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*Study Paper 15*

# INTIMATE COVERT FILMING

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Wellington, New Zealand

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## Preface

COVERT FILMING of people in intimate situations raises a number of specific privacy issues. As a modern form of voyeurism it also has a sexual dimension. The issue intersects with a number of areas of law, including privacy and censorship as well as the criminal law. These matters are best considered together, and the Minister Responsible for the Law Commission requested the Commission to prepare an advisory paper on the subject.

In the course of undertaking the research for this paper and considering possible options, we discussed practical issues and approaches to intimate covert filming with people from a number of agencies and bodies. We acknowledge that contribution and the assistance provided to the Commission. In particular, we express our appreciation for the help given by:

The Chief Censor and the Office of Film and Literature Classification

The Broadcasting Standards Authority

The Office of the Privacy Commissioner

The Human Rights Commission

The New Zealand Police

The Ministry of Justice

The Censorship Compliance Unit, Department of Internal Affairs

Judge David Harvey.

The research and writing was undertaken by Neville Trendle and Elizabeth Thomas.

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## Executive summary

**I**NTIMATE COVERT FILMING involves the filming of others in intimate situations without their knowledge or consent, and includes the subsequent distribution of the recorded images. Such filming and distribution has become of increasing concern in recent times because of enhanced technology.

This paper recommends how the legislature should respond to this phenomenon in the New Zealand context. It traverses the impact and harms such behaviours cause to the individuals filmed and to society as a whole, and reviews the possible motivations for such conduct. It considers what coverage exists already in New Zealand statutory and common law to deal with such behaviour, and discusses approaches taken in overseas jurisdictions. The paper does not address the wider issue of covert filming in general. Its review is specifically limited to “intimate” covert filming.

Such filming will always constitute an affront to dignity and an invasion of privacy, concentrating as it does on the most private behaviours and aspects of the self. It deprives the subjects of control over how they are presented to the world and turns them into objects for the gratification of others. Its impact on individual subjects varies but can be extreme and enduring. Although often undertaken for sexual purposes, this will not always be the case.

Technological developments have made it easier to film surreptitiously in private places, and have similarly extended the possibilities for invasion of privacy in public places, such as by “up-skirt filming”, effectively enabling “the video voyeur to pierce the privacy protections traditionally enjoyed by fully clothed individuals”.<sup>1</sup>

The Commission proposes a dual response to intimate covert filming in New Zealand – that of criminalising specific types of conduct engaged in by a film maker, distributor and person possessing a film, while at the same time ensuring there is an accessible civil remedy for the subjects of the films.

The exploitative and sexual nature of such conduct points to the need for a response in the criminal law. Also of significance are the possible links to more serious sexual offending, with voyeurism being a gateway offence in some circumstances.<sup>2</sup> However, even in the absence of a sexual intent, the breadth of the invasion of privacy for the individual and the wider implications for society of such an invasion, support the case for such behaviour to be recognised as a criminal offence.

The responses of individual victims to this violation of their privacy, autonomy and dignity will vary depending on factors such as the nature of the activity filmed, the location, their relationship, if any, with the perpetrator, whether and

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<sup>1</sup> Lance E Rothenberg “Re-Thinking: Peeping Toms, Video Voyeurs, and the Failure of the Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space” (2000) 49 *American University Law Review* 1127, 1152.

<sup>2</sup> See chapter 2, paras 2.34–2.38.

how the image is distributed, the degree to which they are identifiable, and any pre-existing factors relating to the individual. The harms that people experience from such filming are well recognised and documented internationally. Psychological symptoms and disorders, distrust in relationships, fear for personal safety and shame and humiliation can result. Clearly, a tailored civil remedy to redress the particular harm should be made available.

At common law, following the majority Court of Appeal decision in *Hosking v Runting*,<sup>3</sup> we note that civil proceedings in relation to intimate covert filming may be taken in tort for interference with privacy and, in a typical fact situation, where the subject is identified and filming is published, the elements are likely to be made out.

The Law Commission considers that the subjects of intimate covert filming should also be able to pursue remedies through the existing processes of the Privacy Act 1993. We recommend amendments to the Privacy Act 1993 to facilitate this.

Depending upon the factual circumstances of the filming and their own circumstances and means, the subjects of intimate covert filming would be able to choose whether to proceed via the Privacy Act 1993 or civil proceedings for interference with privacy.

We have also considered, but do not recommend amendment to the Films, Videos, and Publications Classification Act 1993 to extend the application of that legislation to intimate covert filming and distribution.

## RECOMMENDATIONS

We recommend that the following provisions be added to the Crimes Act 1961.

### **Making a voyeuristic recording**

- 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 a 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.

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<sup>3</sup> *Hosking v Runting and Others* (25 March 2004) Court of Appeal CA 101/03 Gault P, Blanchard J, Tipping J.



## **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.

## **Amendments to the Privacy Act 1993**

- R5 We recommend that the Privacy Act 1993 be amended in the following ways:
- amend section 56 to provide that the exemptions for "personal information relating to domestic affairs" do not extend to information obtained through criminal offending, whether or not charged or convicted; and
  - amend section 85 to give the Human Rights Review Tribunal an explicit power when dealing with cases of intimate covert filming, to make orders for forfeiture of any images or any equipment used in making or distributing such images.
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# 1

## Introduction

- 1.1 **C**OVERT FILMING, where it involves a person making a surreptitious visual record of another person in intimate circumstances without their consent, is a problem that has afflicted many overseas jurisdictions. In New Zealand, there have been instances of the use of miniature cameras, cell-phone cameras and other devices to record women and children visually in circumstances of undress or intimacy, without their knowledge or approval. In addition to the concerns caused by such secret filming, the potential publication of the images also raises issues for concern.
- 1.2 Neither the activity of covert filming in intimate circumstances, nor the subsequent distribution of the images is expressly dealt with in current legislation in New Zealand. The Commission was asked by the Minister Responsible for the Law Commission in its Terms of Reference:
- ... to review issues relating to covert filming and make recommendations as to options for law reform. In particular, the Commission is to consider covert filming involving the taking of a visual record of another person without their approval in situations involving nudity, partial nudity, or physical or bodily intimacy where people have a reasonable expectation of privacy, and the subsequent use of any such record.
- 1.3 In addressing this reference, the Commission was mindful that it had arisen in the context of concerns about cell-phone cameras being used in changing rooms, and concerns expressed by Parliament's Government Administration Committee as to the need for amendment to the Films, Videos, and Publications Classification Act 1993 to ensure it covered covertly filmed images involving nudity.<sup>4</sup> We have, therefore, concentrated on covert filming in what might be termed "intimate" circumstances, in accordance with the emphasis of the reference. We have not focused on wider issues of covert filming.
- 1.4 Throughout this paper we use the term "intimate covert filming" to describe our particular area of focus. The words "filming" or "recording" include all forms of visual recording.

### BACKGROUND

- 1.5 Overseas, particularly in the United States of America, intimate covert filming has become an issue sufficient to trigger a specific legislative response. The phenomenon seems also to have spawned its own lexicon denoted by expressions such as "up-skirt", "down-blouse" and "video voyeurism".
- 1.6 Intimate covert filming is often regarded as a contemporary form of voyeurism – the act of a person observing others covertly as they undress, undertake intimate bodily functions, such as using a toilet or showering, or engage in sexual activities,

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<sup>4</sup> Government Administration Committee "Inquiry into the Operation of the Films, Videos, and Publications Classification Act 1993 and Related Issues" [2003] AJHR 1.5A 18–24.

for the purpose of deriving sexual gratification. With the aid of modern technology, however, the actions of the “peeping Toms” of yesteryear can pose a significant threat to commonly held notions of privacy. The recording of the images seen by the voyeur for future personal sexual gratification, for sharing with others, or for commercial gain adds a new dimension to an old problem.

1.7 This particular form of intrusion into the privacy of another may take a number of forms, and may occur in a variety of settings. Some recent instances that have occurred in New Zealand include:

- discovery of images of two teenage girls getting changed before and after swimming and getting ready for bed taken by a video camera hidden in their bedroom;<sup>5</sup>
- a technician who, in the course of his work for a theatre group, installed a hidden camera in the dressing room of female performers;<sup>6</sup> and
- discovery of video footage of boys getting changed for swimming, which appears to have been shot using a hand-held camera from behind a one-way window.<sup>7</sup>

1.8 Examples of intimate covert filming reported overseas include:

- a woman trying on a swimsuit in the changing booth at a market stall whose daughter noticed a partially concealed camera;<sup>8</sup>
- a man who hid a video camera in his backpack with the lens exposed and then secretly aimed the lens up the skirts of a number of female sales clerks who sat at tables while assisting him;<sup>9</sup>
- a man who invited women friends to visit his home and then secretly filmed them when they used his bathroom;<sup>10</sup>
- a tanning salon proprietor in Missouri who surreptitiously videotaped more than 100 women while they tanned in the nude;<sup>11</sup> and
- a school principal who filmed cheerleaders getting changed with a video camera concealed behind a two-way mirror.<sup>12</sup>

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<sup>5</sup> Censor’s Decision (24 February 1999) Office of Film and Literature Classification, 9801483 and 9801484.

<sup>6</sup> Censor’s Decision (14 April 1999) Office of Film and Literature Classification, 9900223.

<sup>7</sup> Censor’s Decision (20 July 2000) Office of Film and Literature Classification, 525.

<sup>8</sup> A market trader was convicted under the Public Order Act 1986, section 5 (UK). He had a changing area at the back of his stall where customers could try on swimwear. He had set up a partially concealed video camera in this changing area. A customer and her daughter were in the changing area when the daughter noticed the camera, and they subsequently reported the matter to the police. An appeal against conviction was dismissed because it was held that the trader’s actions were capable of amounting to disorderly and insulting behaviour likely to cause harassment, alarm or distress to his customers and thus contrary to section 5. (*Vigon v Director of Public Prosecutions* [1997] Queen’s Bench Divisional Court: Kennedy LJ and Smith J).

<sup>9</sup> This reportedly happened in shopping malls in Wisconsin in 1998. See Clay Calvert and Justin Brown “Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace” (2000) 18 *Cardozo Arts & Ent LJ* 469, 491.

<sup>10</sup> This reportedly happened in Pennsylvania in 1999. See Calvert and Brown, above, 533.

<sup>11</sup> Rothenberg, above n 1, 1150.

<sup>12</sup> This reportedly happened in Ohio in 1997. See Calvert and Brown, above n 9, 539.

- 1.9 The type of conduct involved has several common features:
- it is done without the knowledge of the person being filmed;
  - it is done without their consent;
  - it usually involves the concealment of the recording device; and
  - it focuses on places and times where the subjects are likely to be nude, semi-nude and/or engaging in sexual activity or other intimate bodily functions.
- 1.10 The concern is not only with the surreptitious recording of another person in intimate circumstances where they have a reasonable expectation of privacy, it also extends to the possible publication of the image. Two obvious examples are publication via the internet and the use of cell-phones to record the image and then send it to others.
- 1.11 It is the use of, or access to, “high tech” equipment to facilitate the intrusion into the privacy of others that has prompted legislative intervention, or proposed intervention, in a number of overseas jurisdictions. While the law has generally been adequate to deal with traditional “peeping Tom” activities that involve the unaided surreptitious observation of others in circumstances of undress or intimacy, it has proven inadequate to meet the challenges to personal privacy posed by the recording of those observations and the circulation of them to others.
- 1.12 The context of intimate covert filming raises another concern. In many instances, the purpose of the recording is sexual gratification for the person making it. In some cases, the seizure of the recording by law enforcement authorities has resulted in the discovery of other evidence disclosing criminal offending, such as offences against the Films, Videos, and Publications Classification Act 1993 involving children as subjects. Overseas, the occasional link with sexual offending has been identified.<sup>13</sup>

## STRUCTURE OF THE STUDY PAPER

- 1.13 This study paper discusses:
- the nature of the harms caused by covert filming of people in intimate situations, and the distribution of such images;
  - remedies available under current New Zealand law; and
  - proposals for legislative reform to address this conduct.
- 1.14 Appendix 1 provides an overview of relevant New Zealand law, and appendix 2 outlines the relevant law in comparable jurisdictions.

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<sup>13</sup> See R Karl Hanson and Andrew JR Harris “Voyeurism: Assessment and Treatment” in D Richard Laws and William O’Donohue (eds) *Sexual Deviance: Theory, Assessment and Treatment* (The Guilford Press, New York, 1997) 311–331, and discussion in chapter 2, paras 2.34–2.38.

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## 2

# Harms caused by intimate covert filming

- 2.1 **E**XAMINATION of how the law should deal with the covert filming of people in intimate situations and distribution of the images requires an understanding of the type and level of harms caused by this conduct. The addressing of these questions will help determine the appropriate level and type of responses. The issue has both privacy and sexual dimensions.

### THE PRIVACY DIMENSION

- 2.2 As acknowledged by all who write in this field, the concept of privacy is notoriously hard to define. Although it is not necessary for us to develop a definition, it is helpful to consider the value that individuals and society ascribe to privacy. Discussions of the topic almost invariably identify privacy as an essential element in fostering and preserving the dignity, autonomy and freedom of the individual.
- 2.3 The Law Reform Commission for Ireland, in its 1998 *Report on Privacy: Surveillance and the Interception of Communications*, summed up contemporary views on the value of privacy. First, it is closely connected to the inherent dignity of the person: “The intimacies of private life go to the very core of what it means to be human”.<sup>14</sup> Secondly, privacy is closely related to human freedom, autonomy and self-determination. It provides the space necessary for personal growth and development and for the exercise of freedom, including the “freedom to select which aspects of one’s personality should be shared with others and on what terms”.<sup>15</sup> Privacy provides the space to establish and develop relationships with others, another key element of personal growth. It is one of the values that helps to prevent autonomous human beings from being turned into objects or things.<sup>16</sup>
- 2.4 Both the Irish Law Reform Commission and the Law Reform Commission for Victoria also identify the social value of privacy. Social organisation relies on the ability of individuals to be fully functioning human beings, which is assisted by the ‘shield of privacy’. The Irish Law Reform Commission points to “the implicit social contract in every society” that some form of sanctuary from everyday life is needed for society to function in a peaceful and orderly manner,<sup>17</sup> and argues that privacy contributes to “the democratic life of the polity” in two key ways. First, democracy rests on the dignity and inherent self-worth of all

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<sup>14</sup> Law Reform Commission (Ireland) *Report on Privacy: Surveillance and the Interception of Communications* (LRC 57 Dublin, 1998) 3.

<sup>15</sup> Law Reform Commission (Ireland) above n 14, 3.

<sup>16</sup> See also the Victorian Law Reform Commission *Workplace Privacy: Issues Paper* (Melbourne, 2002) 19.

<sup>17</sup> Law Reform Commission (Ireland), above n 14, 4.

human beings. Secondly, those who wish to contribute to public life need “assurance of some secluded space away from public gaze”.<sup>18</sup>

- 2.5 The Victorian Law Reform Commission highlighted that breaches of privacy will affect more than the individuals concerned, quoting Margaret Otlowski: “Consideration must be given to the cumulative effect of the invasion of an individual’s personal sphere and the impact that this has on society as a whole”.<sup>19</sup>
- 2.6 Protection of privacy will not, of course, be absolute. While privacy contributes to other fundamental values for individuals and society, including freedom of expression, freedom of thought, conscience and religion, and freedom of association, it must also be balanced against such values. Society depends on a certain degree of privacy for individuals, but it also depends on social interaction and the ability to function freely in public.

### **Privacy impacts of covert filming and distribution**

- 2.7 Privacy contributes significantly to people’s right and ability to be fully functioning human beings and thereby assists in the functioning of civil society. What then is the impact on the individual and on society of covert filming of people in intimate situations and subsequent distribution of the images?
- 2.8 Covert filming robs individuals of the freedom to choose how they present themselves to others. Because they do not know they are being filmed they cannot adjust their behaviour to minimise the intrusion and control how they are viewed. The United Kingdom *Report of the Committee on Privacy* (“Younger Report”) commented: “Visual surveillance is even more offensive when it is surreptitious. Unless the victim conducts himself always on the assumption that he is being watched, he can take no steps, even unwelcome ones, to shield himself”.<sup>20</sup>
- 2.9 Surreptitious filming typically reduces people to the objects of another’s gaze, and if the images are distributed, particularly on the internet, the subjects become the objects of many people’s gaze. Often the filming involves parts of the body only, which intensifies the objectification of human beings for others’ gratification. The Irish Law Reform Commission opened their *Report on Privacy: Surveillance and the Interception of Communications*, with a quote that aptly sums up these impacts of privacy invasions:

Watching people against their will ... forces them to see themselves and their plans through the eyes of another, as object rather than subject, undermining their self-respect and evincing a lack of respect for their freedom to make choices without pressure from the outside.<sup>21</sup>
- 2.10 Covert filming of people in intimate situations violates the arguably fundamental desire of human beings to control exposure of their own body. As Rothenberg argues, the significance of such control is illustrated by the “acute degradation inherent in non-consensual disrobing that often occurs in situations of war, imprisonment, and rape”.<sup>22</sup> Frequently, the video voyeur exposes the very body parts and the very acts that individuals most want shielded from public view.

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<sup>18</sup> Law Reform Commission (Ireland), above n 14, 4.

<sup>19</sup> Victorian Law Reform Commission, above n 16, 18, n 44 (Margaret Otlowski: *Implications of Genetic Testing for Australian Law and Practice*, 2001, 45).

<sup>20</sup> *Report of the Committee on Privacy* (“Younger Report”) (London: HMSO, Cmnd 5012, 1972) 171.

<sup>21</sup> Law Reform Commission (Ireland), above n 14, 1 and n 1.

<sup>22</sup> Rothenberg, above n 1, 1136–1137.

