SUBMISSION TO THE
STANDING COMMITTEE OF
ATTORNEYS-GENERAL (SCAG)
DISCUSSION PAPER UNAUTHORISED
USE OF PHOTOGRAPHS ON THE
INTERNET AND RELATED PRIVACY
ISSUES

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NSW Commission for Children and Young People
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1. THE COMMISSION FOR CHILDREN AND YOUNG PEOPLE

1.1 The NSW Commission for Children and Young People (‘the Commission’) promotes the safety, welfare and well-being of children and young people in NSW.

1.2 The Commission was established by the Commission for Children and Young People Act 1998 (NSW) (‘the Act’). Section 10 of the Commission’s Act lays down three statutory principles which govern the work of the Commission:

   a) the safety, welfare and well-being of children are the paramount considerations
   b) the views of children are to be given serious consideration and taken into account, and
   c) a co-operative relationship between children and their families and community is important to the safety, welfare and well-being of children.

1.3 Section 12 of the Commission’s Act requires the Commission to give priority to the interests and needs of vulnerable children. Children are defined in the Act as all people under the age of 18 years.

1.4 Section 11(d) of the Act provides that one of the principal functions of the Commission is to make recommendations to government and non-government agencies on legislation, policies, practices and services affecting children.

2. GENERAL COMMENTS

2.1 The Commission is pleased to make a submission to the Standing Committee of Attorneys-General (SCAG) discussion paper on Unauthorised use of photographs on the Internet and related privacy issues.

2.2 In preparing this submission the Commission has sought the views of children and young people.
3. WHY TAKING UNAUTHORISED PHOTOGRAPHS OF CHILDREN IS A CONCERN

3.1 The Commission has undertaken a number of projects which have highlighted the importance of privacy to children and young people. The significance these children and young people have attached to their right to privacy stresses the need for protections from unwanted invasions of their privacy.

3.2 Young people have told the Commission that they consider taking unauthorised photographs of children and young people, or indeed any person, an invasion of privacy. Of particular concern to young people are photographs which focus on one person or a small group taken without the knowledge or consent of the subjects.

3.3 Children and young people are generally more vulnerable than adults to unauthorised invasions of their privacy. They are more likely to have fewer concerns than adults about their privacy in public and be more trusting of someone wishing to take their photograph. Children and young people are used to obeying adults or being required to obey adults, for example in school or family settings. Therefore, they are less likely to question or challenge an adult they don't know who is taking a photograph of them. The risk that photographs of children may be used in an exploitative or offensive way is possible and clearly not in their best interests.

3.4 In our society one of the most fundamental expectations of privacy is bodily integrity, including how one's body is exposed. When that expectation is taken away by a person taking and distributing unauthorised photographs it results in people feeling degraded. For many people it results in a feeling of shame and humiliation.¹

3.5 Filming or photography of children and young people without their knowledge, and distribution of the photographs, will sometimes have a sexual element, but not always. However, in some cases the seizure of recording equipment by law enforcement authorities has resulted in the discovery of other evidence of criminal offending involving children as subjects. Research in the US has identified the occasional link with sexual offending.²

4. REGULATING THE TAKING OF PHOTOGRAPHS IN PUBLIC

4.1 The Commission agrees with the point made in the discussion paper that for any society to function in a free and open manner there can not be a

legal requirement for all photographs in public places to be taken with consent. While society depends and expects a certain degree of privacy for individuals, it also depends on social interaction and the ability to function freely in public.

4.2 It is the Commission’s view that a general prohibition on the taking of photos or filming in public places without consent will not only be unenforceable, but a disproportionate response to the issue.

4.3 Such a prohibition would stop parents taking photographs of their children and friends taking photographs of each other. It may also view photography in public as deviant behaviour when a person is, for example, legitimately taking photographs of their own children.

4.4 The Commission is of the view that existing criminal law provisions in New South Wales, such as the Summary Offences Act 1988 and Crimes Act 1900, are adequate to deal with activities that involve unauthorised taking of photographs in public places for inappropriate reasons. For example, in New South Wales a person who photographs a child getting dressed in a swimming pool change room may be prosecuted under section 21G of the Summary Offences Act 1988 (NSW).

4.5 However, the Commission is concerned that there is a general lack of knowledge about these legal protections amongst the community. We suggest that there needs to be education and information for the community on these protections. This is further discussed below.

5. THE UNAUTHORISED USE OR PUBLICATION OF PHOTOGRAPHS

5.1 As young people have told the Commission, it is often not the taking of photographs that is a concern, rather how photographs are used, or the fear of how they will be used. Given the capabilities of technology, once a digital photograph is taken it can be continually replicated, manipulated and rapidly distributed.

5.2 Generally, we expect information only to be used for the purpose it was provided. In Australia this is reflected in legislation such as the Privacy Act 1988 (Cth) as well as State and Territory privacy legislation. Young people suggested to the Commission that a person being photographed should consent to how the photograph will be used. They said that people should have some control over how they are represented on the internet, in the media, or through other forms of mass communication, such as mobile phones.

5.3 The unauthorised publication of photographs can cause distress to children, young people and families involved. It can make them fearful of further occurrences and affect their enjoyment of being in public places. This is particularly the case where the photographs are published for indecent purposes. For children and young people the effects of unauthorised publication of photographs are likely to continue for longer
than they would for adults, as the child or young person has more years to live than an adult.

5.4 Children and young people can also be harmed by viewing offensive or inappropriate photographs of people, particularly other children and young people, on the internet. The impact on children and young people of being exposed to offensive material is becoming clearer and concerns about exposure to offensive sexual material and to violence appears to be well-founded. Research shows that children and young people become desensitised to sexual material and there is a possible encouragement for some vulnerable young people to be sexually abusive themselves.3

5.5 The Commission suggests that it is in the area of unauthorised publication of photographs that further legislative reform should occur at a national level.

