paper rely on a "reasonable person".[74] The Explanatory Notes for the Justice and Other Legislation Amendment Bill 2005 (Qld) confirm that this is just an issue of semantics rather than one of content because it states that the test is the same as the one used in United Kingdom and the one used in New South Wales.[75]

Consequently, the scope of these definitions connote that the offences or proposed offences in these jurisdictions will apply to, for example, private homes, public toilets, change-rooms in clothing stores and communal change rooms at the beach. In these places, a reasonable adult has a reasonable expectation of privacy.

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[66] *Summary Offences Act 1988* (NSW), s 21G(2)(b).
[67] *Summary Offences Act 1988* (NSW), s 21G(2)(b).
[68] *Sexual Offences Act 2003* (UK), s 68(1)(a).
[69] *Sexual Offences Act 2003* (UK), s 68(1)(b) and (c).
[70] *Criminal Code* (Can), s 162(1)(a).
[71] *Criminal Code* (Can), s 162(1)(b).
[72] Crimes (Intimate Covert Filming) Amendment Bill 2005 (NZ), s 3.
[73] Justice and Other Legislation Amendment Bill 2005 (Qld), s 55.
[74] *Summary Offences Act 1988* (NSW), s 21G(1)(a).
[75] Explanatory Notes, Justice and Other Legislation Amendment Bill 2005 (Qld), 21.

4.5. Up-skirt filming

In Queensland, a further proposed offence is provided in s 227A(2) of the *Criminal Code* (Qld) to capture people who visually record, for example, up a female's skirt to see their underwear or down a female's blouse to see their breasts. More specifically, the proposed offence makes it a misdemeanour to observe or visually record another person's bare genital or anal region without consent and where there is a reasonable expectation of privacy. It also applies where the person's genital or anal region is only covered by underwear. The maximum penalty for this offence is two years imprisonment. A similar offence has been proposed in the Crimes (Intimate Covert Filming) Amendment Bill 2005 (NZ), which makes it an offence to record, without the knowledge or consent of the victim, the victim's naked or undergarment-clad genitals, pubic-area, female breasts made underneath or through a person's clothing.[76] However, there is no parallel offence in New South Wales, the United Kingdom or Canada.

4.6. Installing a device to facilitate recording

The voyeurism offence in the United Kingdom also targets perpetrators who install equipment, construct or adapt a structure, with the intention to enable themself or another person to observe a third person doing a private act, without their consent, for the purpose of sexual gratification.[77] The term "structure" is used to include a tent, vehicle, vessel or other temporary or movable structure.[78] New South Wales provides a similar offence in s 21H of the *Summary Offences Act 1988* (NSW), which relates to installing a device to facilitate filming for indecent purposes. The main difference between these two provisions is that the United Kingdom refers to "equipment" and New South Wales refers to "device". However, this difference appears to be minimal. It is interesting to note that Queensland, Canada and New Zealand have not introduced or proposed an equivalent offence.

4.7. Distributing visual recordings

Some of the jurisdictions examined in this paper punish the distribution of visual recordings, for example, publishing a photograph of another person without consent on the internet. Canada punishes the printing, copying, publishing, distributing, circulating, selling, advertising or making available the recording, or possessing the recording for the one the purposes previously listed.[79] Similarly, New Zealand punishes the publishing, importing, exporting and selling of intimate visual recordings.[80] Publishing is defined to include displaying, sending, distributing, conveying and storing electronically.[81] The United Kingdom voyeurism offences and the New South Wales filming for indecent purposes offences can be distinguished because they do not establish specific offences dealing with this point in the voyeurism chain. However, the offences in the United Kingdom and New South

[76] Crimes (Intimate Covert Filming) Amendment Bill 2005 (NZ), s 3.
[77] *Sexual Offences Act 2003* (UK), s 67(4).
[78] *Sexual Offences Act 2003* (UK), s 68(2).
[79] *Criminal Code* (Can), s 163(4).
[80] Crimes (Intimate Covert Filming) Amendment Bill 2005 (NZ), s 3.
[81] Crimes (Intimate Covert Filming) Amendment Bill 2005 (NZ), s 3.