## “Up-skirt videoing”

- 2.11 “Up-Skirt” videoing is a self-explanatory term for covertly taken images, with the filming usually occurring in a public place such as a shopping mall. A variant on this is “down-blouse filming”. This paper uses “up-skirt videoing” to cover both terms.
- 2.12 The conventional view is that an individual abrogates his or her right to privacy once the individual ventures into a public place. In the course of his judgment in *Hosking v Runting*, a case involving potential publication of a photograph of the appellants’ children that had been taken, without consent, in a public place, Gault P noted that “[t]here is a considerable line of cases in the United States establishing that generally there is no right to privacy when a person is photographed on a public street”.<sup>23</sup> Gault P did, however, go on to note that there may be exceptions to this rule, referring to *Peck*, a case concerning the publication of photographs taken by closed circuit television cameras of a man who tried to commit suicide in a public street, and “perhaps” *Campbell*, a case concerning the publication of photographs of model Naomi Campbell leaving a Narcotics Anonymous meeting.
- 2.13 A degree of public privacy was recognised by the Alabama Supreme Court in *Daily Times Democrat v Graham*.<sup>24</sup> The local paper published a photograph of a woman whose underwear was inadvertently exposed when air jets at a fun fair blew her dress up over her head. The Court held that this constituted an invasion of the woman’s privacy. The United States *Restatement of the Law, Second, Torts* states that:
- Even in a public place, however, there may be some matters about the plaintiff, such as his underwear, or lack of it, that are not exhibited to the public gaze; and there may be invasion of privacy when there is intrusion upon these matters.<sup>25</sup>
- 2.14 Similarly, in New Zealand in *Bradley v Wingnut Films Ltd* it was held that there may be circumstances where “the fact that something occurred or exists in a public place does not necessarily mean that it should receive widespread publicity if it does not involve a matter of public concern”.<sup>26</sup>
- 2.15 As these examples show and as argued by Paton-Simpson<sup>27</sup> and McClurg,<sup>28</sup> privacy is not an all-or-nothing concept that is forfeited the moment the subject steps onto the street. In Western society at least, humans have a fundamental desire to control access to viewing of their most intimate body parts. This expectation still exists when the person is in a public place, and arguably extends to keeping control over who sees one’s underwear, unless clothes are worn in such a manner that underwear is readily able to be viewed. In the great majority of situations it is common sense that the woman who wears a dress in public

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<sup>23</sup> *Hosking v Runting*, above n 3, para 164.

<sup>24</sup> *Daily Times Democrat v Graham* (1964) 162 So 2d (Ala).

<sup>25</sup> *Restatement of the Law, Second, Torts* 652B comment c (1977) quoted in Elizabeth Paton-Simpson, “Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places” (2000) 50 U Toronto LJ 305, 311.

<sup>26</sup> *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415, 424 (HC) Gallen J. This case centred on the appearance of a family tombstone in a “comedy horror” movie. The plaintiff claimed breach of privacy among other causes of action.

<sup>27</sup> Paton-Simpson, above n 25.

<sup>28</sup> Andrew Jay McClurg, “Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places” (1995) 73 North Carolina Law Review 989.



does not expect others to view under her dress, except to the degree that may be possible in a fleeting moment, and certainly not as a permanent image that can be endlessly manipulated and enhanced.

### **The significance of filming and distribution**

- 2.16 Covert filming results in a permanent image that, in the digital age especially, can be endlessly replicated, manipulated and distributed. This takes filming into a different realm from the traditional “peeping Tom” invasion of privacy. McClurg argues that photography intensifies invasion of privacy in three important ways.<sup>29</sup> First, the photograph makes a permanent image, thereby transcending temporal limitations and allowing the photographer to take, keep and scrutinise that part of the person, who is now an object. Secondly, photographs can reveal more than one would see through casual observation, especially through the opportunity for repeated scrutiny or the enlargement possibilities of modern technology. Thirdly, photographs permit dissemination to a much larger audience and to audiences beyond those anticipated by the subject. For instance, while people are prepared to undress in a communal single-sex changing room at a swimming pool, they expect that only those who share the changing room at the time will see them, and then only with the degree of observation permitted by the naked eye, and in accordance with social mores against protracted staring.
- 2.17 Technology can enable people to make images that are not readily accessible to the naked eye, whether this be through long-range lenses or pinhole cameras concealed in bags and placed below women’s skirts. Not only does this extend the possibilities for privacy invasion, it also makes the invasion less likely to be detected.
- 2.18 It is also relevant that the technology is comparatively inexpensive and easy to operate, and, in the case of cell-phone cameras, extremely widespread. One newspaper report from the United States of America claimed that by the end of 2003, worldwide sales of cell-phone cameras were expected to be between 40 and 65 million.<sup>30</sup> As an example of the traffic in cell-phone camera pictures, the same article noted that during the month of July 2003, one million cell-phone camera pictures were sent and received over one United States of America network alone.<sup>31</sup>
- 2.19 Demand for such images is fuelled by the commercial gains that can be made from websites for relatively little outlay. Rothenberg describes the phenomenon thus: “Modern electronics have transformed the deviant, usually solitary, act of peeping into a booming and perverse online-industry, built specifically upon the exploitation of non-consensual pornography”.<sup>32</sup> Both Rothenberg and Pope list

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<sup>29</sup> McClurg, above n 28, 1041–1043.

<sup>30</sup> Brad Wong “Voyeurism by Cell Phone Charged: Man Accused of Sliding Camera Under Woman’s Skirt in Market” (10 December 2003) *Seattle Post-Intelligencer* Seattle <[http://seattlepi.nwsourc.com/local/151817\\_cell10.html](http://seattlepi.nwsourc.com/local/151817_cell10.html)> (last accessed 24 May 2004).

<sup>31</sup> Wong, above.

<sup>32</sup> Rothenberg, above n 1, 1145.

numerous voyeuristic websites.<sup>33</sup> These include sites with names such as “Ultimate Upskirts: Nothing Like the Flash of White Panties”, “Voyeurs Corner: the Peepers Playhouse”, and “Raw Voyeur: A Peeper’s Paradise”. Voyeuristic images are cheap to make because there is no need to pay actors and distribution is easy and inexpensive. The sites are highly profitable because of the fees paid by users and the high number of hits, and because the images are often supplied free of charge. Reportedly, “[m]any of the voyeurs who submit material are more interested in seeing it displayed on the Internet as a ‘trophy’ and do not want any money in return”.<sup>34</sup>

- 2.20 When intimate covert filming is followed by distribution of the images there is a double invasion of privacy: the first when an intimate moment or facet of the individual’s life is photographed or filmed, the second with publication. Now an audience, that is not of the subject’s choosing (and possibly an extremely wide audience in the case of web publication), can see images of the person that he or she would prefer to keep private.

### Perspectives of the subjects

- 2.21 The impacts on subjects of covert filming and distribution will vary from case to case and from individual to individual. Relevant factors include the nature of the activity filmed, the location, the relationship, if any, with the perpetrator, whether and how the image is distributed and any pre-existing factors that make the subject particularly vulnerable. The responses are likely to fall within the parameters of development of psychological symptoms and disorders, distrust in relationships, fear for personal safety, and shame and humiliation.<sup>35</sup>
- 2.22 Examples of the way individuals have reacted include a 1999 case involving a technician for an operatic society production in Christchurch, New Zealand who secretly installed a video camera in a television in the female performers’ changing room. The women were videoed on a number of nights before the recording device was discovered. The submission made to the Office of Film and Literature Classification included the reported comments of six of the women who were surreptitiously filmed. One said: “I cried and felt upset and violated about this, disgusted and that being a private place it should be private and that no-one should have access to it to do this sort of thing”. Other women used terms such as “sick and shocked”, “really disgusted”, “humiliated”, and “really annoyed” to describe their reactions.<sup>36</sup>
- 2.23 In another example, the trusted friend and neighbour of a Louisiana family installed cameras in the family’s house above the bathroom and bedroom. When this was discovered the victim reported that she felt as though her skin had “been ripped off”. She developed an eating disorder, spent nights sleeping in the cupboard and felt that the voyeur’s actions should be “treated like rape”.<sup>37</sup>

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<sup>33</sup> Rothenberg, above n 1, 1145, n 80 and Maria Pope “Comment: Technology Arms Peeping Toms with a New and Dangerous Arsenal: A Compelling Need for States to Adopt New Legislation” (1999) 17 *The John Marshall Journal of Computer and Information Law* 1167, 1193–1194, n 194.

<sup>34</sup> Pope, above, 1193–119, n 195, n 196, n 197.

<sup>35</sup> Robert I Simon “Video Voyeurs and the Covert Videotaping of Unsuspecting Victims: Psychological and Legal Consequences” (1997) 42(5) *Journal of Forensic Sciences*, 884.

<sup>36</sup> Censor’s Decision, above n 6.

<sup>37</sup> Reported in Calvert and Brown, above n 9, 520.

- 2.24 There were similar reactions from the victim in a Hong Kong case prosecuted as sexual harassment.<sup>38</sup> A male student concealed a camera in the university hostel room of a female friend. The camera was discovered after some months and contained tapes of the young woman getting changed. In her evidence to the Court the plaintiff said that:
- ... she was shocked, upset, distressed and was literally trembling upon discovery of the camcorder. After viewing the tape in the camcorder, she was shaking and had to be supported by her friend ... . Furthermore, the incident had left her feeling violated, exploited, betrayed, humiliated and hurt.
- 2.25 For some time following the discovery she was afraid to stay in her hostel room, unable to go to sleep alone and felt she was being watched whenever she was changing.
- 2.26 The invasion caused by publication is illustrated by the comments of one of a group of male student athletes who claim they were secretly filmed in locker rooms, with the images subsequently sold on the web: “I pulled up the home page and I am looking at myself naked on the Internet ... . It is terrible because I have no control over it”.<sup>39</sup>

### **A privacy offence**

- 2.27 Many jurisdictions treat this as a privacy offence, albeit often with a sexual element as well. In the Federal jurisdiction of the United States, the Oxley Bill proposes to introduce an offence of “Video Voyeurism” to the United States Code by inserting the offence within a new privacy chapter.<sup>40</sup> The States of Delaware, Hawaii, Maine, Missouri, New Hampshire, Pennsylvania, Tennessee and Wisconsin deal with this conduct under offence headings of “violation” or “invasion of privacy”.<sup>41</sup> Similarly, in South Carolina, Connecticut and South Dakota the relevant offences sit alongside privacy offences such as eavesdropping, peeping and tampering.<sup>42</sup>
- 2.28 The Canadian Bill proposing the offence of criminal voyeurism defines it as both a privacy and a sexual offence, a dual definition that was supported by the great majority in the consultation on the proposal by the Canadian Department of Justice.<sup>43</sup>

<sup>38</sup> *Yuen Sha Sha v Tse Chi Pan* [1999] 1 HKC 731, 737.

<sup>39</sup> Calvert and Brown, above n 9, 479.

<sup>40</sup> One-hundred-and-seventh Congress, 2d Session, H R 3726, Video Voyeurism Act of 2002, United States House of Representatives, The Library of Congress, Thomas Legislative Information on the Internet <<http://thomas.loc.gov/cgi-bin/query/?c107:HR.3726:>> (last accessed 24 May 2004).

<sup>41</sup> Delaware Code Annotated, Title 11, § 1335 (2003); HRS, Title 37, § 711-1111 (2003); MRS, Title 17-A, § 511 (2003); RS Mo, Title 38, § 565-253 (2003); (New H) R S A, Title LXII, § 644:9 (2003), Pa C S, Title 18, § 7507.1 (2003); Tenn Code Ann, Title 39, §39-13-605 (2003); and Wis Stat, Chapter 941, § 942.08 (2003).

<sup>42</sup> Code Laws of South Carolina Annotated, Title 16, § 16-17-470 (2002); Conn Gen Stat, Title 53a § 53a-189a (2003); and S D Codified Laws, Title 22, § 22-21-1 (2003).

<sup>43</sup> Department of Justice (Canada) *Voyeurism as a Criminal Offence: Summary of the Submissions* (Ottawa, 2002) available at: <<http://www.canada.justice.gc.ca/en/cons/voy/summary-final.html>> (last accessed 24 May 2004). See also appendix 2: The law in other jurisdictions, paras A28–A32.

- 2.29 The offence to privacy was discussed by the United Kingdom Review Committee that considered voyeurism in the context of its review of sexual offences. It proposed that the offence not require a sexual purpose, partly because of the difficulty of proving such, but also because “observation in the circumstances of privacy was sufficient, and the fear and distress its discovery could cause was sufficient in itself to justify the offence”.<sup>44</sup>
- 2.30 Both the Irish Law Reform Commission and the Law Reform Commission of Hong Kong have proposed statutory privacy torts that would cover aspects of covert filming and distribution.<sup>45</sup>

## THE SEXUAL DIMENSION

- 2.31 In addition to the privacy dimensions, it is evident from international responses that many jurisdictions have treated intimate covert filming as a sexual offence. In the United Kingdom, the offence of “voyeurism” is found in the Sexual Offences Act 2003. In Canada, one of the arms of the offence of criminal voyeurism is that the “observation or recording is done for a sexual purpose”.<sup>46</sup> In Ohio, the offence of voyeurism appears in the “Sexual Offenses” chapter of the Ohio Revised Code.<sup>47</sup>
- 2.32 Even though most of the United States jurisdictions describe their relevant offences as violations of privacy, or place them within the privacy chapters of their criminal codes, the frequent use of the term “voyeurism” indicates that this is, nevertheless, seen as an offence with a sexual element.<sup>48</sup> Often, the offences require a sexual intent on the part of the perpetrator, be it the “lewd or lascivious” purpose required in Louisiana, or the requirement that the offence be done for “obtaining sexual gratification” on the part of the person doing the filming or another, as is the case with the new offence in the United Kingdom.<sup>49</sup>
- 2.33 It is easy to argue that a sexual intent underlies most of this conduct because it normally focuses on people in situations when they are likely to be nude or partially nude. Thus, landlords, friends or neighbours install spy cameras to view bathrooms or bedrooms, clothing-stall owners conceal cameras in fitting rooms and people take cell-phone cameras into swimming pool and gym changing rooms. Up-skirt videoing is another version of this behaviour, focusing as it does on the intimate body parts and underwear of unsuspecting individuals. Even if the photographs are made for distribution rather than personal use, the most

<sup>44</sup> Home Office *Setting the Boundaries: Reforming the Law on Sex Offences* (London, 2000) available at <<http://www.homeoffice.gov.uk/docs/vol1mainpdf>> (last accessed 24 May 2004), 122. For further discussion see appendix 2: The law in other jurisdictions, paras A75–A82.

<sup>45</sup> Law Reform Commission (Ireland), above n 14 and Law Reform Commission of Hong Kong, Sub Committee on Privacy, *Consultation Paper on Civil Liability for Invasion of Privacy* (Hong Kong, 1999) <<http://www.info.gov.hk/hkreform/reports/privacy-e.doc>> (last accessed 31 March 2004). See also appendix 2: The law in other jurisdictions, paras A83–A102.

<sup>46</sup> Bill C-20, An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canada Evidence Act, proposed section 162(1)(c) <<http://www.parl.gc.ca/>> (last accessed 31 March 2004).

<sup>47</sup> Ohio Revised Code Ann, Title 29, § 2907.08 (Anderson 2003).

<sup>48</sup> The *Oxford English Dictionary* defines a voyeur as “one whom obtains sexual gratification from looking at others’ sexual actions or organs”.

<sup>49</sup> Louisiana Revised Statutes, Title 14, § 283 (2003); and Sexual Offences Act 2003 (UK) s 67.

likely market will be a website or other publication that is aimed at sexual gratification of the viewers. The availability of the internet as a means of publication fuels the market for voyeuristic images. The reportedly vast number of voyeuristic websites featuring unsuspecting victims who have been filmed while nude or semi-nude underlines the sexual aspect of much of this filming.<sup>50</sup>

## Voyeurism

- 2.34 In discussing covert observation or filming, which they call voyeurism, the Canadian Department of Justice noted three core elements: “the surreptitious nature of the observations; the private and intimate nature of what is observed; and sexual gratification”.<sup>51</sup> In addition, they note that some voyeuristic behaviour is symptomatic of a more serious and compulsive sexual disorder. The Canadian paper cites the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders* with respect to the conditions under which voyeurism may switch from a behaviour to a sexual disorder or paraphilia.<sup>52</sup> Voyeurism may be symptomatic of a sexual disorder if the behaviour becomes recurrent, and is associated with intense sexually arousing fantasies, sexual urges or behaviours, and if the fantasies, urges, or behaviours result in clinically significant distress or impairment in social, occupational, or other important areas of functioning, and particularly if the behaviour persists over an extended time period.<sup>53</sup> Voyeurism may be an obsessive and compulsive disorder that may both contribute to, and reinforce, violent sexual fantasies, and is often associated with other paraphilias. Voyeurs typically reduce their victims to objects in their fantasies, which means they can then do what they will to them, and some go on to act out those fantasies.<sup>54</sup>
- 2.35 Both the Canadian Department of Justice and the Review Committee established to consider sexual offences in the United Kingdom, refer to research evidence that links voyeurism with other more serious sexual crimes. The Canadian report noted research evidence that most voyeurs engage in at least one other sexually deviant behaviour, usually exhibitionism or frotteurism (non-consensual sexual touching or rubbing).<sup>55</sup> There is evidence that voyeurism often occurs at an early point in the individual’s criminal history and as part of a continuum of sexual

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<sup>50</sup> See para 2.19.

<sup>51</sup> *Voyeurism as a Criminal Offence: A Consultation Paper* (Communications Branch, Department of Justice, Ottawa, 2002) <<http://www.canada.justice.gc.ca/en/cons/voy>> (last accessed 31 March 2004) 3.

<sup>52</sup> *Paraphilia* is a diagnostic term used to describe a compulsive condition responsive to, and predicated and dependent upon, stimulus that are unusual and personally or socially unacceptable, and that are combined with fantasy to stimulate sexual arousal and fulfilment. Recognised paraphilias other than voyeurism include: exhibitionism, paedophilia, frotteurism (non-consensual sexual touching or rubbing), sexual masochism and sexual sadism. See Joseph Davis “Voyeurism: A Criminal Precursor and Diagnostic Indicator to a Much Larger Sexual Predatory Problem in Our Community” in Ronald M Holmes and Stephen T Holmes (eds) *Current Perspectives on Sex Crimes* (Sage Publications Inc, Thousand Oakes, California, 2002) 73, 75.

<sup>53</sup> *Voyeurism as a Criminal Offence*, above n 51, 4.

<sup>54</sup> Davis, above n 52, 79-81.

