

**COMMISSIONER FOR CHILDREN**

**COMMENTS**

***UNAUTHORISED PHOTOGRAPHS ON THE INTERNET AND ANCILLARY  
PRIVACY ISSUES***

**DISCUSSION PAPER  
STANDING COMMITTEE OF ATTORNEYS-GENERAL**

**AUGUST 2005**

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*The Commissioner for Children is an independent, statutory office responsible to the Parliament of Tasmania. The Commissioner's functions include promoting the rights and well-being of children along with examining the policies, practices and services provided for children and any laws affecting their health, welfare, care, protection and development.*

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## 1. BACKGROUND

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- 1.1 On 12 August 2005 I was invited by the Department of Justice in Tasmania to comment upon the Discussion Paper *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* prepared by the Standing Committee of Attorneys-General. The purpose of the Discussion Paper is to develop options for reform to address the unauthorised publication of photographs on websites and the privacy issues associated with this practice.
- 1.2 As Commissioner for Children, my functions include examining the laws, policies, practices and services relating to the health, welfare, care, protection and development of children in Tasmania, as well as promoting their rights and well-being. Accordingly, I am particularly interested as to how the unauthorised use of photographs on the Internet may be restricted to better protect children against the publication of their photograph or image on public websites for improper purposes.
- 1.3 Children are inherently vulnerable due to their age and the extent to which younger children can advocate for themselves is particularly limited. This places children at an increased risk of exploitation by adults who seek to cause them harm by using their image for purposes of sexual gratification. The display of images in this way can cause significant emotional and psychological harm to children.
- 1.4 Furthermore, as noted in the Discussion Paper, the permanent nature of recorded images enables them to be circulated widely and viewed repeatedly, which can cause ongoing harm to those individuals depicted.

## 2. JURISDICTIONAL ISSUES IN TASMANIA

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- 2.1 The Tasmanian *Criminal Code Act 1924* and *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (“the two Acts”) have recently been amended in line with the principles developed by the Standing Committee of Attorneys-General for nationally consistent child pornography laws. The two Acts contain, inter alia, provisions prohibiting the making, reproduction, possession, distribution and access of “child exploitation material”. Under the two Acts, “child exploitation material” is defined as:

*“child exploitation material” means material that describes or depicts, in a way that a reasonable person would regard as being, in all the circumstances, offensive, a person who is or who appears to be under the age of 18 years –*

*(a) engaged in sexual activity; or*

*(b) in a sexual context; or*

*(c) as the subject of torture, cruelty or abuse (whether or not in a sexual context);<sup>1</sup>*

- 2.2 The Discussion Paper outlines cases where unauthorised pictures of children have been posted on websites. For example, photographs of Melbourne school boys undertaking sporting activities, such as rowing, were taken without consent and posted on a website. The photographs of the rowers were particularly focussed on the physical attributes of the boys and included close up photographs of their bodies. It is my understanding that some of the photographs were taken in what was believed to be the privacy of the rowing shed. The press claimed that the website was a “gay website”. Adult links attached to the site were claimed by the webmaster to have been placed on the site by hackers.
- 2.3 As noted in Appendix 1 of the Discussion Paper, the definition of “child exploitation material” contained in the two Acts could be applied to the unauthorised use of the images of the school boy rowers described in the Discussion Paper. However the above provision remains untested and the circumstances that constitute “sexual context” may require a higher degree of intimacy than images of children depicted during sporting activities. As such, there appears to be minimal legislation in Tasmania that could be confidently invoked to prevent the exposure of children in this way. This includes both the taking of the photograph and the way in which the photograph is used.
- 2.3 At a National level, the existing National Classification Scheme and the Australian Communications and Media Authority (ACMA) play important roles in monitoring and classifying the content of Internet sites and this is highlighted in the Discussion Paper. However, these schemes cannot prevent the taking of photographs or images for publication on Internet sites and therefore more comprehensive legislative reform is required to address this issue.
- 2.4 The Discussion Paper recognises that two types of conduct are involved in the publication of unauthorised photographs on the Internet and questions whether each should be restricted. Firstly, the act of taking the photographs and secondly, how the photographs are used. In my view, legislative reform is required in relation to both types of conduct to properly protect children from the harm caused by the publication of unauthorised images.
- 2.5 For the purposes of the following comments, the term “children” refers to persons under 18 years of age. This is consistent with the definition of “child” under the Tasmanian *Children, Young Persons and Their Families Act 1997*.

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<sup>1</sup> *Criminal Code Act 1924*, section 1A; *Classification (Publications, Films and Computer Games) Enforcement Act 1995*, section 71.