Wales apply to voyeurs who act for the purpose of sexual gratification for themselves or a third person.[82]

The Queensland proposals are analogous to the position in Canada and New Zealand. It proposes an additional misdemeanour in s 227B of the *Criminal Code* (Qld), which punishes the distribution of prohibited visual recordings, without the consent of the subject. The maximum penalty is two years imprisonment. As discussed above, greater harm occurs to the victim when the visual recording is disseminated to a wider audience. Consequently, providing an offence for distributing visual recordings is more justified than providing an offence for making visual recordings.

A further rationale for this offence stems from the example that a person may not be guilty of visually recording another person without consent if they accidentally activated their mobile phone camera whilst they were in a communal change room. However, if the person realised that this had happened and then forwarded the images to another person, they would be caught by this provision of distributing prohibited visual recordings. In the Queensland proposals, the term "distribute" includes communicate, exhibit, send, supply, transmit, make available for access, enter into an agreement to do one of the previous things and attempting to distribute.[83] This wide definition will capture, for example, the sending of images via email and the posting of unauthorised photographs on websites. That is, the conduct that was brought to the attention of the community in the media reports discussed above.

4.8. Exemptions

An exemption represents a weakening of these laws that serve to protect the victims of voyeurism. There are no exemptions in New South Wales or in the United Kingdom. However, Canada provides an exemption for peace officers who are acting under a warrant for certain activities.[84] It also provides a public good defence.[85] Whether an act serves the public good is a question of law.[86] The term "public good" is not expressly defined in the Canadian provisions for the purposes of voyeurism and is left open to judicial interpretation. However, the defence of "public good" exists for the offence of corrupting morals[87] and the courts are likely to interpret it in the same way for the voyeurism offences.

In contrast, the proposed Queensland provisions do not provide exemptions for the public good or for news gathering purposes. However, they provide several exemptions relating to law enforcement purposes. For example, they will not apply to a law enforcement officer reasonably performing their duties will not be criminally responsible for observing or visually recording or distributing a visual recording.[88] A further exemption is granted to a person acting reasonably in the performance of their duties where the victim is in lawful custody (detained under the *Mental Health 2000*

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[82] *Summary Offences Act 1988* (NSW), s 21G(1); *Sexual Offences Act 2003* (UK), ss 67(2) and (3).
[83] Justice and Other Legislation Amendment Bill 2005 (Qld), s 55.
[84] *Criminal Code* (Can), s 162(3).
[85] *Criminal Code* (Can), s 162.
[86] *Criminal Code* (Can), s 163(7).
[87] *Criminal Code* (Can), s 163(3).
[88] Justice and Other Legislation Amendment Bill 2005 (Qld), s 55.

(Qld) or subject to a supervision order).[89] A supervision order includes a community based order under the *Penalties and Sentences Act 1992* (Qld), a community based order or supervised release order under the *Juvenile Justice Act 1992* (Qld), a post-prison community based release order or a conditional release order under the *Corrective Services Act 2000* (Qld), an intensive drug rehabilitation order under the *Drug Rehabilitation (Court Diversion) Act 2000* (Qld), and a supervision order or an interim supervision order under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).[90]

The proposed Queensland exemptions are most akin to the proposed exemptions in New Zealand. However, the proposed New Zealand exemptions are more comprehensive and exempt a wider range of people conducting a wider range of duties. For example, New Zealand contains exemptions for postal operators, couriers, network operators and service providers in relation to the publishing of covert intimate recordings.[91] Further exemptions are given to lawyers or agents giving legal advice in relation to an intimate visual recording[92] and for lawyers or agents giving legal advice or making representations in relation to any civil or criminal proceedings.[93] These exemptions are not included in the proposed Queensland laws as they are currently drafted, but are arguably justified for obvious and practical reasons. Queensland should consider the New Zealand proposed exemptions in more detail.