<sup>55</sup> *Voyeurism as a Criminal Offence*, above n 51, 4, n 4 referring to Hanson, R Karl and Andrew JR Harris “Voyeurism: Assessment and Treatment” in *Sexual Deviance: Theory, Assessment and Treatment* (New York, The Guilford Press, 1997) 311, 313.

disorders that may get steadily more serious.<sup>56</sup> One study is reported to have revealed that approximately 20 per cent of voyeurs have committed sexual assault or rape.<sup>57</sup> Voyeurism is a chronic and prolific behaviour. In one study of 411 men, 13 per cent (62 men) admitted to being voyeurs and self-reported 29,090 voyeuristic acts against 26,648 victims.<sup>58</sup> As with many others with sexual disorders, voyeurs tend to rationalise that their conduct is not harmful and have little empathy with their victims.<sup>59</sup>

- 2.36 The United Kingdom Review Committee refers to a study by Abel, Mittelman and Becker that reported 14 per cent of child molesters and 20 per cent of rapists had committed voyeurism.<sup>60</sup> A 1984 study of 41 convicted serial rapists in the United States found a much higher correlation with voyeurism. This was found to be the predominant past or present sexual behaviour among the group, with 68 per cent of the men having a history of voyeurism that began in their childhood or adolescence.<sup>61</sup> By way of contrast, a recent Australian study of men serving prison terms for child sexual abuse in Queensland found a much lower percentage of paraphilias among these offenders. The Queensland study used criminal records and self-report data, and, with respect to paraphilias, found that 5.4 per cent of the study population could be diagnosed with voyeurism. This was the same percentage as for exhibitionism, with only frotteurism being more common in the group (9.0 per cent).<sup>62</sup>
- 2.37 On the basis of the studies showing correlations between voyeurism and more serious sexual offending, it is sometimes argued that voyeurism should be dealt with more seriously than as a “nuisance offence”. Although such correlations do not equate to causation, Davis argues that instances of voyeurism “should be considered, both clinically and legally, [as] red flags for other sexually deviant offenses”, with voyeurs being assessed for probable future danger and the potential for violence.<sup>63</sup> Such early identification could be instrumental in preventing future sexual offending.
- 2.38 Voyeurism will not always be a gateway offence to more serious sexual offending, nor will it always be part of a pattern of serious offending, nor will all individual voyeurs engage in the conduct to the extent that it becomes a sexual disorder. In some instances these wider patterns will be present, but irrespective of such links, voyeurism is at heart a sexually motivated behaviour, and the act of taking and distributing photographs of people in intimate situations will very often have a sexual motivation.

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<sup>56</sup> *Voyeurism as a Criminal Offence*, above n 51, 4, n 5 referring to Hansen and Harris, 314.

<sup>57</sup> *Voyeurism as a Criminal Offence*, above n 51, 4, n 6 referring to Hansen and Harris, 314.

<sup>58</sup> *Voyeurism as a Criminal Offence*, above n 51, 5, n 9 referring to Abel, GG and JL Rouleau “The Nature and Extent of Sexual Assault” in WL Marshall, D and R Laws and HE Barbaree (eds) *Handbook of Sexual Assault: Issues, Theories and Treatment of the Offender* (Plenum Press, New York, 1990) 9, 15.

<sup>59</sup> *Voyeurism as a Criminal Offence*, above n 51, 5, n 12 referring to Hansen and Harris, 317–318.

<sup>60</sup> *Setting the Boundaries*, above n 44, 121.

<sup>61</sup> Cited in Davis, above n 52, 77.

<sup>62</sup> Stephen Smallbone and Richard Wortley “Child Sexual Abuse in Queensland: Offender Characteristics and Modus Operandi” (Queensland Crime Commission and Queensland Police Service, Brisbane, 2000) 33–35. Smallbone and Wortley comment that the studies by Abel and his colleagues may have artificially inflated the incidence of paraphilia among sex offenders.

<sup>63</sup> Davis, above n 52, 81–82.

- 2.39 It is possible, however, that intimate covert filming will be undertaken for reasons other than sexual gratification. It may be done simply to embarrass or humiliate the victim and amuse others at the victim's expense. This may be particularly the case with teenagers' use of the technology. The secret taking of photographs of a particular person may also be an harassment or stalking technique.<sup>64</sup> Where these practices involve photographing people in intimate situations they would fall within our terms of reference.

## CONCLUSION

- 2.40 Covert filming of people in intimate situations, and distribution of the images, will often have a sexual element, but not always. It will, however, always constitute an invasion of privacy, concentrating as it does on behaviour and aspects of the self that for the majority of people are the most private, and it can have serious consequences for the film's subjects. It strikes at aspects fundamental to human dignity and autonomy, turning individuals into objects for others' gratification and depriving individuals of control over how they are presented to the world. The affront to an individual's privacy and dignity is also significant when the secret filming focuses on intimate parts of another person or their underwear, when that person has taken reasonable steps to protect these from public view and can reasonably assume that they are indeed so protected.

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<sup>64</sup> In a New Jersey case the Appellate Court found that a husband's installation of a hidden camera and microphone in his estranged wife's bedroom constituted stalking but not harassment under the New Jersey offence provisions, *H E S v J C S* (2002) 793 A 2nd 780 (N J Super App Div).

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### 3

## Intimate covert filming and current New Zealand law

- 3.1 **T**HE COMMISSION has been asked to recommend options for law reform. As a first step we have canvassed the existing law, both statutory and common, to determine how it touches on the issues. A more detailed discussion of the relevant criminal and civil law can be found in appendix 1: Remedies available under current New Zealand law. The main focus of this chapter is on those areas of our law that are of most relevance to the issues, and our consideration of law reform options, namely the Films, Videos, and Publications Classification Act 1993, the Privacy Act 1993 and the emerging tort of privacy.
- 3.2 The Films, Videos, and Publications Classification Act 1993 is discussed because it was previously the main vehicle for prosecuting instances of intimate covert filming, and there have been calls for the Act to be amended to enable resumption of such prosecutions.<sup>65</sup> The Privacy Act 1993 and the tort of privacy have obvious relevance given the fundamental nature of the invasion of privacy constituted by this conduct.

### FILMS, VIDEOS, AND PUBLICATIONS CLASSIFICATION ACT 1993

- 3.3 Since 1997, most instances of intimate covert filming appear to have been investigated as breaches of the Films, Videos, and Publications Classification Act 1993 relating to the making and distribution of objectionable publications. A number of video recordings submitted or referred to the Office of Film and Literature Classification (Classification Office) under that Act for classification were found to fall within the scope of the definition of “objectionable” and prosecutions were successfully undertaken.<sup>66</sup>
- 3.4 However, the Court of Appeal’s decision in *Living Word* (a case that will be discussed shortly, but which did not concern covert filming) made it clear that to be classified as objectionable, a publication had to first pass the subject matter gateway in section 3(1) of the Act. That gateway limited the reach of censorship laws to publications dealing with sex, horror, crime, cruelty, or violence, or other similar matters, and that were likely to be injurious to the public good.

### Offences under the Films, Videos, and Publications Classification Act 1993

- 3.5 Two sections of the Act contain the offence provisions of most relevance to intimate covert filming:

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<sup>65</sup> Government Administration Committee, above n 4; and Martin Kay “Film Censor Wants Gap in Law Fixed” (14 November 2003) *Dominion Post* Wellington A5.

<sup>66</sup> See paras 3.8–3.11.



- section 123 – offences of strict liability relating to objectionable publications; and
  - section 124 – offences involving knowledge in relation to objectionable publications.
- 3.6 These offences are concerned with making, and with supplying, distributing, exhibiting, displaying, or otherwise making available “objectionable” publications. They are punishable by either a fine for a strict liability offence, or imprisonment for up to one year or a fine up to \$20 000 where the offender knew, or had reasonable cause to believe the publication was objectionable. “Supplying” or “making available” extends to the electronic transmission of the contents of the publication otherwise than by broadcasting. Following conviction for offences relating to objectionable publications, the Court may order destruction and forfeiture of the publications and associated equipment.<sup>67</sup>
- 3.7 The Act defines “publication” widely to include things that store information that is capable of being reproduced by the use of a computer or electronic device. A publication is “objectionable” if, in terms of section 3(1) of the Act, “it depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good”. A publication that promotes or supports the exploitation of children or young persons for sexual purposes is deemed to be objectionable under section 3(2) of the Act.

### **Decisions under the Films, Videos, and Publications Classification Act 1993**

- 3.8 In *Overend v Department of Internal Affairs*,<sup>68</sup> the appellant had been prosecuted under the Act for knowingly making objectionable publications and making available (over the internet) objectionable publications in expectation of gain. The appellant’s activities included using a small camera mounted in the toe of his shoe that he directed up women’s skirts. He also surreptitiously planted small cameras in bathrooms and other such places. He made the results of his activities available to others over the internet. His appeal to the High Court against a total sentence of 21 months imprisonment was unsuccessful, though fines imposed on lesser charges were quashed.
- 3.9 In several other cases, the Classification Office classified video recordings that surreptitiously filmed subjects who were completely unaware of the recording. Some nudity was involved in each recording. Those recordings included:
- images from a hidden stationary camera of a dressing area used by a number of women dancers whilst they were getting changed for a performance;<sup>69</sup>
  - images from a stationary camera secreted in a bedroom wall and containing footage of young girls getting changed;<sup>70</sup>
  - footage that appeared to have been shot using a hand-held camera from behind a one-way window of boys changing for swimming.<sup>71</sup>

<sup>67</sup> Films, Videos, and Publications Classification Act 1993, s 136.

<sup>68</sup> *Overend v Department of Internal Affairs* (1998) 15 CRNZ 529.

<sup>69</sup> Censor’s Decision, above n 6.

<sup>70</sup> Censor’s Decision, above n 5.

<sup>71</sup> Censor’s Decision, above n 7.

- 3.10 In the first case, the Classification Office concluded that the recording had breached the women’s privacy, and that there was a strong inference the video recording had a “prurient purpose”. The Office concluded that the availability of the publication was likely to be injurious to the public good because of the degree to which the publication degraded the women for what appeared to be a prurient purpose and classified the recording as objectionable.
- 3.11 The circumstances of the filming and the content of the other two recordings led the Classification Office to draw the inference that they were intended for adults with a sexual interest in children. The Office concluded that the availability of the publications was likely to be injurious to the public good because of the presentation of child nudity for the apparent intended purpose of sexual arousal. The Office also concluded that these recordings breached the privacy of the children filmed. Both recordings were classified as objectionable.

### **The “Living Word” decision**

- 3.12 In *Living Word Distributors v Human Rights Action Group Inc (Wellington)*<sup>72</sup> the Court of Appeal was called on to determine the scope of the subject-matter limitations of the definition of “objectionable” in section 3(1) of the Act. In considering the classification of the videos in question, the Film and Literature Board of Review had concluded that the definition of objectionable was inclusive and not limited to publications depicting sex, horror, crime, cruelty or violence. Consideration of other matters was not excluded, though they were qualified by the phrase “injurious to the public good”. However, in defining the reach of censorship law, the Court of Appeal held that the words used in section 3(1) of the Act, “limit the qualifying publications to those that can fairly be described as dealing with matters of the kinds listed”, namely sex, horror, crime, cruelty or violence.<sup>73</sup>
- 3.13 Thus, the earlier approach of the Classification Office to the classification of videos produced as a result of intimate covert filming was no longer appropriate to the extent it had placed weight on other considerations.
- 3.14 The *Living Word* decision was subsequently applied in the classification of an untitled video recording referred to the Classification Office by the Manukau District Court in February 2003. The video included a segment recorded in the changing rooms of a swimming pool of boys changing in and out of their clothing, though it did not present child nudity. The Classification Office concluded that, while the filming of the children without their consent, and in a deliberately covert manner appeared to be a breach of their privacy, the publication could not be said to deal with matters of sex in terms of the definition of “objectionable”.<sup>74</sup>

### **Inquiry into the operation of the Act**

- 3.15 In March 2003, Parliament’s Government Administration Committee presented a report on its review of the operation of the Films, Videos, and Publications

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<sup>72</sup> *Living Word Distributors v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570 (CA).

<sup>73</sup> *Living Word*, above n 72, para 28, Richardson P for the majority.

<sup>74</sup> Censor’s Decision (27 May 2003) Office of Film and Literature Classification, 300507.

Classification Act 1993. The report considered the scope of the subject matter gateway and the impact of the decision in the *Living Word* case. On the topic of covert filming, the Committee expressed its concern that the *Living Word* decision restricted the powers of the Chief Censor to classify such material as objectionable because it was not generally of sexual activity and thus within the reach of the section 3(1) gateway. The Committee expressed similar concern with respect to computer image files and photographs of naked children.<sup>75</sup>

- 3.16 The Government members of the Committee identified two approaches to broaden the meaning of “objectionable” by either removing section 3(1) as a “gateway”, or widening it to reflect better the ultimate criterion of whether a publication was likely to be injurious to the public good. Other committee members favoured a more limited amendment to the section to include reference to offensive language and nudity.

### **Films, Videos, and Publications Classification Amendment Bill**

- 3.17 This Bill<sup>76</sup> was introduced late in 2003 to deal with changes that had occurred in the decade since the Act was passed, particularly with respect to the proliferation of child pornography via the internet. It contains a number of reforms directed at that type of offending.
- 3.18 The Bill does not change the section 3(1) gateway to the classification of publications as “objectionable” in any of the ways suggested by members of the Government Administration Committee. It does, however, make it clear that a publication deals with a matter such as sex within the definition if it contains visual images of children or young persons who are nude or partially nude and the images are reasonably capable of being regarded as sexual in nature. This proposed legislative clarification of the scope of the subject-matter gateway preserves the application of the Films, Videos, and Publications Classification Act 1993 with respect to intimate covert filming that relates to what is generally regarded as child pornography.
- 3.19 The proposed amendments to the censorship law do not extend to the intimate covert filming of adults, or where the images recorded of children do not include nudity, or partial nudity, and are not reasonably capable of being regarded as sexual in nature.

### **Intimate covert filming and censorship**

- 3.20 While the proposed amendments to the Films, Videos, and Publications Classification Act 1993 that are presently before Parliament confirm the application of that Act to objectionable material that can be described as child pornography, the Commission does not recommend further amendment to deal more generally with intimate covert filming for a number of reasons.
- 3.21 First, to extend the Act in this way would be to depart from its focus on pornography and upon the nature of images rather than the means by which they were obtained. Secondly, likelihood of “injury to the public good”, the test

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<sup>75</sup> Government Administration Committee, above n 4.

<sup>76</sup> The Bill had its first reading on 2 March 2004 and was referred to the Government Administration Committee for report back by 30 June 2004.

that is central to the definition of “objectionable”, may not always be easy to apply to material obtained through covert filming, where the harm is often suffered by single individuals. Thirdly, extending the present legislation to deal directly with intimate covert filming would be likely to introduce uncertainty into the scope of censorship laws. Fourthly, of the numerous overseas jurisdictions that have enacted or intend to enact legislation to deal with the problem, none has done so by reference to its censorship law; rather, the response has been tailored to meet the privacy intrusion posed by intimate covert filming.

## PRIVACY ACT 1993

- 3.22 This Act is designed to “promote and protect individual privacy”, in particular by establishing principles to govern the collection, use and disclosure of personal information, and to govern access by individuals to their personal information. It also establishes the position of Privacy Commissioner, whose functions include investigating complaints about interferences with individual privacy.<sup>77</sup>
- 3.23 The Privacy Act 1993 can be used to respond to some of the conduct covered by this reference and in fact has already been so used. The definition of “document” in the Act makes clear that images are included,<sup>78</sup> and among the information privacy principles in the Act, several have particular relevance to intimate covert filming.
- 3.24 Information Privacy Principle 3 requires that when collecting information directly from an individual, the (collecting) agency is required to take reasonable steps to make the individual aware of matters such as the fact of the information collection, why it is being collected and who will have access to the information. There are exceptions to the need to comply with these conditions, including if the information will not be used in a form in which the individual concerned is identified.<sup>79</sup> Intimate covert filming and distribution are fundamentally at odds with this principle given their surreptitious nature. The fact that such filming often focuses on body parts and may not result in images of an “identifiable” person may, however, mean it falls within the exception.<sup>80</sup>
- 3.25 Information Privacy Principle 4 requires that the manner of collection of personal information shall not be by “unlawful means”, or a means that in the circumstances of the case is “unfair; or intrude[s] to an unreasonable extent upon the personal affairs of the individual concerned”.<sup>81</sup> Some forms of intimate covert filming are unlawful under existing law, and, even if they are not, by their very nature they will almost always amount to circumstances that “are unfair; or intrude to an unreasonable extent upon the personal affairs of the individual concerned”.

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<sup>77</sup> Privacy Act 1993, long title.

<sup>78</sup> Privacy Act 1993, the definition of document in s 2(1)(e) includes “any photograph, film, negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced”.

<sup>79</sup> Privacy Act 1993, s 6 Principle 3(4)(f)(i).

<sup>80</sup> There is some debate as to whether filming someone amounts to collecting information “directly from the individual concerned”, see Paul Roth, *Privacy Law and Practice* (Wellington, LexisNexis, 2003) 1006.17. We note, however, that the more relevant principle in terms of intimate covert filming is Information Privacy Principle 4 as discussed below.

<sup>81</sup> Privacy Act 1993, s 6, Principle 4.

- 3.26 Also relevant are Information Privacy Principles 9 and 11. Principle 9 requires that an agency not keep information for longer than is required for the purposes for which the information may lawfully be used.<sup>82</sup> This Principle could be relevant in instances of retention. Principle 11 requires that an agency that holds personal information must not disclose it unless the circumstances come within one of the exceptions.<sup>83</sup>
- 3.27 A complaint of privacy breach under the Act does not simply require a breach of one of the principles (or of a code of practice or the information matching provisions). The breach must also, in the opinion of the Privacy Commissioner or the Human Rights Review Tribunal (the Tribunal), have caused or possibly cause “loss, detriment, damage, or injury to the individual”; or have adverse affects on the individual’s rights and entitlements; or, most significantly for intimate covert filming, have resulted in or possibly result in “significant humiliation, significant loss of dignity, or significant injury to the feelings of that individual”.<sup>84</sup>
- 3.28 The Act provides a State-funded means for people to seek redress for breaches of their privacy, including remedies through the Tribunal.<sup>85</sup> In the first instance, complainants do not have to go through the normal civil court process and so do not have to instruct a lawyer, although if they wish to, they may do so. The Privacy Commissioner does have a discretion to decline to take action or further action in certain circumstances further to section 71, and, if this is exercised, the complainant will have to proceed on his or her own. If the Privacy Commissioner investigates and finds a breach, attempts are made to conciliate. This may include getting assurances that the conduct will not be repeated, and a financial settlement. If a settlement cannot be secured, the Privacy Commissioner may refer the matter to the Director of Human Rights Proceedings to determine whether proceedings should be taken in the Human Rights Review Tribunal.<sup>86</sup> The aggrieved person may bring their own proceedings if the Privacy Commissioner and/or the Director of Human Rights Proceedings decline to do so, or if the Director of Human Rights Proceedings agrees that they may.<sup>87</sup>
- 3.29 The complaints settlement process is a private one, although if the matter goes to the Human Rights Review Tribunal, the proceedings and reports are normally public, unless the Tribunal decides it is desirable to do otherwise.<sup>88</sup> Remedies available at the Tribunal include a declaration, a restraining order, award of damages, an order requiring performance of any specified acts of a remedial or redress nature, or “[s]uch other relief as the Tribunal thinks fit”. The Tribunal may award costs.<sup>89</sup> Damages may be awarded under various headings, including pecuniary loss, expenses, humiliation, loss of dignity, and injury to feelings.<sup>90</sup>

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<sup>82</sup> Privacy Act 1993, s 6, Principle 9.