6. REGULATING THE UNAUTHORISED USE OF PHOTOGRAPHS

6.1 The Commission considers that civil law responses to this issue are not appropriate as victims may not realise they have been photographed or that their photograph has been published and therefore would never initiate a civil claim. Children and young people are unlikely to have the resources or capacity to initiate a civil claim. In addition, the potential award in a successful claim is unknown as any harm caused to the victim is likely only to be non-economic, which may be difficult to prove and quantify in monetary terms. This uncertainty may deter people from making a claim, the cost of which is likely to be significant.

6.2 It is suggested that the nationally combined approach of criminal law responses and industry regulation that currently exists seems to be the most suitable approach to regulating the use of unauthorised photographs. Criminal law is appropriate as it aims to reflect community concerns and values by criminalising behaviour that causes harm to others. Industry codes of practice are often the most workable solutions to community concerns, particularly in an environment of constantly changing technology, as they balance such concerns with the industry's capacity to adequately address them.

6.3 **Criminal Code Act 1995 (Cth)**

6.3.1 The Commission is of the opinion that the recently introduced Commonwealth **Criminal Code Act 1995** offences of using carriage services, such as the internet and mobile phones, offensively and child pornography are sufficient to cover the majority of instances where inappropriate photographs of children and young people are published. However, there may be opportunities to strengthen these protections for children and young people.

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6.3.2 It is suggested that the offence under the *Criminal Code Act 1995* (Cth) of using the internet offensively could be further expanded to include a test of reasonable interests, similar to the Dutch Copyright Act approach canvassed in the discussion paper. The reasonable interests would be determined by the Courts in each matter. Expanding this provision may potentially mean that unauthorised publication of photographs of children which are not clearly offensive, but against the interest of the child, such as a series of close up photographs of a child playing sport on a website unrelated to sport, are captured.

6.3.3 Consistent with recommendations made by in the New Zealand Law Commission Study Paper, *Intimate Covert Filming*, the Commission suggests that any legislative response to this issue should also provide for confiscation and/or destruction of the photographs so that invasions of privacy are not repeated. As complete destruction of digital photographs is difficult, it is also suggested that the equipment used for distribution be seized. It is suggested that such a provision could be introduced into the Commonwealth *Criminal Code Act 1995*.

6.4 **Classification and removal of internet content**

6.4.1 The Commission supports broadening the National Classification Code to take the context of the material, such as links to other websites, into consideration in determining whether content is offensive. While it is acknowledged this may be difficult in some cases, considering the possible number of links from some websites, it will provide the Classification Board with more information on which to make decisions about classification of offensive material. This will be useful where websites feature a significant number of unauthorised “innocent” photographs of children but have an inoffensive URL and are linked to other offensive websites.

6.4.2 The Commission also supports further consideration of establishing a process where individuals can request their photographs be removed from a website if they object to its content. This could be co-ordinated by the Australian Communications and Media Authority (ACMA) as part of its role in investigating complaints about internet content.

6.4.3 The Commission recognises that the global nature of the internet means that the solution to the issue also has to be global. Local regulation of the internet will not be sufficient to protect a child or young person who has an unauthorised photograph posted on an overseas website. We encourage agencies such as ACMA to work with Internet Service Providers (ISPs) to develop safer services, for example, by extending the use of mechanisms to filter offensive material from overseas before it reaches public users in Australia. This is one strategy to stop unauthorised photographs from overseas being viewed on the internet by the Australian public.

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6.5 Existing protections

6.5.1 However, before any legislative amendments are made the impact of recently introduced provisions should be considered. The Commission understands that in addition to the Criminal Code provision, new laws and industry codes of practice have been recently introduced to deal with inappropriate publishing of photographs of children and that a review is being undertaken of content delivered over mobile phones. These changes may address some of the issues regarding unauthorised publication of photographs and it may be necessary to monitor the impact of these changes over a reasonable period of time before additional legislation is introduced.

7. COMMUNITY EDUCATION AND INFORMATION

7.1 The Commission supports a general community education campaign to increase awareness of the existing mechanisms for regulating the unauthorised use of photographs and encourage the modelling of appropriate mobile phone and camera etiquette by adults. Such a campaign should also focus on educating people how they can make complaints to bodies such as ACMA about offensive internet content.

7.2 The Commission suggests that any such education campaign should include a component targeted at promoting safe behaviours, as well as phone and internet etiquette, amongst children and young people. This should be developed in consultation with children and young people.

7.3 We also recommend that a program be developed to give organisations working with children and young people, such as sporting clubs, skills to address these issues. The program may include information on existing mechanisms for regulating the unauthorised use of photographs and skills in developing policies to protect children and young people, such as having designated photographers for events and requiring consent forms from children and young people before they are photographed.

7.4 The Commission also suggests that education and information should be made available specifically for professional photographers, including media, on taking photographs in public. On occasions the Commission has received phone calls from parents who have expressed concerns regarding photographers taking unauthorised photographs of their children and publishing such photographs. This information for photographers should include a best practice direction that photographers seek consent of the person, and in the case of a child, their parent as well, before taking photographs in public where it is reasonable to do so. While such a requirement cannot be enforced, it can be encouraged through professional associations as an ethical responsibility of photographers.
8. CONCLUSION

8.1 The Commission welcomes the review of the law relating to unauthorised use of photographs. A well thought out response to the new challenges posed by changing technology in our society, such as digital cameras and the internet, is needed to protect children and young people from the potential harms caused by the misuse of such technology.