### 3. DISCUSSION QUESTIONS AND OPTIONS FOR REFORM

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***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?***

#### 3.1 Comment

- 3.1.1 In my view, there are two options for reform and both should be explored to ensure best practice protection of children in this area. Firstly, there is a need to regulate the taking of photographs of children in public places to reduce the opportunity for persons to obtain images for improper purposes.
- 3.1.2 As referred to in the Discussion Paper, there are questions as to when a person may reasonably expect privacy in a public place. An expectation of personal privacy in a public place involves an inherent conflict that cannot be uniformly resolved. The Discussion Paper highlights the difficulties involved in regulating the taking of photographs, particularly where this is made dependant upon consent. Nevertheless, in my view there are some easily identifiable circumstances where the taking of photographs or images of children should be expressly prohibited and should not be reliant upon consent. In particular, any circumstances where it is clear that the taking of photographs would be for improper purposes. An absolute prohibition could extend to photographs in change rooms, toilets, showers and similar facilities.
- 3.1.3 In addition to an absolute prohibition, there should also be a prohibition against persons taking photographs or images of children for purposes that an ordinary member of the community would find improper or objectionable.
- 3.1.4 Whether the purpose was improper or objectionable would be based upon an objective test, applied on a case by case basis where there is valid concern regarding the circumstances in which photographs were taken. In particular, where there was excessive intrusion into a child's privacy or the photographer seeks to demean those children depicted. For example, the case of school boys who were photographed whilst rowing and these pictures displayed with a focus on their physical attributes as mentioned above. As with any objective test, this test would seek to reflect community values. This prohibition would therefore not exclude a parent at an athletic carnival taking photographs and publishing them in an online school newsletter. However applying the test, the taking of photographs for the purposes of using them for sexual gratification

or like purposes would be prohibited. Whilst intent in these circumstances would be difficult to prove it would, I expect, positively discourage gratuitous photographers.

***Discussion Questions:***

***(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?***

### **3.2 Comment**

- 3.2.1 In addition to restricting the taking of photographs and images of children in public places, the use of these photographs and images that is likely to cause offence should be restricted and publishers should be liable for prosecution.
- 3.2.2 Similarly to the objective test outlined above at 3.1.4, the threshold for prosecution should be whether the community could view the use of the photographs or images as an excessive intrusion of the child's privacy or that the photographer seeks to demean the children or to cause offence. This would encompass photographs published with a salacious flavour or to "gratify sexual interest", as referred to in the offence suggested at paragraph 146 of the Discussion Paper. The publishing of the photographs of school boy rowers previously referred to is again illustrative of such purposes.

***Discussion Questions:***

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

### **3.3 Comment**

- 3.3.1 As stated above, legislative reform is needed in relation to both the taking and use of photographs and images of children in public places.

- 3.3.2 The Discussion Paper outlines two offences which may be created to address these issues. The first offence is based upon whether the photographs or images that a reasonable adults is likely to consider exploitative, offensive or for the purposes of sexual gratification and the second offence is based solely upon whether the photographs are displayed on the Internet for sexual gratification. In my view, the first offence is preferable, as it is sufficiently broad to capture photographs and images not provided for under existing child pornography legislation, which is predominantly concerned with children in an abusive or sexual context. However the nature of the objective test incorporated in this offence should be extended as outlined below.
- 3.3.3 Furthermore, the element of consent should be considered in any legislative reform. This should include consent from the child themselves or from his or her parent or guardian. In keeping with community standards at the present time, a child under the age of 14 years should be deemed incapable of giving consent for the publication of their photograph or image on the Internet.
- 3.3.3 The Discussion Paper also recognises that a new offence could be created focussing on the restriction of voyeurism in situations where a person may expect privacy exists. This approach would be similar to offences addressing voyeurism in New Zealand, the United Kingdom, Canada and the United States. The Discussion Paper suggests that the offence could refer 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.
- 3.3.4 Based upon these options for reform and the issues I have outlined in my above comments, I suggest the development of legislative provisions incorporating the following elements:
- An absolute prohibition on taking photographs or images of children in change rooms, toilets, showers and similar facilities.
  - A prohibition on the photographing of children for purposes that an ordinary member of the community would find improper or objectionable. Factors to be taken into account include:
    - excessive intrusion into the child's privacy
    - an intention to demean the child depicted
    - consent of the child or the child's parents
  - A restriction on the use of photographs and images of children for purposes that an ordinary member of the community would find improper or objectionable. Factors to be taken into account include:
    - excessive intrusion of the child's privacy
    - an intention to demean the child depicted or to cause offence. In particular, those photographs or images published with a salacious flavour or to gratify sexual interest
    - consent of the child of the child's parents

3.3.6 Legislative reform should be coupled with an education campaign regarding existing online regulation schemes and the development of mechanisms for requesting images to be removed from websites as suggested in the Discussion Paper.

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Tasmania

14 October 2004