<sup>83</sup> Privacy Act 1993, s 6, Principle 11.

<sup>84</sup> Privacy Act 1993, s 66. The position differs for access requests in ways that are not relevant to this discussion, see section 66 (2).

<sup>85</sup> Privacy Act 1993, ss 67–89.

<sup>86</sup> Privacy Act 1993, s 77.

<sup>87</sup> Privacy Act 1993, s 83.

<sup>88</sup> Human Rights Act 1993, s 107.

<sup>89</sup> Privacy Act 1993, s 85.

<sup>90</sup> Privacy Act 1993, s 88.

- 3.30 The exemptions for “personal information relating to domestic affairs” of section 56 are a significant constraint on the use of the Privacy Act to deal with intimate covert filming. This states that:
- Nothing in the information privacy principles applies in respect of—
- (a) The collection of personal information by an agency that is an individual; or
  - (b) Personal information that is held by an agency that is an individual,—
    - where that personal information is collected or held by that individual solely or principally for the purposes of, or in connection with, that individual’s personal, family or household affairs.
- 3.31 On its face, subsection (a) appears to provide an exemption for an individual who covertly films another for his or her own gratification. Similarly, subsection (b) would seem to exempt an individual if retaining covertly filmed images for his or her own use.
- 3.32 A complaint was made to the Privacy Commissioner about the covert filming of a Christchurch theatre group in their dressing room.<sup>91</sup> The respondent had access to the dressing room through his employment as a technician, but his filming was not held to be collecting information for a lawful purpose connected with his role as a contractor. His activity was found to be in breach of Information Privacy Principle 1.<sup>92</sup> The Privacy Commissioner attempted a settlement. The respondent was prepared to make a modest financial settlement and this was accepted by all but one of the women. The Privacy Commissioner used his powers under section 74 (settlement of complaints) to seek an assurance that there would be no repetition of the conduct. Such an assurance was given, albeit in the knowledge that if it was contravened the Commissioner would refer the matter on to the Director of Human Rights Proceedings to decide whether or not to take the matter to the Human Rights Review Tribunal. In the event, the matter was separately referred to the Office of Film and Literature Classification. The recording was declared objectionable, and this classification was confirmed by the Film and Literature Board of Review.<sup>93</sup>
- 3.33 As this example shows, the Privacy Act 1993 can provide an avenue to address some instances of intimate covert filming and distribution. There will, however, often be instances where images are discovered but there is no “identifiable individual” to seek redress.<sup>94</sup> In addition, the domestic exemptions of section 56 may apply in instances where the film was made or held for “personal” use.

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<sup>91</sup> Case Note 18302 [2001] NZPrivCmr 8.

<sup>92</sup> Information Privacy Principle 1 prohibits agencies from collecting personal information unless it is collected for a lawful purpose connected with the function or activity of the agency and the collection is necessary for that purpose. See Privacy Act 1993, s 6.

<sup>93</sup> Censor’s Decision, above n 6; and Film and Literature Board of Review in the matter of Police Exhibit 7205/79, 6 July 1999.

<sup>94</sup> This need not prevent a complaint being lodged, as section 67 allows “any person” to make a complaint, or the Privacy Commissioner may initiate an investigation as provided in section 69. Depending on the circumstances of the case, under section 71 the Commissioner may dismiss complaints if the individual alleged to be aggrieved does not desire further action, or if the complainant does not have sufficient personal interest in the subject matter of the complaint.

## A TORT OF BREACH OF PRIVACY

3.34 New Zealand common law now provides a remedy in tort for interference with privacy.<sup>95</sup> This is the result of the Court of Appeal decision in *Hosking v Runting*,<sup>96</sup> released in March 2004. Several prior decisions appeared to indicate a new tort of breach of privacy was emerging and these indications were confirmed in this case. The two fundamental requirements for a successful claim are set out at paragraph 117 in the judgment of Gault P:

- 1 The existence of facts in respect of which there is a reasonable expectation of privacy; and
- 2 Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

The *Hosking* case involved the potential publication of a photograph of the appellants' children. It had been taken in a public place, without the knowledge of the children or their celebrity parents. While the behaviour at issue did not reach the threshold to constitute an interference with privacy it may well do in cases of intimate covert filming. In the course of their judgment, Gault P and Blanchard J noted at paragraph 109 that the courts had responded to gaps in the law with respect to the hurt or harm caused by wide publicity of intimate, private information:

The intrusiveness of the long-range lens and listening devices and the willingness to pay for and publish the salacious are factors in modern society of which the law must take account. The provision of civil remedies in appropriate circumstances represents the response. That is something the courts are equipped to do. It is the very process of the common law.

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<sup>95</sup> In the United States a common law tort of infringement of privacy has existed in most jurisdictions for many years, with the generic concept recognised in the *Restatement of the Law, Second, Torts* (1977), Sections 652A to 652E. The concept of "invasion of privacy" would seem there to be a convenient label for a complex of four separate torts protecting disparate dimensions of the right "to be let alone".

On the other hand, the Court of Appeal in England held in *Kaye v Robinson* [1991] FSR 62 that there was no right of action for breach of personal privacy and more recently, in *Wainwright v Home Office* [2003] UKHL 53 the House of Lords declined the invitation to declare the existence of such a tort. It should be noted, however, that those cases were decided against the background of the significant development of the tort of breach of confidence. The appropriateness of recourse to such a remedy, which, in several recent cases, seems to have merged the concepts of privacy and confidence (see, for example, *Douglas and Others v Hello! Ltd* [2001] 2 All ER 289; *Venables v News Group Newspapers Ltd* [2001] 1 All ER 908; and *A v B (a Company)* [2002] 2 All ER 545) was doubted by Lord Phillips MR in *Campbell v Mirror Group Newspapers Ltd* [2003] 1 All ER 224, 240 who considered the unjustifiable publication of information about an aspect of an individual's private life to be better described as a breach of privacy rather than a breach of confidence.

In Australia, the existence of a tort of invasion of privacy was left open by the High Court of Australia in *Australian Broadcasting Corporation v Lenah Game Meats* [2001] HCA 63, with indications in several of the judgments that the long-standing decision in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 may not necessarily restrict its development in a suitable case.

Civil remedies for breach of privacy in Canada have tended to develop in the context of Charter jurisprudence. While a specific common law tort has not emerged, relief has generally been afforded through the Charter cases, together with legislative recognition of privacy rights in some provinces, and, in the case of Quebec, a specific provincial charter provision guaranteeing a right to respect for "private life" (Section 5 Quebec Charter of Human Rights and Freedoms. See *Aubry v Les Editions Vice-Versa Inc* (1998) 157 DLR (4th)).

<sup>96</sup> *Hosking v Runting*, above n 3.

- 3.35 Though the tort is in an early stage of development with no precedents in the area of intimate covert filming it appears that, even in its present form, it could provide a civil remedy for a breach of privacy occasioned by the distribution or pending distribution of covertly filmed intimate images, though not where filming occurred for personal use without publication.
- 3.36 Accessing the courts to claim a remedy for breach of privacy when one has been covertly filmed in an intimate situation, is not, however, a simple process. It generally requires the film's subject to retain a lawyer, pay court filing fees, which may be significant, and enter upon an adversarial process, which may be lengthy and not user-friendly. Legal aid may alleviate some difficulties, by being available to those whose incomes are low enough to qualify, with its costs being paid back out of any award. Also, the ranges of likely award in successful claims are unknown and may not justify incurring the cost of proceedings.
- 3.37 The tort avenue also provides a means for obtaining an interim injunction, whereas this is not available under the Privacy Act 1993. Although the threshold for an interim injunction has been set very high, namely "compelling evidence of most highly offensive intended publicising of private information and there is little legitimate public concern in the information",<sup>97</sup> and the Court of Appeal in *Hosking* envisaged that it would not be available in most cases, intimate covert filming may well be the very type of case that crosses the threshold.

## SUMMARY OF THE APPLICATION OF OTHER NEW ZEALAND LAW

### **Criminal offences**

- 3.38 Under existing legislation, there is no provision that specifically prohibits the taking of a photograph or other visual record of a person who is nude, partially nude, or engaging in sexual or other intimate activity, or that prohibits the distribution of such images.
- 3.39 The criminal law does provide some potential avenues for prosecution but this is very much dependent on the individual circumstances of the filming meeting the terms of the specific offence. Even the classic "peeping Tom" offence of peeping or peering into a dwellinghouse<sup>98</sup> is of limited application because it can be committed only at night time, and, of course, those who engage in intimate covert filming need not actually be present and looking. They may simply set up a camera and depart.
- 3.40 The only possible relevant offences under the Crimes Act 1961 are sections 125 and 126, the indecency offences, although it is debatable whether the act of surreptitiously recording another person in intimate circumstances will necessarily be an "indecent" act for the purposes of these provisions.
- 3.41 The criminal provisions of section 8 of the Harassment Act 1997 would only apply if the circumstances of the secret filming came within the Act's definition

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<sup>97</sup> *Hosking v Runting*, above n 3, para 158.

<sup>98</sup> Summary Offences Act 1981, s 30.



of “specified act”,<sup>99</sup> and if there was a pattern of behaviour involving the same victim.

### **Other statutory provisions**

- 3.42 The sexual harassment provisions of the Human Rights Act 1993 and the Employment Relations Act 2000 could be used against some instances of intimate covert filming and distribution.<sup>100</sup> The circumstances would need to be such that the filming and/or distribution could be held to be “physical behaviour of a sexual nature”, that is “unwelcome or offensive” and either by its nature or through repetition, has a “detrimental effect” on the person’s enjoyment of access to specified areas as defined in the Human Rights Act section 62(3), or in the context of the Employment Relations Act, a “detrimental effect” on the employee’s employment, job performance, or job satisfaction.<sup>101</sup>
- 3.43 The civil harassment provisions in Part 3 of the Harassment Act 1997 may be applicable where there is a pattern of behaviour in terms of that Act and the circumstances were such that a restraining order would provide a remedy.
- 3.44 The Broadcasting Standards Authority (BSA) has a jurisdiction under the Broadcasting Act 1989 to “receive and determine complaints” about the content of television or radio programmes,<sup>102</sup> including complaints relating to the broadcasters’ obligations under section 4(1)(c) to maintain standards that are consistent with “the privacy of the individual”. The BSA’s processes and the privacy principles they have developed could be used to deal with intimate covert filming and distribution only if the images were subsequently broadcast on public television and if a complaint was received.

### **General tort law**

- 3.45 There are other actions in tort, such as trespass, which may provide relief in some circumstances. The circumstances of the intimate covert filming would have to fit the established elements of the particular tort, and, even then, with the exception of the emergent tort for interference with privacy, the success of any action would be on the basis of the harm to the particular interest covered by the tort, for instance, trespass to property, rather than the harm to privacy interests that is central to intimate covert filming. In these actions the privacy harm would be incidental.

## **CONCLUSION**

- 3.46 The Films, Videos, and Publications Classification Act 1993 could be used to deal with covertly filmed images that meet the test of “objectionable” in that

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<sup>99</sup> The meaning of “specified act”, as set out at section 4 does not specifically include secretly filming someone but, depending on the particular circumstances, this could fall under the headings of “watching” a place the subject frequents; “entering, or interfering with” the subject’s property, for instance where a camera is secretly installed in a house; or “acting in any other way” that “would cause a reasonable person” in the subject’s “particular circumstances to fear for his or her safety”.

<sup>100</sup> Human Rights Act 1993, s 62; Employment Relations Act 2000, s 108.

<sup>101</sup> Employment Relations Act 2000, s 108(1).

<sup>102</sup> Broadcasting Act 1989, s 21.

Act. This would open the way to prosecutions for making, possessing, and distributing the images, and for the Court to make orders for destruction and forfeiture of the images and associated equipment.

- 3.47 As clarified in the proposed amendments to that Act, the test of “objectionable” would include any visual images of children or young persons who are nude or partially nude and the images are reasonably capable of being regarded as sexual in nature. Covertly filmed images of children or young people that do not meet the above test would not be held to be “objectionable” and neither would covertly filmed images of adults that showed simple nudity.
- 3.48 The Privacy Act 1993 can provide an avenue for redress for individuals who become aware they have been filmed, although the “domestic exemptions” of section 56 may apply in instances where the film was made or held for “personal” use.
- 3.49 Following the Court of Appeal decision in *Hosking v Runting*, the tort for interference with privacy provides a potential remedy, but only where there is publication of private and personal information and the publicity is highly offensive to a reasonable person.
- 3.50 Other New Zealand law, both statutory and tort, may provide some avenues of redress for the subjects of intimate covert filming in certain circumstances, but the coverage is patchy and many instances remain outside the reach of the law.
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# Proposals for legislative reform

### CRIMINAL AND CIVIL REMEDIES

- 4.1 **W**E RECOMMEND that three criminal offences be created, one for making the image, one for distributing the image, and one a possession offence. We also recommend several amendments to the Privacy Act 1993 to facilitate effective use of that Act's complaints process to pursue civil remedies. Additionally, following *Hosking v Runting*, subjects of intimate covert filming will be able to pursue the common law remedy for interference with privacy in appropriate cases.
- 4.2 The exploitative and sexual nature of such conduct points to the need for a response in the criminal law. Also significant are the possible links to more serious sexual offending, with voyeurism as a gateway offence in some circumstances.<sup>103</sup> Even in the absence of a sexual intent, the breadth of the invasion of privacy for the individual and the wider implications for society of such an invasion support the case for a criminal offence.
- 4.3 Because of its very nature, detection of intimate covert filming is inherently difficult. There will be many instances where the subjects of this conduct will not be aware they have been filmed and/or that their images have been distributed. The voyeuristic focus on private body parts may mean that it is difficult to identify individuals. When subjects do become aware they are likely to want the intrusion stopped immediately. If intimate covert filming is made a criminal offence, then the police can intervene immediately, for instance, by arresting the voyeur filming up skirts in the shopping mall. The full police detection and investigation powers, including existing search and seizure powers, become available, for example, to investigate the source of images discovered on the internet. Plus, of course, the criminal law can provide for deterrent and incapacitative penalties, such as imprisonment, sentences with a rehabilitative focus and, where there is an identifiable victim or victims, the sentence of reparation is an option.
- 4.4 The creation of criminal offences is in line with the responses of a number of other jurisdictions.<sup>104</sup> Many States in the United States have taken this path, and there is currently a Bill before the legislature proposing a federal offence of "video voyeurism". The United Kingdom has enacted a criminal offence and one is proposed in Canada. In Australia, the New South Wales Government is proposing to introduce legislation to create a new offence of "indecent filming or photographing".

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<sup>103</sup> See chapter 2, paras 2.34–2.38.

<sup>104</sup> See appendix 2: The law in other jurisdictions.

- 4.5 The criminal law does not provide the only answer, however. The way individual victims react to this violation of their autonomy and dignity will vary depending on factors such as the nature of the activity filmed, the relationship, if any, with the perpetrator, the location, whether and how the image is distributed, the degree to which they are identifiable, and any pre-existing factors relating to the individual. Subjects of intimate covert filming should have the opportunity to seek redress through the civil justice system instead of, or in addition to, criminal prosecutions. Civil remedies can be specifically tailored to redress the particular harm to the individual, and the processes and outcomes for the individual can be more personally restorative and meaningful than the ordeal of a criminal trial.
- 4.6 While we believe complainants in cases of intimate covert filming and distribution should have the option of seeking a civil remedy, we do not favour the creation of a specific intimate covert filming statutory tort to achieve this.<sup>105</sup> The majority decision in *Hosking v Runting* enables the development of a common law tort of interference with privacy, which may provide a remedy in many cases.
- 4.7 In addition, by virtue of the Privacy Act 1993 we already have a statutory scheme and a body of relevant expertise. The Office of the Privacy Commissioner is a specialist body with 14 years of experience in dealing with privacy complaints, meaning it is an obvious avenue through which the subjects of intimate covert filming may seek redress.
- 4.8 The proposal for a dual civil and criminal system is not dissimilar from the proposals of the New South Wales Law Reform Commission for regulation of covert surveillance (although that Commission does not discuss voyeurism as such). The Commission proposed that unlawful covert surveillance could be the subject of criminal proceedings, but the victims could also have access to the Privacy Commissioner's complaints process if they wish.<sup>106</sup> This would be the same complaints process as proposed for breaches of overt surveillance provisions. The Privacy Commissioner's process involves conciliation, or an Administrative Decisions Tribunal hearing if no agreement is reached. Potential remedies would include damages, injunctions or a mandatory order. Officials of the New South Wales Government are currently reviewing the recommendations of this report.<sup>107</sup>
- 4.9 The Irish Law Reform Commission study of surveillance also recommended both civil (new statutory torts) and criminal responses, although in this case the criminal responses were reserved for the more serious instances, described by the

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<sup>105</sup> We note that the Law Reform Commission of Hong Kong has proposed statutory torts that would encompass covert filming in intimate situations and distribution of the images. There would be a tort of intrusion and a tort of giving "publicity to a matter concerning the private life of another". Both the intrusion and the extent and content of the disclosure would need to be of a kind that would be "seriously offensive and objectionable to a reasonable person of ordinary sensibilities". See Law Reform Commission of Hong Kong, above n 45. See also the discussion in appendix 2: The law in other jurisdictions, paras A83–A95.

