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New visual recording offences

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Abstract

The Standing Committee of Attorneys-General's discussion paper entitled, "Unauthorised Photographs on the Internet and Ancillary Privacy Issues," mentions several recent incidents in the media where people have visually recorded (for example, via mobile phone cameras and concealed digital cameras) other members of the community in public places without consent and published them on the internet. The Queensland Attorney-General and Minister for Justice identified this as an area in need of urgent law reform, (Linda Lavarch, 'Linda Closes Loophole in Privacy Laws' 21 August 2005 <http://www.lindalavarch.com/Privacy-approve.doc> viewed at 14 December 2005.) and introduced new offences for observing and recording other people without consent and for distributing prohibited visual recordings in the Justice and Other Legislation Amendment Bill 2005 (Qld) on 8 November 2005. The maximum penalty for these offences is two years imprisonment. These new offences were passed by the Queensland Parliament and commenced on 8 December 2005 (*Justice and Other Legislation Amendment Act 2005* (Qld), s 2; *Acts Interpretation Act 1954* (Qld), s 15A.). This section commentary will examine the scope of these new offences.

Background

The Standing Committee of Attorneys-General's discussion paper suggests that the publication on the internet of covert photographs of school students participating in sporting events and children at South Bank Parklands prompted public attention and concern (Standing Committee of Attorney General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* at 5 and 6, [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~8+AugInternetPhotosFinalPaperAugust05.pdf/\\$file/8+AugInternetPhotosFinalPaperAugust05.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~8+AugInternetPhotosFinalPaperAugust05.pdf/$file/8+AugInternetPhotosFinalPaperAugust05.pdf) viewed 18 November 2005.). This assertion was based on the media reports and there is no empirical evidence to substantiate the extent of the community concern. It also refers to other conduct such as up-skirt filming, photographing topless female bathers at a public beach, and sporting centres banning the use of mobile phone cameras in communal change rooms (Standing Committee of Attorney General, *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* at 5 and 19, [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~8+AugInternetPhotosFinalPaperAugust05.pdf/\\$file/8+AugInternetPhotosFinalPaperAugust05.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~8+AugInternetPhotosFinalPaperAugust05.pdf/$file/8+AugInternetPhotosFinalPaperAugust05.pdf) viewed 18 November 2005.).

The offences in Queensland relating to stalking (*Criminal Code* (Qld), s 359E.), indecent acts (*Criminal Code* (Qld), s 227.), obscene publications (*Criminal Code* (Qld), s 228.), public nuisance (*Summary Offences Act 2005* (Qld), s 6.), trespass (*Summary Offences Act 2005* (Qld), s 11.), indecent treatment of children (*Criminal Code* (Qld), s 210(1)(f.)) and child exploitation material (*Criminal Code* (Qld), ss 228A-D.) do not prevent people from publishing visual recordings, for example, photographs, of other people without consent on the internet (Burton, K, 'Why Voyeurs can get away with it' (2005) November *Proctor* 19.). To address this, the Standing Committee of Attorneys-General called for submissions on, amongst other things, how the use or publication of unauthorised photographs taken or images made in public places should be regulated. Additionally, new offences targeting voyeurism

inserted by the *Justice and Other Legislation Amendment Act 2005* (Qld) into the *Criminal Code* (Qld), commenced on 8 December 2005.

New offence punishing observing and recording another person without consent

Section 227A(1) of the *Criminal Code* (Qld) (*Justice and Other Legislation Amendment Act 2005* (Qld), s 55.) 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 maximum penalty for this proposed offence is two years imprisonment. The maximum penalty is similar to 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, which is \$110,000, according to s 17 of the *Crimes (Sentencing Procedure) Act 1999* (NSW). This fine is in addition to or instead of two years imprisonment.

The Queensland provision is drafted more effectively than this New South Wales counterpart (*Summary Offences Act 1988* (NSW), s 21G Filming for indecent purposes) because it is not anchored around the purpose of sexual arousal or sexual gratification. That is, it only becomes an offence in New South Wales, if the perpetrator has done the visual recording for the purpose of sexual arousal or sexual gratification of themselves or a third person. The new Queensland provision will capture a perpetrator who has the purpose of commercial benefit, harassment, humiliation, sexual arousal, sexual gratification or another purpose because the motive is irrelevant.

“Consent” is a key element in this Queensland provision. It is not defined in the *Justice and Other Legislation Amendment Act 2005* (Qld), but is likely to include express, implied or tacit consent. This approach would be consistent with the definition of “consent” used for the assault offences (*Kimmorley v Atherton; Ex parte Atherton* [1917] Qd R 117, 133 per Hoare J.). Consequently, if a person knows that they have been photographed, it will still amount to an offence, if they have not consented to it. It will also be an offence if a person is covertly photographed and thus has no knowledge that they have been photographed.

In the Queensland provision, the term “observe” is defined to mean observe by any means (*Justice and Other Legislation Amendment Act 2005* (Qld), s 54.). The outcome of this broad definition is that it applies not only to electronic observations, but also mechanical observations, for example, using binoculars or looking through a peephole in a wall. It also captures voyeurs who relay the images in real time to a television or website.