4.9. Sentencing

The sentencing framework for these offences in Queensland, New South Wales, the United Kingdom, Canada and New Zealand are similar. The position in Queensland is identical to the position in the United Kingdom and closely reflects the position in New South Wales. In Queensland, the proposed maximum penalty for the visual recording and distributing visual recording offences are two years imprisonment.[94] A conviction on indictment of voyeurism in the United Kingdom would result in the same maximum penalty.[95] This is similar to the maximum penalty in the New South Wales counterpart in s 21G of the *Summary Offences Act 1988* (NSW). The punishment for this offence in New South Wales is a fine of 100 penalty units ($110,000)[96] in addition to or instead of two years imprisonment. In New Zealand, the maximum penalty for making an intimate visual recording or publishing, importing, exporting or selling an intimate visual recording is three years imprisonment.[97] The Canadian maximum penalty is higher than these jurisdictions as it provides five years imprisonment for a conviction on indictment for voyeurism.[98] Consequently, the maximum penalties in all of these jurisdictions are within three years of each other. Maximum penalties are only given in worse-case scenarios.[99]

[89] Justice and Other Legislation Amendment Bill 2005 (Qld), s 55.
[90] Justice and Other Legislation Amendment Bill 2005 (Qld), s 55.
[91] Crimes (Intimate Covert Filming) Amendment Bill 2005 (NZ), s 4.
[92] Crimes (Intimate Covert Filming) Amendment Bill 2005 (NZ), s 4.
[93] Crimes (Intimate Covert Filming) Amendment Bill 2005 (NZ), s 4.
[94] Justice and Other Legislation Amendment Bill 2005 (Qld), s 55.
[95] *Sexual Offences Act 2003* (UK), s 67(5).
[96] *Crimes (Sentencing Procedure) Act 1999* (NSW), s 17.
[97] Crimes (Intimate Covert Filming) Amendment Bill 2005 (NZ), s 3.
[98] *Criminal Code* (Can), s 162(5)(a).
[99] *Penalties and Sentences Act 1992* (Qld), s 9(2)(b).

Whether there is consistency in sentencing in these jurisdictions will only become apparent as these offences are applied over time.

As discussed above, the harm sustained by a victim is more intense if they can be identified or if their image is disseminated to wider audiences, for example, via the internet. The maximum penalties in these jurisdictions do not recognise this intensified level of harm as they do not increase the maximum penalty for the distribution of visual recording offence as compared to the making of a visual recording. Further, the identification of the victim is not currently an aggravating circumstance deserving an increased penalty. The voyage forward should reconsider these issues.

5. Conclusion

The inappropriate use of small digital cameras and mobile phone cameras to visually record other people without consent has been brought to the community's attention in several media reports. The community's concern is warranted because the current offences in the *Criminal Code* (Qld) are inadequate to punish this conduct, which infringes on the privacy rights of the victims.

The United Kingdom, Canada and New South Wales have introduced offences to prohibit voyeurism. New Zealand and Queensland have proposed offences. Queensland has had the benefit of analysing the voyeurism offences and proposals in these jurisdictions before drafting its own. However, further improvements could be made to the Queensland proposals. For example, it could clarify the meaning of consent, further consider the additional exemptions provided in the New Zealand proposals, further consider introducing a public good exemption like the Canadian provision and further consider punishing the installation of devices to conduct voyeuristic activities like the United Kingdom and New South Wales provisions. All jurisdictions should reflect on whether it is appropriate that the maximum penalty for distributing a visual recording should attract the same maximum penalty for making a visual recording. They should also consider whether it is appropriate to provide a harsher penalty when the victim is identified.

The Queensland proposed offences will capture, for example, a person who decides to visually record a flatmate whilst they are bathing without consent. They will also capture a person who visually records another person in a communal change room at a gym without consent. They will also stop a voyeur from covertly filming up skirts as females walk up stairs. It will not stop voyeurs from visually recording children clothed in outer garments participating in athletic events or playing in the park. It will not prevent people from covertly photographing people wearing outer clothes in public places or topless female bathers at the beach. As a result, the proposed Queensland offences do not provide a remedy for some of the incidents reported in the media and thus the voyage to reform the *Criminal Code* (Qld) must continue if the expectations of the community are to be satisfied.