<sup>106</sup> New South Wales Law Reform Commission *Surveillance* (NSWLRC, Sydney 1997); and New South Wales Law Reform Commission *Surveillance: An Interim Report* (NSWLRC, 98, Sydney 2001). For more detailed discussion see appendix 2: The law in other jurisdictions, A68.

<sup>107</sup> Email message of 27 February 2004 from New South Wales Attorney-General's Department.

Commission as the “particularly offensive and socially unacceptable” forms of privacy-invasive surveillance.<sup>108</sup>

- 4.10 The civil route will, of course, only be a valid option where there is an identifiable victim who is aware of the privacy invasion he or she has suffered. There will be many instances where this is not the case, so that the criminal law will be the only way to respond if the images are subsequently discovered.

## VULNERABILITY OF CHILDREN

- 4.11 One aspect of particular concern in respect of covert filming and distribution is the potential it brings for the exploitation of children for sexual purposes. The innocence of children in situations where adults may have greater concern for their privacy than would children – for example, when they are undressing – creates opportunities for the voyeur that would not necessarily be available with adults. Whilst children may have less concern for their personal privacy with intimate covert filming, the risk that they may be exploited for the purposes of child pornography, for example, through the portrayal of images on the web, is a significant one, and clearly not in the children’s interests.
- 4.12 We have considered whether special provision should be made to recognise the vulnerability of children in the context of intimate covert filming, but concluded that this is not necessary because this would be adequately covered by the aggravating factors the Court is required, under section 9 of the Sentencing Act 2002, to consider at sentencing. Of particular relevance would be section 9(1)(f) “that the offender was abusing a position of trust or authority in relation to the victim”, and section 9(1)(g) “that the victim was particularly vulnerable because of his or her age or health or because of any other factor known to the offender”. These factors would, of course, also apply to situations where vulnerable people, other than children, were the victims, for instance adults who have an intellectual disability.
- 4.13 The proposed increases in the Films, Videos, and Publications Classification Amendment Bill to sentences for offences relating to objectionable material, including “child pornography” are also relevant to the protection of children in situations where intimate covert filming results in images of children that are sexual in nature. Further, proposed new section 132A would require the sentencing court to treat as an aggravating factor the extent to which a publication is objectionable because it concerns what is generally termed “child pornography”.
- 4.14 We also note the proposed new section 98AA in the Crimes Amendment Bill (No 2) 2003,<sup>109</sup> which creates a number of new offences relating to the exploitation of people under 18 years for sexual purposes. As defined at new section 98AA(2) “sexual exploitation” includes taking or transmitting still or moving images of the person engaged in explicit sexual activities and taking or transmitting still or moving images of the person’s sexual organs, anus or breasts. Anyone filming a young person under the circumstances of the proposed offences,

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<sup>108</sup> The Law Reform Commission (Ireland), above n 14, 100–113. To date, these recommendations have not been implemented. See also discussion in appendix 2: The law in other jurisdictions, A98–A102.

<sup>109</sup> This Bill was introduced in December 2003, had its first reading in March 2004, and is currently before the Law and Order Committee.

covertly or otherwise, would be liable on conviction to a maximum penalty of 14 years' imprisonment.

## PROPOSED OFFENCES

- 4.15 Our proposed new offences are targeted at three different stages of the privacy invasion caused by intimate covert filming: recording of the image, distribution of the image, and possession of the image. For each offence we have outlined the key elements necessary to address the harms of intimate covert filming.

### **New offence: making a voyeuristic recording**

- 4.16 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 a 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.

### *Comment*

- An alternative approach to requiring the filming to be without the consent or knowledge of the other person, which is a common legislative expression in some States in the United States, would be to prohibit "surreptitious" filming.
- The term "visual recording" is not defined, on the basis that it can be understood as applying to all forms of image recording without limitation – including images captured on cell-phones.
- The key mental element is that the recording is done intentionally or recklessly, without the need to establish whether the underlying purpose was sexual, commercial or for the purpose of invading the subject's privacy, for instance, to humiliate them. This formulation would mean that purely accidental filming would not be captured by the offence, but the inclusion of recklessness in the definition means that it would cover instances such as a person who deliberately leaves their cell-phone camera on in a swimming pool change room, knowing that there is a risk they will film someone.
- Part (b) of the proposed offence covers "up-skirt" filming. The importance that individuals attach to the ability to control access to viewing of their most intimate body parts extends to keeping control over who sees their underwear, even when they are not in a private place. This is another form of voyeurism, and it is another instance where technology enhances the ability of the voyeur

to pierce the “cloak of privacy” surreptitiously.<sup>110</sup> This part of the offence does not require that the subject be in a private place; rather, it requires the subject to be in circumstances where it is objectively reasonable for others not to be able to make a visual recording under the subject’s clothing. They may be in a public place, such as on an escalator, in a shopping mall, or in a private place, such as their own home.

- There is no requirement that the person filmed is identifiable, although this is an element of the offence in some States in the United States. The focus in intimate covert filming is usually on the body parts of the person filmed and their identity will frequently be unknown. Whilst identity should not be included as an element of the offence, if the victim is identified in the course of the recording it should be regarded as an aggravating factor for the purpose of sentencing.
- No separate offence of installing a device for the purpose of making a voyeuristic recording is proposed. Although such an offence is in the laws of several States of the United States, such conduct would usually amount, in terms of sections 72 and 311 of the Crimes Act 1961, to an attempt to commit the proposed offence.

### **New offence: publishing a voyeuristic recording**

4.17 We propose a second new offence with the following elements:

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.

#### *Comment*

- This offence is directed at the distribution or publication of a voyeuristic recording and is a necessary provision to complement the offence of making the recording. The breach of personal privacy through publication is separate from, additional to and potentially greater than that which occurred in the making of the recording. This offence includes the publishing of an intimate recording that was made inadvertently or accidentally.
- Terms describing other types of distribution used in some overseas legislation have not been included on the premise that they were encompassed by the general words.
- The mental element of the offence requires distribution either in the knowledge that the recording was made in the prescribed circumstances, or, under the

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<sup>110</sup> See chapter 2, paras 2.11–2.15 for further discussion.

standard of recklessness, distribution in the knowledge that there is a risk that the recording was made in the prescribed circumstances and unreasonably distributing the recording nonetheless. We do not, however, believe that this offence should extend to those who simply fail to exercise due care, for instance, by making insufficient inquiries as to the origin of the recording.

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

- 4.18 The proposed offence of publishing a voyeuristic recording includes the possession of such a recording for the purposes of publication. That leaves for consideration whether there should also be a separate offence of simple possession. Such an offence would be directed to the “demand” end of the chain and could be seen as complementing the principal offences in much the same way as possession of controlled drugs under the Misuse of Drugs Act 1975, or possession of objectionable material under the Films, Videos, and Publications Classification Act 1993 complement the major offence provisions in those Acts.
- 4.19 Because possession perpetuates the initial privacy intrusion we recommend an offence of simple possession. This completes the chain and reinforces the policy behind the proposed principal offences.
- 4.20 Although the scope of such an offence is potentially very wide this can be addressed. First, the possessor would need to know that the image had been unlawfully recorded or distributed. Secondly, there would only be an offence where possession was “without reasonable excuse”. This would avoid capturing the person who received the image unsolicited via the internet and tried but failed to delete it from their computer hard drive.<sup>111</sup>

### **New offence: possession of a voyeuristic recording**

- 4.21 We propose a possession offence with the following elements:

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.

### **Exemptions**

- 4.22 Our proposed offences relate to images of a very intimate nature, confined as they are to people who are *in circumstances that would reasonably be expected to provide privacy*, who are in a state of undress, or engaged in sexual activity, or other intimate bodily activity such as using a toilet, or in Part (b) of the main offence, images must be filmed up, under or down a person’s clothing when that person would have a reasonable expectation that such filming would not occur.

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<sup>111</sup> Such a legislative provision is rare in overseas jurisdictions, but an example of the first qualification can be found in the relevant Wisconsin law. See Wis Stat, Chapter 941, § 942.09 (2)(c) (2003), which makes it a Class I felony to possess a covertly recorded representation captured or reproduced in violation of the section if the offender knew or had reason to know the representation was captured or reproduced in violation of the section and the subject had not consented to the possession.



- 4.23 It is, therefore, difficult to argue that there is a legitimate need for anyone to make, distribute or possess such images. Further, the mental element of both the recording offence and the distribution offence requires intention or recklessness. This precludes, for instance, purely accidental filming by a cell-phone camera inadvertently left on in a swimming pool changing room, although any subsequent copying or distribution of such an image would be an offence. The possession offence is similarly confined by the requirements for knowledge and no “reasonable excuse”.
- 4.24 Where exemptions are provided for in overseas jurisdictions, they most commonly relate to authorised law enforcement activity. In New Zealand, the situation with regard to visual recording for law enforcement purposes is complicated by the lack of any statutory provisions regulating such recording.<sup>112</sup> Section 198 of the Summary Proceedings Act 1957 is the relevant provision in respect of police applications for search warrants, but such warrants would not usually be applicable in the case of video surveillance. Visual recording would, therefore, normally be conducted under the common law powers of the police to gather evidence, with the main constraints being whether the recording constitutes a search and, if so, whether the search can be seen as “reasonable” in terms of the right under section 21 of the New Zealand Bill of Rights Act 1990 to be free from unreasonable search and seizure.
- 4.25 These issues have been the subject of judicial deliberation but the law remains unsettled. As the Court of Appeal stated in *R v Fraser*, a key issue has been consideration of what constitutes “a reasonable expectation of privacy”, but “there is no consistent approach to whether that is a test for what constitutes search or whether it is applied, once it is established there is a search, to test its reasonableness”.<sup>113</sup> The courts have, however, given indications of the privacy considerations that would be relevant to determining reasonableness. In *Fraser*, the Court observed that, “[r]easonable expectations of privacy for activities readily visible from outside the property must be significantly less than, for instance, for activities within buildings”.<sup>114</sup> Again, in *R v Gardiner*, another case involving video surveillance by the police, the Court of Appeal observed that, “[s]uch is the importance of personal privacy that it will be a case out of the ordinary where surveillance by video is reasonable when it encompasses the interior of a dwelling”.<sup>115</sup> Although the Court held in this case that the video surveillance did not constitute an unreasonable search and seizure under section 21, in this context, it noted that, although the camera was focused on the house

<sup>112</sup> In *R v Gardiner* (1997) 15 CRNZ 131, 136, the Court of Appeal stated that “There is no mechanism in the law requiring or enabling the authorisation of video surveillance”.

<sup>113</sup> *R v Fraser* (1997) 15 CRNZ 44, 52. This case concerned video surveillance by the police of a property for over three months for the purpose of gathering evidence of drug offences.

<sup>114</sup> *R v Fraser*, above, 56. See also *Kyllo v US* 150 L Ed 2d 94 (2001) where the United States Supreme Court concluded that police use of a thermal imaging device to detect cannabis growing in a house was a search, stating that:

We think that obtaining by sense-enhancing technology any information regarding the interior of a home that could not otherwise have been obtained without physical ‘intrusion upon a constitutionally protected area’, ... constitutes a search – at least where (as here) the technology in question is not in general public use.

Although we note that the same cannot be said for cell-phone cameras, the material point is that there was an intrusion into a private area.

<sup>115</sup> *R v Gardiner*, above n 112, 136.

from a neighbouring property, “it was not trained on a bedroom or bathroom or other area of particular privacy”, and the occupants’ conduct suggested they “had a less than complete expectation of privacy” in the area under observation.<sup>116</sup>

- 4.26 We note that not filming into areas of “particular privacy” was but one of the factors considered. Also relevant in this decision was the seriousness and scale of the offending, the inability of the police to obtain evidence by other means, and the reasonable grounds the police had for believing that the part of the house under observation was being used for illegal purposes.<sup>117</sup> Whether the courts would consider intimate covert filming of the type covered by our main offence to be reasonable would, of course, need to be addressed on a case-by-case basis, and would depend on a number of factors. Nonetheless, it is difficult to imagine when visual recording of this type would reasonably be required for law enforcement or evidence gathering purposes.
- 4.27 Given the considerable degree of ambiguity around the issue, we consider the situation as to intimate covert filming for law enforcement purposes should be considered in the context of the wider questions about the surveillance powers of law enforcement officials.
- 4.28 In the absence of such wider consideration, and because it is difficult to imagine when such recording would be reasonable, we do not recommend any law enforcement exemptions.

### **Penalty and ancillary orders**

- 4.29 Overseas legislation generally treats voyeurism offences as a crime (sometimes classified as a “felony”, or “indictable offence”). The maximum penalty varies, but is commonly set at around two years’ imprisonment (five years is proposed in Canada). In some instances, for jurisdictional reasons, provision is made for a lesser maximum penalty on summary conviction, an alternative that should not require consideration in New Zealand.
- 4.30 We have considered the maximum penalty levels in the context of comparable offences. We note further that the presumption in favour of the sentence of reparation as provided in the Sentencing Act 2002 would be especially relevant for most instances of these offences.<sup>118</sup> Additionally, we propose that the sentencing court be empowered to make orders for destruction and forfeiture. Also relevant are the avenues for civil remedies that would be available to subjects to seek individualised redress.

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<sup>116</sup> *R v Gardiner*, above n 112, 137.

<sup>117</sup> The police knew the occupants and their visitors were wary of, and taking precautions against, audio surveillance so an audio interception warrant would have been ineffective. *R v Gardiner*, above n 112, 136.

<sup>118</sup> Section 32 of the Sentencing Act 2002 establishes the circumstances for imposing the sentence of reparation, including when the victim has suffered emotional harm or loss or damage consequential on emotional harm by reason of the offence. If these conditions are met, then section 12 requires the Court to impose reparation, unless satisfied that the sentence would result in undue hardship for the offender or his or her dependants, or that any other special circumstances would make it inappropriate. Section 32 (3) requires the Court to consider the relationship between reparation and any other avenues for legal redress available to the victim in relation to loss or damage, but section 38(2) provides that a sentence of reparation does not affect the victim’s right to recover by civil proceedings any damages in excess of the amount recovered under the sentence.

- 4.31 For the offences of *making a voyeuristic recording* and *publishing a voyeuristic recording* a maximum penalty of three years' imprisonment would be indicative of the seriousness of both the breach of personal privacy involved and the potential for the images to be exploited for sexual purposes. This is slightly higher than for comparable privacy invasion offences in Part 9A of the Crimes Act 1961, where the maximum is two years' imprisonment.<sup>119</sup>
- 4.32 It is also apt to make comparison here with the penalties for sexual offences in the Crimes Act 1961 and those proposed in the Crimes Amendment Bill (No 2) 2003, that is currently before Parliament. A three year maximum would put these offences at the same penalty level as the offence of indecency with an animal, and the proposed offence of performing an indecent act on a family member under the age of 18, where consent has been given because of the use of power or authority.<sup>120</sup> The maximums would be well below the level for most other sexual offences in the Crimes Act and most of the penalty levels proposed in the Bill.<sup>121</sup> On the other hand, three years provides a clear differentiation in penalty from the less serious offences contained in the Summary Offences Act 1981.
- 4.33 Another reference point is the penalty provisions in the Films, Videos, and Publications Classification Act 1993, particularly sections 123 and 124 dealing with offences of strict liability and knowledge. The present maximum penalty for making or distributing an objectionable publication, knowing or having reasonable cause to believe it is objectionable, is one year of imprisonment. Under the Films, Videos, and Publications Classification Amendment Bill that is presently before Parliament that penalty would increase to a maximum of ten years' imprisonment. This markedly higher proposed maximum penalty reflects the nature of the material that may be classified as objectionable, including as it does child pornography. If any material produced as the result of intimate covert filming were likely to reach that standard it would be open to the police to seek to have the Court refer the publication to the Classification Office under section 29 of the Act. In the event that the publication were declared objectionable, the offender would become liable to the more serious penalty, should that be passed into law.
- 4.34 For the offence of *possession of a voyeuristic recording* we propose a maximum penalty of twelve months' imprisonment. This would distinguish simple possession from the more serious conduct of making or publishing the recordings.
- 4.35 By way of comparison, section 131 of the Films, Videos, and Publications Classification Act 1993 penalises possession of an objectionable publication with a fine of up to \$2000 for an individual or \$5000 for a body corporate. The Film, Videos, and Publications Classification Amendment Bill's proposed new possession offence has a maximum penalty of two years' imprisonment or a fine up to \$50 000 for an individual (or a fine up to \$100 000 for a body corporate).<sup>122</sup> This new offence has a wider reach than our proposed possession offence because it encompasses situations where the person "has reasonable cause to believe"

<sup>119</sup> The key comparative offences are section 216B, which concerns interception of a private communication by means of an interception device and section 216C, which prohibits disclosure of private communications unlawfully intercepted.

<sup>120</sup> Crimes Act 1961 s 144; and Crimes Amendment Bill (No 2) 2003, proposed new section 131(3).

<sup>121</sup> The other proposed offences in the Bill have penalties in the 5, 7, 10, 14 and 20 year range, as is the case with most sexual offences currently in the Crimes Act 1961.

<sup>122</sup> Films, Videos, and Publications Classification Amendment Bill 2003, proposed new section 131A.

that the publication is objectionable, and it deals with material that is by its nature “injurious to the public good”.

- 4.36 The provisions of sections 8 and 9 of the Sentencing Act 2002, particularly those relating to aggravating factors, provide a sufficiently flexible framework for the Court to take account of any serious features in an individual case, such as a breach of trust, or the vulnerable position of the victim. Other factors, such as the extent of any publication (over the internet, for example), would undoubtedly be given the weight that was felt appropriate by the sentencing judge, depending on the circumstances of the case.
- 4.37 An important aspect of responding to intimate covert filming is confiscation and/or destruction of the images and the means to distribute them so that the privacy invasions are not repeated. With digital images, complete destruction may be difficult or impossible, but the law should respond as far as is possible by providing for the seizure of the equipment used for distribution. The courts overseas are often empowered to make an order forfeiting for destruction any recording or copy made in breach of the law. Alternatively, an order could be made requiring a convicted offender to delete records stored on a computer, but this would be difficult to enforce.
- 4.38 We recommend destruction and forfeiture provisions along the lines of section 136(1) and (3) of the Films, Videos, and Publications Classification Act 1993.<sup>123</sup> This would allow the Court to order the destruction of any covertly filmed images, and to order that any equipment, goods, or other thing used in the commission of the offence be forfeited to the Crown. Forfeiture orders of this type may also have a deterrent effect.