One of the examples in this offence refers to a mobile phone camera. However, technology providers can take comfort as the new offences are technology neutral. This is evident in the definition of “visually record”, which is defined to mean record or transmit by any means (*Justice and Other Legislation Amendment Act 2005* (Qld), s 54.). It applies to moving and still images.

The term “private place” is defined to mean a place where a person might reasonably be expected to be engaging in a private act (*Justice and Other Legislation Amendment Act 2005* (Qld), s 54.). A “private act” is further defined as 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 (*Justice and Other Legislation Amendment Act 2005* (Qld), s 54.). “State of undress” essentially requires that a person is naked or has exposed their genital or anal region, or female breasts. It is also satisfied when a person is only wearing underwear or

only wearing some outer garments and is exposing undergarments. This does not mean that it applies, for example, to a female that wears hipster long pants lower on her waist than her g-string underwear and thus exposing her undergarment. The definitions of “private place”, “private act”, and “state of undress” indicate that this offence is not limited to observations and visual recordings made without consent in private homes. It also captures observations and visual recordings made in public places where private acts are conducted, for example, public toilets, change rooms in clothing stores and a communal change room at a swimming pool. In these places, a “reasonable adult” has a reasonable expectation of privacy.

It is interesting to note that the new offences refer to the standard of a “reasonable adult” as opposed to a “reasonable person” or the traditional “reasonable man”. The drafting of the offences suggests that the expectation of privacy of a reasonable child is not necessarily sufficient for these offences and the “reasonable person” takes on the personal characteristic of maturity. Correspondingly, the New South Wales provision is hinged around the “reasonable person” standard (*Summary Offences Act 1988* (NSW), s 21G.). 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 New South Wales (Explanatory Notes, Justice and Other Legislation Amendment Bill 2005 (Qld), 21.).

The new offences in Queensland do not provide an equivalent for s 21H of the *Summary Offences Act 1988* (NSW). Essentially, this offence relates to installing any device or adapting, for example, buildings or temporary structures, to facilitate filming for indecent purposes.

A further offence is provided in s 227A(2) of the *Criminal Code* (Qld). It 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. The drafting of this offence is aimed at up-skirt and down-blouse filming. There is no parallel offence in any other jurisdiction in Australia. However, a similar offence has been proposed in New Zealand (Crimes (Intimate Covert Filming) Amendment Bill (NZ), s 4.).

New offence punishing distributing prohibited visual recordings

An additional misdemeanour is provided 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.

This offence targets a person acting at the next point in the chain, that is, a person may not be guilty of visually recording another person without consent because they accidentally activated their digital camera whilst they were in a communal change room. However, if the person realised what had happened and then continued to send the images to another person, they would be caught by this provision of distributing prohibited visual recordings. The term “distribute” includes communicate, exhibit, send, supply, transmit, make available for access, and entering into an agreement to do one of these, and attempting to distribute (*Justice and Other Legislation Amendment Act 2005* (Qld), s 55.). This wide definition will capture the posting of unauthorised photographs on websites and sending images via email.

Exemptions

A person will not be criminally responsible for observing or visually recording, or distributing a visual recording in specific circumstances (*Justice and Other Legislation Amendment Act 2005* (Qld), s 55.). For example, a law enforcement officer reasonably performing their duties, a person acting reasonably in the performance of their duties and the victim is in lawful custody (detained under the *Mental Health 2000* (Qld) or subject to a supervision order). 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).

All of these exemptions relate to law enforcement purposes. There is no exemption for news gathering purposes. Further, unlike the Canadian equivalent, there is no exemption for public good (*Criminal Code* (Can), s 162.).

The parallel proposed provision in New Zealand goes much further than the new Queensland exemptions by containing numerous exemptions, for example, in relation to publishing intimate covert filming; the New Zealand proposed laws contain an exemption for postal operators, couriers, network operators and service providers (Crimes (Intimate Covert Filming) Amendment Bill (NZ), s 4.). More importantly, it expressly protects lawyers or agents giving legal advice in relation to an intimate visual recording (Crimes (Intimate Covert Filming) Amendment Bill (NZ), s 4.). It also specifically protects lawyers or agents giving legal advice or making representations in relation to any civil or criminal proceedings (Crimes (Intimate Covert Filming) Amendment Bill (NZ), s 4.). These protections for lawyers are not conveyed in the new Queensland laws.

Conclusion

The scope of these new Queensland offences will prohibit, for example, a landlord from visually recording their tenant as they shower without their consent. It will also prevent a person from visually recording another person in a state of undress in a public change room at the local swimming pool. It will prevent a person from visually recording up female skirts as they travel on an escalator at the shopping centre. The new Queensland offences will also ban the publication of these visual recordings on the internet. However, the proposed Queensland visual recording offences will not prevent people taking photographs of topless female bathers at the beach, children wearing outer garments and playing in a park, or school children participating in sporting events. Arguably the new offences do not ban the observation or taking of these photographs because it would restrict civil liberties, for example, the freedom to take scenic photographs. As a result, the new Queensland criminal offences do not provide a remedy for some of the incidents referred to in the Standing Committee of Attorneys-General's discussion paper. The Standing Committee of Attorneys-General is currently considering the submissions on the discussion paper, and one of its challenges will be to weigh up the competing interests of privacy and the freedom to make and distribute photographs.