### **Legislative framework**

- 4.39 There will be some overlap between the offences proposed above and the provisions of the Films, Videos, and Publications Classification Act 1993, particularly in respect of that Act’s application to sexualised nude or semi-nude images of children and young people. Despite the overlap, and the recommendations of Parliament’s Government Administration Committee that the “gateway” provisions of that Act be either removed or widened in a way that would provide for coverage of covertly filmed material,<sup>124</sup> we do not regard intimate covert filming as being best dealt with as an extension to the censorship laws, for reasons set out at paragraphs 3.20 and 3.21.
- 4.40 The proposed offences are of a type that could be expected to be found in the Crimes Act 1961. Given that the harms of intimate covert filming concern the breach of privacy and the potential risk of sexual exploitation, we consider the offences could be placed in the Crimes Act in either Part 7 (under the heading of either Sexual Crimes, or Crimes Against Morality and Decency), or Part 9A (Crimes Against Personal Privacy).
- 4.41 We note that overseas jurisdictions have adopted different approaches to where these offences should sit in their criminal codes. Some have placed the offences in the context of sexual offending, some address this conduct as a criminal breach

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<sup>123</sup> Another relevant provision is section 216E of the Crimes Act 1961, which enables the Court to order forfeiture of interception devices following conviction, for intercepting private communications, or for dealing and so on with interception devices.

<sup>124</sup> Government Administration Committee, above n 4.

of privacy, and several jurisdictions cover other aspects of voyeurism, including observation (“peeping Tom”) in the same provision. Canada’s proposed offence has both privacy and sexual elements, but is drafted for inclusion at the end of the sexual offences part of the criminal code.

## PRIVACY ACT 1993 COMPLAINTS RESOLUTION PROCESS

- 4.42 Given the fundamental nature of the violation of privacy and the existence of a statutory privacy complaints jurisdiction, with relevant expertise and experience, we believe that the best way to proceed with a civil remedy is through the Privacy Act 1993 complaints process. This is already possible in certain circumstances, and has been done on at least one occasion.<sup>125</sup>
- 4.43 Several amendments to the Privacy Act 1993 would be necessary to make this an effective route to pursue remedies for intimate covert filming and distribution.
- 4.44 The first concerns section 56 “Personal information relating to domestic affairs”. The exemptions of section 56 apply to an individual’s collection or holding of personal information “solely or principally for the purposes of, or in connection with, that individual’s personal, family or household affairs”. This raises questions about the situation where an individual secretly films another for the individual’s own gratification, or retains a covertly filmed image for his or her own use. An amendment is required to ensure such conduct is not exempted.
- 4.45 If the offences of *making a voyeuristic recording*, *publishing a voyeuristic recording* and *possessing a voyeuristic recording* were introduced as we recommend, this could be accompanied by an amendment to section 56 to clarify that information obtained through criminal conduct is not covered by these exemptions. The standard for “criminal conduct” would not require the respondent to have been charged or convicted. The Office of the Privacy Commissioner would make a decision on the balance of probabilities as they do with all other complaints investigations.
- 4.46 The amendment would clear the way for all conduct that falls within the offence provisions to also be dealt with as a breach of privacy complaint. This would reinforce the position set out in Information Privacy Principle 4, which requires that the collection of personal information shall not be by “unlawful means”, or means that in the circumstances of the case “are unfair; or intrude to an unreasonable extent upon the personal affairs of the individual concerned”.<sup>126</sup>
- 4.47 One relevant question is whether it is appropriate that there must be an attempt at conciliation and agreed settlement before resort can be made to the Human Rights Review Tribunal for this type of privacy breach. Would such a process be realistic given the way the complainants are likely to be feeling and the likely type of defendant? The alternative would be to allow or require by-passing of the Privacy Commissioner’s conciliation process in favour of investigation, followed by referral to the Director of Human Rights Proceedings if there is a case to be answered.
- 4.48 In considering this issue, we note that one case of intimate covert filming was dealt with by the Privacy Commissioner, and a settlement was reached and accepted by all but one complainant.<sup>127</sup> If the normal conciliation system were

<sup>125</sup> See chapter 3, para 3.32.

<sup>126</sup> Privacy Act 1993, s 6, Principle 4.

<sup>127</sup> This was the filming of the theatre group in Christchurch, Case Note, above n 91.

by-passed in such cases, this may cause an undue erosion of the process and the complaints resolution philosophy of the Privacy Commissioner, where the focus is on resolving the issue at the lowest level possible. This focus may, in fact, be one of the chief benefits of using this route, in a suitable case, although we note the other key advantage of a Privacy Act approach is the specialist nature of the Human Rights Review Tribunal. We are not convinced that intimate covert filming complaints are sufficiently different from other privacy complaints to justify such a departure. In cases where conciliation appears to have little or no prospect of success the Privacy Commissioner should be able to ensure there is no unnecessary time spent and immediately refer the complaint on, once this has become obvious.

- 4.49 Victims will, of course, wish to stop the distribution or further distribution of images, which means complaints may be time-critical. Within resource and workload constraints, the Office of the Privacy Commissioner has the capacity to prioritise complaints, as does the Director of Human Rights Proceedings, although it is likely that distribution may often have taken place before the complainant discovers the filming, and, of course, time is required to investigate complaints.<sup>128</sup>
- 4.50 An undertaking not to distribute or further distribute the material could be sought as part of the Privacy Commissioner's settlement process, and the Human Rights Review Tribunal has the power under section 85(1)(b) of the Privacy Act 1993 to make an order "restraining the defendant from continuing or repeating the interference". Although such orders may be made "after the horse has bolted" in some cases, especially given the instantaneous and prolific nature of digital filming and distribution, the orders will be a restraint against future conduct.
- 4.51 These orders would be reinforced by orders for forfeiture of any images or equipment used in making or distributing them. Forfeiture orders could be made under section 85(1)(e) of the Privacy Act 1993, which allows the Tribunal to order "[s]uch other relief as [it] thinks fit". It may, however, be useful to make forfeiture orders an explicit power of the Tribunal with respect to intimate covert filming and distribution.
- 4.52 Also particularly apposite to these complaints would be the award of damages as provided for at section 88 of the Act, including damages for "humiliation, loss of dignity, and injury to feelings".
- 4.53 Of course, where there is not an identifiable victim who knows that she or he has been filmed, criminal prosecution will be the only possible response should such images be discovered. Given the nature of intimate covert filming and distribution this lack of knowledge may often be the case.

## Summary

- 4.54 The Privacy Act complaints process is likely to be of benefit in those cases where the subject becomes aware of the filming, distribution or possession. The State-funded specialist jurisdiction of the complaints process provides a viable alternative route through which subjects of intimate covert filming may wish to

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<sup>128</sup> As discussed in para 3.37, the remedy of interim injunction could be sought under the common law tort of interference with privacy. Although the Court of Appeal has set the threshold very high, namely "compelling evidence of most highly offensive intended publicising of private information and there is little legitimate public concern in the information", cases of intimate covert filming may well cross that threshold.

seek tailored redress for the violation of their privacy. In order to facilitate this, we recommend the following amendments to the Privacy Act 1993:

- amend section 56 to provide that the exemptions for “personal information relating to domestic affairs” do not extend to information obtained through criminal offending whether or not charged or convicted; and
- amend section 85 to give the Human Rights Review Tribunal an explicit power when dealing with cases of intimate covert filming, to make orders for forfeiture of any images or equipment used in making or distributing such images.

4.55 In making these recommendations we are aware that there has, for a number of years, been a significant backlog in complaints resolution at the Office of the Privacy Commissioner, although special additional funding was allocated for 2003/04 and 2004/05 to address this. The resource implications for the Office of the Privacy Commissioner of our recommendations will of course need to be considered.

## NEW ZEALAND BILL OF RIGHTS ACT 1990: PRIVACY AND FREEDOM OF EXPRESSION

- 4.56 These legislative proposals affect the right to freedom of expression as provided for in section 14 of the New Zealand Bill of Rights Act 1990 (Bill of Rights Act). Section 14 provides: “Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form”. There is no corresponding right to privacy in the Bill of Rights Act, although the section 21 right to be free from unreasonable search and seizure provides an indirect recognition of aspects of personal privacy,<sup>129</sup> and section 28 provides that existing rights or freedoms are not “abrogated or restricted” only because they are not included in the Bill of Rights Act in whole or in part. Further, privacy has been described as an internationally recognised fundamental value,<sup>130</sup> and one that has gained legislative protection in various forms in all comparable jurisdictions, despite the existence of freedom of expression provisions in charters and constitutions.
- 4.57 The section 14 right is, like all other rights in the Bill of Rights Act, not an absolute right but one subject to section 5, which provides that the rights and freedoms in the Act “may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.
- 4.58 Film, video and pictures are included in the “information” protected by section 14, and a fundamental aspect of the right is that it extends to protecting all information and opinion, however unpopular, offensive or distasteful.<sup>131</sup> Although

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<sup>129</sup> See the discussion of the Canadian jurisprudence on this point as set out by Gault P (Blanchard J concurring) in *Hosking v Runting*, above n 3, paras 60–61.

<sup>130</sup> *Hosking v Runting*, above n 3, para 92, Gault P.

<sup>131</sup> In *Living Word*, above n 72, para 45 the Court drew attention to the European Court of Human Rights statement in *Handyside v UK* (1976) 1 EHRR 737, para 49:

Freedom of expression constitutes one of the essential foundations of a [democratic] society ... Subject to Article 10(2), it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.

freedom of expression is content neutral, the courts nevertheless weigh the value of the particular “expression”, and do not treat all forms of expression equally. In *Hosking v Runtig*, the Court stated, “The importance of the value of the freedom of expression ... will be related to the extent of legitimate public concern in the information publicised”.<sup>132</sup>

- 4.59 We have considered whether our proposed limitations on the ability to seek, receive, and impart covertly filmed intimate images are justifiable under section 5 of the Bill of Rights Act.<sup>133</sup> Key issues are whether the overall objective is of sufficient importance and significance to override the right to freedom of expression; whether there is a rational and proportionate connection between the objective and the means to achieve it; and whether the measure impairs the right as little as possible.
- 4.60 Covert filming of people in intimate situations, and distribution and possession of the resultant images are fundamental invasions of personal privacy, dignity and autonomy, at the serious end of the spectrum of privacy invasions. The damage goes beyond the psychological and emotional violation of the individuals filmed. Such conduct creates fear and unease in society as a whole. The behaviour often has a predatory sexual element, which in some cases may be an indicator of a link to more serious sexual offending.<sup>134</sup> The objective of protecting individuals and society from these harms is a significant one.
- 4.61 The criminal law is well placed to provide an effective response to this conduct. The response can be immediate. The investigative and prosecutorial resources of the police can be marshalled, and the process of conviction and penalty can have deterrent, incapacitative, rehabilitative and reparative effects. The complaints process of the Office of the Privacy Commissioner offers civil remedies to redress the damage and distress caused by the filming. We note that the Court of Appeal has already held that the tort of interference with privacy is a justifiable limit on freedom of expression<sup>135</sup> and we consider the same applies to these proposals.

We have considered whether there are other, less intrusive, options to address this conduct, such as education, regulation of the devices, or industry regulation, but believe these options would be impractical and ineffective. While people can be warned of the dangers, they cannot reasonably be expected to be constantly on their guard against miniscule cameras. There are very few devices that do not have legitimate uses, so it would be difficult to define the devices that were outlawed. Also, the law would not be able to keep pace with technological developments. Lastly, much of this conduct is the work of individuals rather than organisations, and publication is most often through private networks, particularly the internet, which is not centrally owned or controlled, nor is it amenable to control by territorial jurisdictions.

- 4.62 In considering the appropriateness and proportionality of the proposed maximum penalties and forfeiture provisions, we have used several yardsticks. These are:

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<sup>132</sup> *Hosking v Runtig*, above n 3, para 132, Gault P.

<sup>133</sup> Also relevant is section 6, which requires that enactments be interpreted consistently with the Bill of Rights Act: “wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning”.

<sup>134</sup> See chapter 2, paras 2.35–2.38.

<sup>135</sup> *Hosking v Runtig*, above n 3, paras 109–116, Gault P.



the provisions for similar offences in the Films, Videos, and Publications Classification Act 1993 and the proposed penalty levels in the Amendment Bill; the penalty levels for Crimes Act 1961 offences against personal privacy relating to interception of communications; the existing penalties for sex offences in the Crimes Act 1961; and the proposed penalties for sex offences in the Crimes Amendment Bill (No 2) 2003.

- 4.63 In addition, our proposed maximum penalties sufficiently differentiate the seriousness of making, distributing and possessing a permanent record of someone in an intimate moment, as opposed to the less serious offences in the Summary Offences Act 1981.
- 4.64 Given the significance of technology in our recommended offences, the proposed forfeiture provisions are reasonable. These provisions would be modelled on those in the Films, Videos, and Publications Classification Act 1993 and compare with those in the Crimes Act 1961 section 216E regarding forfeiture of interception devices used for offences of privacy invasion.

## AREAS NOT COVERED BY OUR OFFENCE PROPOSALS

- 4.65 The scope of the recommended offences is, with the exception of “up-skirt” voyeurism, confined to the terms of reference. As with any offence provisions, conduct that meets some but not all of the requisite elements will either fall to be dealt with by the existing criminal law, or it will be no offence. Some examples are listed below.
- The offences are concerned with covert recording and not covert observation. Accordingly, not all types of visually aided voyeurism are included – such as the use of binoculars, for example.
  - The covert filming of people who may be nude or partly nude, but who cannot reasonably expect privacy, for example, secretly filming topless bathing on a public beach, is not included.
  - Surreptitiously filming people in public or in non-intimate circumstances (other than filming under their clothing), even if done for the purposes of sexual gratification, for example, filming children in a public place walking to school, is not included, although other offences may be applicable.<sup>136</sup>
  - Also not included is publication on the internet of images of a another person who is nude, or in intimate circumstances, if the visual recording was made with their knowledge or consent.<sup>137</sup>

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<sup>136</sup> See appendix 1, para A4 and n 138 regarding the recent conviction of a man for offensive behaviour in respect of such conduct.

<sup>137</sup> In this context, we note the case of *L v G* [2002] DCR 234, where the plaintiff successfully sued for damages for breach of privacy following the defendant’s publication, without her consent, of a sexually explicit photograph that had been taken with her consent.

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## APPENDIX 1

### Remedies available under current New Zealand law

- A1 **T**HIS APPENDIX surveys relevant New Zealand law. It does not, however, include discussion of the Films, Videos, and Publications Classification Act 1993, the Privacy Act 1993 nor the emerging tort of privacy. These are discussed in the body of the report at chapter 3.

#### CURRENT LAW – CRIMINAL OFFENCES

- A2 Under existing legislation, there is no provision that specifically prohibits the taking of a photograph or other visual record of a person who is nude, partially nude, or engaging in sexual activity. There are, however, a number of possible criminal offences that may, in some circumstances, be applicable to covert filming and the subsequent distribution of the images.

#### **Summary Offences Act 1981**

- Section 4 – offensive behaviour in a public place.
  - Section 29 – being found on a building or enclosed yard without reasonable excuse.
  - Section 30 – peeping or peering into a dwellinghouse by night without reasonable excuse.
- A3 These provisions, which, in the case of offensive behaviour and peeping or peering into a dwellinghouse, carry a maximum penalty of a fine and, in the case of being found on a building, a maximum of three months' imprisonment, are aimed at nuisance-type behaviour. Each of the offences may apply to the activities of a voyeur in certain circumstances, but each has its limitations: offensive behaviour extends only to activity occurring in a “public place”; being found on a building or enclosed yard requires no proof of intent, but it is a defence if the offender satisfies the Court that he or she had no intention to commit an offence; peering into a dwellinghouse – the classic – “peeping Tom” offence – can be committed only at night time.
- A4 In a recent Dunedin case, a man was successfully prosecuted on a charge of offensive behaviour for surreptitiously photographing passing schoolgirls through a gap in a curtain in a bus parked on a public street. The subjects photographed were fully dressed and were walking to school when filmed. The Judge found

that, in the circumstances, the defendant's actions met the objective test for behaviour that is "offensive".<sup>138</sup>

### **Crimes Act 1961**

- Section 125 – wilfully doing an indecent act in a public place.
- Section 126 – indecent act with intent to insult or offend.

A5 Indecency offences under the Crimes Act 1961 carry a maximum penalty of two years' imprisonment. Both crimes may cover intimate covert filming in some situations – if it takes place in, or within view of, a "public place" under section 125, or if it can be established that the recording was made with the intention of insulting or offending the victim under section 126. It is, however, debatable whether the act of surreptitiously recording another person in intimate circumstances will necessarily be an "indecent" act for the purposes of these provisions.

### **Harassment Act 1997**

- Section 8 – criminal harassment.

A6 It is an offence punishable by a maximum penalty of two years' imprisonment to engage in a pattern of behaviour (at least twice in a 12 month period) that is known to the offender to be likely to cause another to fear for his or her own safety. In *Police v D* the Court held that the legislation recognised that behaviour that appears trivial or innocent when viewed in isolation may amount to harassment when viewed in its proper context.<sup>139</sup> The "specified acts" prescribed by the Act as constituting harassment could include conduct associated with intimate covert filming, but the requirement for a pattern of behaviour involving the same victim limits its practical application.<sup>140</sup>

### **OTHER STATUTORY PROVISIONS**

A7 Some other avenues may provide recourse for the subjects of intimate covert filming.

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<sup>138</sup> *Police v R* (20 February 2004) District Court Dunedin, Judge O'Driscoll (appeal pending). Relevant circumstances included that the defendant had taken a very large number of photographs of schoolgirls over an extended period of time and on a number of occasions, the defendant offered the Court no explanation for the photography, he took the photographs furtively and gave a number of different false names when having the films developed, and he had mentioned to a witness that he had a friend who put the images on "the net".

<sup>139</sup> *Police v D* [1999] DCR 426, 429 Judge Deobhakta.

<sup>140</sup> The meaning of "specified act", as set out at section 4 of the Harassment Act 1997 does not specifically include secretly filming someone but, depending on the particular circumstances, this could fall under the headings of "watching" a place the subject frequents; "entering, or interfering with" the subject's property, for instance, where a camera is secretly installed in a house; or "acting in any other way" that "would cause a reasonable person" in the subject's "particular circumstances to fear for his or her safety".

## Human Rights Act 1993

- Section 62 – sexual harassment.

- A8 This provision could be used against intimate covert filming in some instances. Subsection (2) provides that it is unlawful to use:
- ... physical behaviour of a sexual nature to subject any other person to behaviour that–
- (a) Is unwelcome or offensive to that person (whether or not that is conveyed to the first mentioned person); and
  - (b) Is either repeated, or of such a significant nature that it has a detrimental effect on that person in respect of any of the areas to which this subsection is applied by subsection (3) of this section.
- A9 Subsection (3) specifies that the provision applies to employment and employment-related situations, educational situations, and the provision of access to places, vehicles, and facilities, the provision of access to goods and services or land, and provision of access to housing or accommodation.
- A10 Depending on the context, intimate covert filming could be “physical behaviour of a sexual nature”, particularly given the sexual elements of voyeurism.<sup>141</sup> The scope is limited by needing to fall within one of the subsection (3) areas. This would cover intimate covert filming in the context of employment, or examples such as a landlord installing hidden cameras in tenants’ bathrooms.<sup>142</sup> Arguably, a case could also be made to include instances such as recording by way of a cell-phone camera that occurs, between two patrons at a swimming pool, for example, if it could be held that the recording and/or distribution had a “detrimental effect” on that person in respect of access to the service (of going to the swimming pool).
- A11 Section 64 provides that where a sexual (or racial) harassment complaint arises in respect of an employee who would also have the option of pursuing a personal grievance under the Employment Relations Act 2000, then the employee must choose either procedures under the Human Rights Act or the Employment Relations Act.
- A12 To date, the Human Rights Commission has not received any sexual harassment complaints based on the circumstances of intimate covert filming.<sup>143</sup> There have, however, been complaints in relation to peeping, which behaviours can now, with the ready accessibility of technology, be easily converted into intimate covert filming.<sup>144</sup>

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<sup>141</sup> See chapter 2, paras 2.31–2.38 for discussion of voyeurism as a sexual behaviour.

<sup>142</sup> In this context, we also note section 38 of the Residential Tenancies Act 1986, which entitles the tenant to “quiet enjoyment” of the premises, and places a duty on the landlord to “not cause or permit any interference with the reasonable peace, comfort, or privacy of the tenant” in his or her use of the premises. Section 40(2) of the Residential Tenancies Act 1986 places a duty on tenants to not interfere with the “reasonable peace, comfort, or privacy” of other tenants or neighbours.

<sup>143</sup> Telephone conversation with Mervin Singham, Manager Dispute Resolution, Human Rights Commission, 16 March 2004.

<sup>144</sup> See for instance *Proceedings Commissioner v Mundy* (22 April 1996) Complaints Review 7/96.

## **Employment Relations Act 2000**

- Section 108 – sexual harassment.

- A13 If intimate covert filming occurs within a work context there may be a remedy through a personal grievance on grounds of sexual harassment. Section 108 defines sexual harassment for the purposes of the Act. As with the Human Rights Act 1993, the relevant part of that definition is where the employee is subject to “physical behaviour of a sexual nature” that is either “unwelcome or offensive” and “either by its nature or through repetition, has a detrimental effect on that employee’s employment, job performance, or job satisfaction”.<sup>145</sup>
- A14 If a personal grievance is brought on the basis of sexual harassment, the Employment Relations Authority or the Employment Court have a range of options. These include the payment of compensation to the employee for humiliation, loss of dignity, and injury to feelings. The Employment Relations Authority or Employment Court may also make recommendations to the employer regarding actions in respect of the person who committed the harassing behaviour, or other recommendations as necessary to prevent further such harassment.<sup>146</sup>
- A15 As is the case in the Human Rights Act 1993, employees are required to choose between either pursuing their sexual harassment case through a personal grievance under the Employment Relations Act 2000 or a complaint under the Human Rights Act.<sup>147</sup>

## **Harassment Act 1997**

- Part 3 – civil harassment.

- A16 This allows persons to apply to the Court for a restraining order against a person who is harassing them. Under section 16, the Court may make a restraining order if the respondent is, or has been harassing the applicant, and this behaviour causes the applicant distress, threatens to cause distress or would do so to a reasonable person in the applicant’s particular circumstances, and in the circumstances the behaviour justifies the order, and the order is necessary to protect the applicant from further harassment.
- A17 As with criminal harassment, civil harassment requires “specified acts” and a pattern of behaviour directed against the same person. The meaning of “specified act” as it may apply to intimate covert filming would be as discussed above in the context of the criminal harassment provisions.<sup>148</sup>

## **Broadcasting Act 1989**

- A18 The Broadcasting Act 1989 established the Broadcasting Standards Authority (BSA) to, among other things, “receive and determine complaints” about the content of television or radio programmes.<sup>149</sup> Section 4(1)(c) requires broadcasters to maintain standards that are consistent with “the privacy of the individual”.

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<sup>145</sup> Employment Relations Act 2000, s 108(1).

<sup>146</sup> Employment Relations Act 2000, s 123.

<sup>147</sup> Employment Relations Act 2000, s 112.

<sup>148</sup> See para A6 and above n 140.

<sup>149</sup> Broadcasting Act 1989, s 21.

Unlike complaints about the maintenance of other standards, privacy complaints can be made directly to the BSA, and it is the only type of complaint on which the BSA may award compensation (up to \$5000).<sup>150</sup> The BSA's normal practice is to consider written statements, although it may hold a formal hearing if necessary, and may agree to name suppression when dealing with complaints about privacy.<sup>151</sup> A privacy complaint may be made by anyone.<sup>152</sup>

A19 The BSA has developed privacy principles to apply in respect of complaints alleging a breach of the privacy standard. These principles have their genesis in the jurisprudence developed around the privacy torts in the United States of America,<sup>153</sup> and the BSA has adapted and developed them over time. The current seven relevant principles are:

- i) The protection of privacy includes protection against the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities.
- ii) The protection of privacy also protects against the public disclosure of some kinds of public facts. The "public" facts contemplated concern events (such as criminal behaviour) which have, in effect, become private again, for example through the passage of time. Nevertheless, the public disclosure of public facts will have to be highly offensive to a reasonable person.
- iii) There is a separate ground for a complaint, in addition to a complaint for the public disclosure of private and public facts, in factual situations involving the intentional interference (in the nature of prying) with an individual's interest in solitude or seclusion. The intrusion must be offensive to the ordinary person but an individual's interest in solitude or seclusion does not provide the basis for a privacy action for an individual to complain about being observed or followed or photographed in a public place.
- iv) The protection of privacy also protects against the disclosure of private facts to abuse, denigrate or ridicule personally an identifiable person. This principle is of particular relevance should a broadcaster use the airwaves to deal with a private dispute. However, the existence of a prior relationship between the broadcaster and the named individual is not an essential criterion.
- v) The protection of privacy includes the protection against the disclosure by the broadcaster, without consent, of the name and/or address and/or telephone number of an identifiable person. This principle does not apply to details which are public information, or to news and current affairs reporting, and is subject to the "public interest" defence in principle (vi).

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<sup>150</sup> The general process is that complaints must first be directed to the broadcaster, and the complainant can only come to the BSA for investigation and review if dissatisfied with the response from the broadcaster. For breaches of standards other than privacy, the remedies are directions to the broadcaster to publish a statement and an order for the broadcaster to pay costs of up to \$5000 to the Crown. These remedies are available for privacy breaches in addition to the compensation order. The BSA can also direct the broadcaster to stop broadcasting or refrain from advertising for up to 24 hours.

<sup>151</sup> *Television and Radio Complaints: A Guide for Viewers and Listeners*, Broadcasting Standards Authority <<http://www.bsa.govt.nz/>> (last accessed 18 December 2003).

<sup>152</sup> Michael Stace *Privacy: Interpreting the Broadcasting Standards Authority's Decisions January 1990–June 1998* (Dunmore Press Ltd, Palmerston North, 1998) 73.

<sup>153</sup> See appendix 2: The law in other jurisdictions, paras A60–A62 for discussion of the four privacy torts in the United States of America.

- vi) Discussing the matter in the “public interest”, defined as of legitimate concern or interest to the public, is a defence to an individual’s claim for privacy.
- vii) An individual who consents to the invasion of his or her privacy, cannot later succeed in a claim for a breach of privacy. Children’s vulnerability must be a prime concern to broadcasters. When consent is given by the child, or by a parent or someone in loco parentis, broadcasters shall satisfy themselves that the broadcast is in the best interest of the child.

A20 The BSA makes the following comments in relation to these principles:

These principles are not necessarily the only privacy principles that the Authority will apply.

The principles may well require elaboration and refinement when applied to a complaint.

The specific facts of each complaint are especially important when privacy is an issue.<sup>154</sup>

A21 The processes of the BSA, and the privacy principles they have developed, could be used to deal with intimate covert filming only if the images were subsequently broadcast on public television and if a complaint were received. Although there is a relatively narrow intersection between our area of focus and the provisions of the Broadcasting Act 1989, the principles and approach of the BSA are instructive.

## CURRENT LAW – GENERAL TORT LAW

A22 Depending on the circumstances, a civil remedy may be available to the subject of intimate covert filming. Other than the tort of interference with privacy discussed in chapter 3, possible causes of action would be trespass, harassment, breach of confidence, intentional infliction of nervous shock, and nuisance.

A23 A claim in trespass may be available if the filming involved a trespass to the subject’s property. Even where entry to the property could fall within the terms of an implied licence, if the person making the recording knew the occupier would not have agreed to the filming, they could be liable in trespass.<sup>155</sup>

A24 Liability for harassment, or for sexual harassment, may arise, although a remedy would usually be sought under the civil harassment provisions of the Harassment Act 1997, or the relevant provisions of the Human Rights Act 1993 or the Employment Relations Act 2000 as discussed above.

A25 Breach of confidence has provided a long-standing civil remedy for the publication or disclosure of confidential information about the plaintiff. It generally required the plaintiff to establish first, that the information was confidential; secondly, that it had been imparted in circumstances importing an obligation of confidence and, thirdly, that the unauthorised disclosure must have led to some detriment being suffered by the person who imparted it. In England, the scope of this tort has been extended by recent decisions, including *Douglas v Hello! Ltd*,<sup>156</sup> where it has been held that it is not necessary to establish a confidential relationship between the publisher of the information and the subject of it. In New Zealand, the requirement

<sup>154</sup> *Privacy Principles*, Broadcasting Standards Authority <<http://www.bsa.govt.nz/privacy.htm>> (last accessed 18 December 2003).

<sup>155</sup> *TV3 Network Services Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720,732 (HC) Eichelbaum CJ.

<sup>156</sup> *Douglas v Hello! Ltd* [2001] 2 All ER 289 (CA).

remains for the confidential information to have been imparted in circumstances importing an obligation of confidence.<sup>157</sup> Even though in England, the development of this tort provides the basis for a claim in cases of covert filming, in New Zealand, it is unlikely to be available.

- A26 The long-established tort of intentional infliction of nervous shock may be applicable in rare cases.<sup>158</sup> Like breach of confidence, the boundaries of this tort have also been the subject of debate, most recently in *Wainwright v Home Office*.<sup>159</sup> In New Zealand, proceedings for the intentional infliction of harm or distress succeeded in *Stevenson v Basham*,<sup>160</sup> but, more recently, claims under this tort have been largely unsuccessful as alternatives to claims for breach of privacy.
- A27 The tort of nuisance is essentially concerned with the undue interference with the use of or enjoyment of another's land. Filming that involved an element of harassment may fall within the boundaries of the tort, but the very nature of intimate covert filming means that an occupier will be unaware it is occurring, and, thus, it may be difficult to argue that his or her enjoyment of the land has been interfered with.

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<sup>157</sup> See *P v D* [2000] 2 NZLR 591 (HC) Nicholson J. This case concerned threatened publication of information that P (a public figure) had been treated in a psychiatric hospital.

<sup>158</sup> As established in *Wilkinson v Downton* [1897] 2 QB 57 Wright J.

<sup>159</sup> *Wainwright v Home Office* [2003] 3 All ER 943 (CA) and [2003] 4 All ER 969 (HL).

<sup>160</sup> *Stevenson v Basham* [1922] NZLR 225 (SC) Herdman J. This case concerned a man threatening another that he would burn down the house occupied by the second man and his wife.



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## APPENDIX 2

### The law in other jurisdictions

#### CANADA

- A28 **L**EGISLATION is currently before the Canadian House of Commons to enact a new offence of “voyeurism”. The Bill was introduced in December 2002 and as of March 2004 had been reported back from committee and reinstated in the House of Commons.<sup>161</sup>
- A29 The legislation follows publication by the Canadian Department of Justice in 2002 of *Voyeurism as a Criminal Offence: A Consultation Paper*.<sup>162</sup> This paper responds to increased awareness of, and concern at, incidents involving voyeurism and modern technology, for which the criminal code provided no remedy. There were calls to reform the law, including from the Provincial and Territorial Ministers of Justice. The paper proposed new criminal offences of sexual voyeurism and the distribution of voyeuristic materials. The responses received were overwhelmingly in favour of enacting such offences. The great majority of respondents were of the view that criminal voyeurism should be defined as both a privacy and a sexual offence, and there was also strong support for a “public good” defence to such conduct. Views were mixed as to whether the offences of making the image and distributing the image should have different penalty levels.<sup>163</sup>
- A30 The Bill defines criminal voyeurism as follows:
- (1) Every one commits an offence who, surreptitiously, observes – including by mechanical or electronic means – or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if
    - (a) the person is in a place in which 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;
    - (b) the person 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 or recording is done for the purpose of observing or recording a person in such a state or engaged in such activity; or
    - (c) the observation or recording is done for a sexual purpose.
- “Visual recording” is defined as including “a photographic, film or video recording made by any means”. There is an exemption for peace officers when engaged in judicially authorised surveillance.
- A31 It is a further offence to print, publish, distribute, circulate, sell, advertise or make available a recording, or to have such a recording in one’s possession for such purposes, providing one knows that the recording was obtained through

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<sup>161</sup> Bill C-20, above n 46.

<sup>162</sup> *Voyeurism as a Criminal Offence*, above n 51.

<sup>163</sup> *Voyeurism as a Criminal Offence: Summary of the Submissions*, above n 43.

commission of the voyeurism offence. Voyeurism may be prosecuted by indictment with a maximum penalty of five years' imprisonment, or as a summary offence with a maximum penalty of six months' imprisonment. Liability is exempted for actions that "serve the public good" so long as they "do not extend beyond what serves the public good".

- A32 The Bill provides that "voyeuristic recordings" are among the items for which a judge may make an order of forfeiture for disposal as the Attorney-General may direct. "Voyeuristic recordings" are added to the list of things for which a judge can order the custodian of a computer system to produce an electronic copy, to render the material inaccessible, and to provide the necessary information to identify and locate the person who posted it. The Court may also order such material to be deleted from a computer system, if certain conditions are met. Finally, voyeurism is added to the list of offences for which an authorisation can be sought to intercept private communications.<sup>164</sup>

## UNITED STATES OF AMERICA

### Federal jurisdiction

- A33 In February 2002, Representative Michael Oxley introduced the Video Voyeurism Act of 2002.<sup>165</sup> The Bill was referred to the House Judiciary Committee and in March 2002 was referred on to the Subcommittee on Crime. The Oxley Bill is designed "to prohibit video voyeurism". It inserts a new chapter into the United States Code under the heading of "Privacy".
- A34 "Video voyeurism" involves videotaping, photographing, filming, or recording by any electronic means, any nonconsenting person, in circumstances in which that person has a reasonable expectation of privacy, "if that person is totally nude, clad in undergarments, or in a state of undress that exposes the genitals, pubic area, buttocks, or female breast"; or filming and so on "under that person's clothing so as to expose the genitals, pubic area, buttocks, or female breast". The penalty is a fine or imprisonment for not more than one year, or both. Exceptions are provided for law enforcement and corrections officers in appropriate circumstances.
- A35 A companion Bill was introduced to the Senate by Senator DeWine. This Bill was referred to the Senate Committee in June 2002, read twice and referred to the Committee on the Judiciary.<sup>166</sup>

### State jurisdictions

- A36 A large number of State legislatures have passed statutes to address video voyeurism from the mid-1990s onwards. The offences have been added to the criminal codes, where they are most frequently included within the category of

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<sup>164</sup> Bill C-20: 162, above n 46; and Robin MacKay and Marilyn Pilon *Legislative Summary* (Parliamentary Research Branch, Library of Parliament, Canada, Ottawa, 2003).

<sup>165</sup> Video Voyeurism Act of 2002, above n 40.

<sup>166</sup> One-hundred-and-seventh Congress, 2d Session, S 2661 IS, Video Voyeurism Act of 2002, United States Senate, The Library of Congress, Thomas Legislative Information on the Internet <<http://thomas.loc.gov>> (last accessed 31 March 2004).

offences against public order and decency.<sup>167</sup> Within this category they are usually expressed in terms of violation or invasion of privacy.<sup>168</sup> These offences often sit alongside earlier enacted provisions to regulate eavesdropping and audio surveillance.<sup>169</sup> They may also be accompanied by, usually older, viewing (“peeping Tom”) offences.

- A37 Many of these offences have been enacted in response to particular incidents where the law was found to be wanting. The Connecticut voyeurism legislation followed an incident in 1998 when a school student secretly filmed female classmates changing into swimsuits at a party. He then displayed and distributed the images to male classmates. The Louisiana law followed prosecutors’ difficulties in dealing with complaints that a trusted neighbour had installed cameras in the next-door house above the bedrooms and bathrooms.<sup>170</sup> Similarly, Alaska’s 1995 law change followed the secret videoing of high-school students in a locker room.<sup>171</sup>

### *Key elements of the offence*

- A38 There must be filming or some other means of making an image or representation. The images must be made intentionally, secretly and without the consent of the subject. Many versions of the offence require that the subject be in a private place or a place where he or she would have “a reasonable expectation of privacy” and be “safe from hostile intrusion or surveillance”.<sup>172</sup> Many require that the subject be in a state of nudity or partial nudity.<sup>173</sup> Some require installation of the viewing or filming device.<sup>174</sup>
- A39 Some of the codes require the filming or viewing to be done for a sexual purpose.<sup>175</sup> South Carolina’s offence does not require nudity but the filming has to be “for the purpose of arousing or gratifying the sexual desire of any person”. Louisiana

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<sup>167</sup> Alaska Statutes, Title 11, § 11.61.123 (2003); SC Code Ann, Title 16, § 16-17-470 (2002); Utah Code Ann, Title 76, § 76-9-702.7 (2003); Wis Stat, Chapter 941, § 942.08 (2003); (New H) R S A, Title LXII, § 644:9 (2003); MRS, Title 17-A, § 511 (2003); HRS, Title 37, § 711-1111; Del C, Title 11, § 1335 (2003); OCGA, Title 16, § 16-11-62 (2002); and LaRS, Title 14, § 14:283 (2003).

<sup>168</sup> For “violation or invasion of privacy” offences see R S Mo, Title 38, § 565-253 (2003); M R S, Title 17-A, § 511 (2003); Del C, Title 11, § 1335 (2003); HRS, Title 37, § 711-1111 (2003); (New H) R S A, Title LXII, § 644:9 (2003); Pa C S, Title 18, § 7507.1 (2003); Wis Stat, Chapter 941, § 942.08 (2003); and Tenn Code Ann, Title 39, § 39-13-605 (2003). A notable exception is Ohio, where the offence of voyeurism appears in the “Sexual Offenses” chapter of the Ohio Revised Code, ORC Ann, Title 29, § 2907.08 (Anderson 2003).

<sup>169</sup> See for instance S D Codified Laws, Title 22, § 22-21-1 (2003); Conn Gen Stat, Title 53a § 53a-189a (2003); and S C Code Ann, Title 16, § 16-17-470 (2002).

<sup>170</sup> Rothenberg, above n 1, 1154–1155, 1162–1165.

<sup>171</sup> Calvert and Brown, above, n 9, 524–526.

<sup>172</sup> See for instance Conn Gen Stat, Title 53a, § 53a-189a (2003); Fla Stat, Title 46, § 810.14 (2003); OCGA, Title 16, § 16-11-62 (2002); MRS, Title 17-A, § 511 (2003).

<sup>173</sup> See for instance Del C, Title 11, § 1335 (2003); KSA, Chapter 21, § 21-4001 (2002); and RS Mo, Title 38, § 565.253.

<sup>174</sup> See for instance Del C, Title 11, § 1335 (2003); HRS, Title 37, § 711-1111 (2003); and KSA, chapter 21, § 21-4001 (2002).

<sup>175</sup> Code Laws of South Carolina Annotated, Title 16, § 16-17-470 (2002); LaRS, Title 14, § 14:283 (2003); Conn Gen Stat, Title 53a, § 53a-189a (2003); Tenn Code Ann, Title 39, § 39-13-605 (2003); Cal Pen Code, Title 15, § 647 (k); Pa C S, Title 18, § 7507.1 (2003); ORC Ann, Title 29, § 2907.08 (Anderson 2003).

law requires “a lewd or lascivious purpose”, with depictions of nudity or sexual intercourse as aggravating factors. A sexual purpose is a feature of the offence definitions in Connecticut, Tennessee, California (for the “up-skirt” version of the offence), Pennsylvania and Ohio. Tennessee, California and Ohio specify that it must be for the defendant’s own sexual pleasure, whereas in the other States it can be for the gratification of any person. This would cover capturing the images for sale or distribution.

- A40 Other requisite intentions are “malice” (Connecticut), and intent to invade the subject’s privacy (Utah and California).<sup>176</sup> Tennessee requires that the image “would offend or embarrass an ordinary person if such person appeared in the photograph”. Some also require that the subject be “identifiable”, as is the case with Tennessee and California’s up-skirt offences.<sup>177</sup>

### “Up-skirt videoing”

- A41 Up-Skirt videoing is a self-explanatory term for covertly taken images, with the filming usually occurring in a public place such as a shopping mall. A variant on this is “down-blouse filming”. A typical incident of this behaviour is provided by the following example, which occurred in California in 1998. Security staff at a shopping mall noticed a man carrying a shopping bag who on several occasions rode on the escalator behind a woman wearing a skirt, placing his bag on the step below the woman. He then rode down again and waited for another woman wearing a skirt. He was found to have an 8mm camera hidden in a shoebox in the bag, and admitted making the tapes in order to sell to a website.<sup>178</sup> Similar examples have occurred with women waiting in line at sports events, while shopping or at an amusement park, and with sales clerks assisting a customer in a store.<sup>179</sup> There are reported to be a number of websites that specialise in these sorts of images with names such as “Hidden Voyeur Camera”, “Undies and Upskirts”, “Upskirts.com” and “Upskirts Sex Voyeur”.<sup>180</sup> As well as being taken for the perpetrator’s own purposes, these images may well be taken to supply the internet market as in the example above.
- A42 Up-skirt videoing is explicitly covered by the voyeurism laws of Hawaii, Maine, California, Delaware, Ohio and Missouri. It is also implicitly captured by the laws of Louisiana and Utah.<sup>181</sup> The key elements that enable such conduct to be captured are that the filming does not need to be in a private place or a place where the victim has “a reasonable expectation of privacy”, although it may be required to be in “circumstances” with such an expectation. Full nudity is not required. Some examples follow.

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<sup>176</sup> Connecticut Annotated Statutes, Title 53a, § 53a-189a (2003); Utah Code Ann, Title 76, § 76-9-702.7 (2003); and Cal Pen Code, Title 15, § 647 (k).

<sup>177</sup> Tennessee Code Annotated, Title 39, § 39-13-605 (2003); and Cal Pen Code, Title 15, § 647 (k).

<sup>178</sup> Rothenberg, above n 1, 1130.

<sup>179</sup> Rothenberg, above n 1, 1159, and Calvert and Brown, above n 9, 477-478, 491.

<sup>180</sup> Rothenberg, above n 1, 1145, n 80. See also Calvert and Brown, above n 9, 475-476, n 39-44 and Pope, above n 33, 1193-1194, n 194.

<sup>181</sup> Hawaii Revised Statutes, Title 37, § 711-1111(2003); MRS, Title 17-A, § 511 (2003); R S Mo Title 38, § 565.253 (2003); Cal Pen Code, Title 15, § 647 (k); Del C, Title 11, § 1335 (2003); ORC Ann, Title 29, § 2907.08 (Anderson 2003); LaRS, Title 14, § 14:283 (2003); and Utah Code Ann, Title 76, § 76-9-702.7 (2003).

## Hawaii

- A43 The offence of “violation of privacy” includes covertly recording or broadcasting “an image of another person’s intimate area underneath clothing, by use of any device”, such an image being taken while the subject is in a public place and without the subject’s consent. “Intimate areas underneath clothing” are defined as not including intimate areas visible through a person’s clothing or intimate areas exposed in public. “Public place” means “an area generally open to the public, regardless of whether it is privately owned, and includes but is not limited to streets, sidewalks, bridges, alleys, plazas, parks, driveways, parking lots, buses, tunnels, buildings, stores, and restaurants”. This provision became effective in May 2003.<sup>182</sup>

## Maine

- A44 The offence of “violation of privacy” includes engaging in:  
Visual surveillance in a public place by means of mechanical or electronic equipment with the intent to observe or photograph, or record, amplify or broadcast an image of any portion of the body of another person present in that place when that portion of the body is in fact concealed from public view under clothing and a reasonable person would expect it to be safe from surveillance.<sup>183</sup>

## Missouri

- A45 Invasion of privacy includes using a concealed camera secretly to “record by electronic means another person under or through the clothing worn by that other person for the purpose of viewing the body of or the undergarments worn by that other person without that person’s consent”.<sup>184</sup>
- A46 Other States try to capture this conduct by being neutral as to the place in which the voyeurism occurs. In Louisiana the key element is that the filming is done for “lewd or lascivious purpose”.<sup>185</sup> The Utah voyeurism offence focuses on secret filming “for the purpose of viewing any portion of the individual’s body regarding which the individual has a reasonable expectation of privacy, whether or not that portion of the body is covered with clothing”. The application of this provision in a public place is somewhat questionable because of the requirement that the individual filmed also be “under circumstances [in which they have] a reasonable expectation of privacy”.<sup>186</sup>
- A47 The Florida law, passed in 1998, was tested in an up-skirt case. Because it requires that the subject be in a “location” that provides “a reasonable expectation of privacy”, the prosecutor had to argue that the portion of the woman’s body covered by the skirt was such a “location”. In the event, the Court was not required to make a ruling on this because the defendant pleaded guilty.<sup>187</sup>

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<sup>182</sup> Hawaii Revised Statutes, Title 37, § 711-1111 (2003).

<sup>183</sup> Maine Revised Statutes, Title 17-A, § 511 (2003).

<sup>184</sup> Missouri Annotated Statutes Title 38, § 565.253 (2003).

<sup>185</sup> Louisiana Revised Statutes, Title 14, § 14:283 (2003).

<sup>186</sup> Utah Code Annotated, Title 76, § 76-9-702.7 (2003).

<sup>187</sup> Calvert and Brown, above n 9, 526-531.

### *Distribution of the images*

- A48 Not all of the State laws cover the distribution of the voyeuristic images, although most do.<sup>188</sup> Most of these offences require that the distributor “know or have reason to know” that the images were obtained in violation of the relevant voyeurism provisions, and that the distribution occurs without the consent of the subject. Generally, distribution is viewed more seriously than filming. In Utah, distribution is a third degree felony but filming is a class A misdemeanour.<sup>189</sup> In Connecticut, distribution and filming are respectively a class D felony and a class A misdemeanour.<sup>190</sup> These offences are usually framed in order to capture also distribution by someone other than the maker of the image. Some examples follow.

#### Georgia

- A49 It is:  
... unlawful for ... [a]ny person to sell, give, or distribute, without legal authority, to any person or entity any photograph, videotape, or record, or copies thereof, of the activities of another which occur in any private place and out of public view without the consent of all persons observed.<sup>191</sup>

#### Alabama

- A50 “A person commits the crime of divulging illegally-obtained information if he knowingly or recklessly uses or divulges information obtained through criminal eavesdropping or criminal surveillance.” The commentary on this section notes that the section seeks to punish taking advantage of surveillance that has been done by another, and that the penalties “should be sufficient to control those who form the market for free-lance eavesdropping or surveillance-derived information”, as well as encouraging the “customers” to cooperate with the police against the actual makers of the images.<sup>192</sup>

#### Wisconsin

- A51 The relevant offences cover reproducing “a representation”, or possessing, distributing, or exhibiting “a representation” or “a reproduction” depicting nudity if the perpetrator knows or has reason to know that the image was taken in a “circumstance” where the subject had a “reasonable expectation of privacy”, and if the subject did not consent to the making of the reproduction, or the possession, distribution, or exhibition.<sup>193</sup>

### *Exemptions*

- A52 The general pattern is for the offences to include specific exemptions to allow for surveillance by police, corrections and other security personnel, so long as

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<sup>188</sup> The Ohio voyeurism offences do not appear to cover distribution, nor does the Californian provision. See Cal Pen Code, Title 15, § 647 (k); and ORC Ann, Title 29, § 2907.08 (2002).

<sup>189</sup> Utah Code Annotated, Title 76, § 76-9-702.7 (2003).

<sup>190</sup> Connecticut Annotated Statutes, Title 53a, § 53a-189a and § 53a-189b (2003).

<sup>191</sup> Official Code of Georgia Annotated, Title 16, § 16-11-62 (6) (2002).

<sup>192</sup> Code of Alabama, Title 13A, § 13A-11-35 (2003).

<sup>193</sup> Wisconsin Statutes, chapter 941, § 942.09 (2) (2003).

the surveillance is lawful, in the execution of a public duty, in the course of crime prevention or similar.

- A53 Wisconsin's law provides a specific exception for parents, guardians and legal custodians who make or send representations of children that depict nudity, taken without the child's knowledge and in circumstances where there would be an expectation of privacy. This applies so long as the images do not fall within the definitions of sexual exploitation of children or child pornography, and so long as they are not made for commercial purposes. The exception also covers those who receive such images from parents/guardians.<sup>194</sup> This is presumably intended to cover photos such as children in the bath. The Delaware Code contains a similar exemption.<sup>195</sup>
- A54 Louisiana has an exemption for telephone, cable television companies, internet providers and the like in respect of the distribution element of the offence.<sup>196</sup> The Louisiana Bill contained originally a number of exceptions for legitimate surveillance but these were deemed no longer necessary when the legislation was reframed around the requirement for the filming to be for a "lewd or lascivious purpose".<sup>197</sup>

### *Remedies and punishments*

- A55 The punishments are usually a maximum fine and/or a maximum term of imprisonment. In some instances aggravating factors are defined, which may change the classification of the offence from a misdemeanour to a felony. Some jurisdictions escalate the penalties for repeat conduct. In South Carolina, the first offence is a misdemeanour, with a fine up to \$500, imprisonment for up to three years or both, but a second and subsequent offence becomes a felony. This carries a fine of between \$500 and \$5000, imprisonment for up to five years or both.<sup>198</sup>
- A56 In Louisiana, a first conviction for video voyeurism (as long as there are no aggravating circumstances) means a fine of not more than \$2000 or imprisonment, with or without hard labour, for not more than two years, or both. A second or subsequent conviction carries a fine of not more than \$2000 and imprisonment at hard labour for between six months and three years without benefit of parole, probation, or suspension of sentence.<sup>199</sup> The Pennsylvania and Missouri laws similarly include provisions to punish repeat conduct more harshly.<sup>200</sup>
- A57 Another frequently specified aggravating factor is that the subject of the filming is a child or young person. In Louisiana, the relevant aspects are that the images are of a child under 17 and are made "with the intention of arousing or gratifying the sexual desires of the offender".<sup>201</sup> Utah aggravates the offences of both making the image and distributing it if the subject is a child under 14.<sup>202</sup> In Ohio, there

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<sup>194</sup> Wisconsin Statutes, chapter 941, § 942.09 (3) and (4) (2003).

<sup>195</sup> Delaware Code Annotated, Title 11, § 1335 (2003).

<sup>196</sup> Louisiana Revised Statutes, Title 14, § 14:283 (2003).

<sup>197</sup> Louisiana Revised Statutes, Title 14, § 14:283 (2003), and Rothenberg, above n 1, 1162–1165.

<sup>198</sup> Code Laws of South Carolina Annotated, Title 16, § 16-17-470 (2002).

<sup>199</sup> Louisiana Revised Statutes, Title 14, § 14:283 B (2003).

<sup>200</sup> 18 Pennsylvania Consolidated Statutes, Title 18, § 7507.1 (2003); and RS Mo, chapter 565, § 565.253 (2003).

<sup>201</sup> Louisiana Revised Statutes, Title 14, § 14:283 B(4), (2003).

<sup>202</sup> Utah Code Annotated, Title 76, § 76-9-702.7, (2003).

are a number of variations on the voyeurism offence depending on whether the victim is a minor and depending on the relationship of the offender to the victim, for instance parent, caregiver, teacher or sports coach. These aspects were added in response to secret filming of pupils by a school principal.<sup>203</sup>

- A58 The Louisiana video voyeurism offence does not require nudity, but if the conduct viewed or recorded involves nudity or sexual intercourse this is an aggravating factor as to sentence.<sup>204</sup>

### *Destruction of the recordings*

- A59 A number of the jurisdictions provide for destruction of the images in addition to the other penalties. In Hawaii, the Court may order the destruction of any recording made in violation of the voyeurism offence. South Carolina requires films and images to be forfeit and destroyed when no longer required for evidentiary purposes. Tennessee is essentially the same, as is Louisiana, with the proviso that the victim or victims may object to the destruction. Alabama law also provides for forfeiture of the devices used in commission of the offence.<sup>205</sup>

### **Civil liability for invasion of privacy**

- A60 The Federal courts recognise four separate but related privacy torts:
- intrusion on the plaintiff's seclusion or private affairs;
  - publication of private information about an individual;
  - publication of material that puts an individual into a false light position; and
  - appropriation of someone's personality for commercial use.<sup>206</sup>
- A61 The tort of intrusion upon the seclusion of another has been held not to include taking photographs of a person in a public place without his or her consent or knowledge.<sup>207</sup> Filming a person in a private place from a public vantage point has also been held not to be an intrusion as long as the view is one that the general public could have seen.<sup>208</sup>
- A62 The second tort, publication of private information about an individual, has, in practice, been limited by the First Amendment guarantee of Freedom of Expression, by the requirement that the material disclosed is highly offensive from an objective standpoint, and by the requirement that any publicly available

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<sup>203</sup> Ohio Revised Code Annotated, Title 29, § 2907.08 (Anderson 2003); and Calvert and Brown, above n 9, 538–539.

<sup>204</sup> Louisiana Revised Statutes, Title 14, § 14:283 B(3), (2003).

<sup>205</sup> Hawaii Revised Statutes, Title 37, § 711-1111 (3), (2003); SC Code Ann, Title 16, § 16-17-470 (F), (2002); La RS, Title 14, § 14:283 D, (2003); Tenn Code Ann, Title 39, § 39-13-605 (2003); and Code of Ala, Title 13A, § 13A-11-37 (2003).

<sup>206</sup> See for instance McClurg, above n 28, 997–999.

<sup>207</sup> See William L Prosser "Privacy" (1960) 48 Cal L Rev, 383, 391–392. Prosser states:

On the public street, or in any other public place, the plaintiff has no right to be alone, and it is no intrusion of his privacy to do no more than follow him about. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which any one present would be free to see.

<sup>208</sup> Prosser, above n 207.



information is not considered private.<sup>209</sup> It has been argued that, despite the purported recognition of the privacy torts in the courts of most States, actions based on these causes are not favourably received.<sup>210</sup>

## AUSTRALIA

A63 None of the Australian jurisdictions has, as yet, enacted legislation to respond specifically to the conduct of the type covered by this reference, although the New South Wales Government plans to do so this year. Officials of the New South Wales Attorney-General's Department are developing a new offence of "indecent filming or photographing" to be included in the Crimes Act 1900 (NSW). The offence will be designed to protect individuals from the threat of unwanted photography within private areas. It will have the following elements, which will need to be proved in a court beyond reasonable doubt, namely that:

- a person observes another person for the purpose of sexual gratification;
- the person being observed is in a place that would reasonably be expected to be private;
- the person being observed holds a reasonable expectation that they are in a private place; and
- that person has not consented to being observed.<sup>211</sup>

A64 A number of the States have Surveillance Devices Acts that regulate some of the conduct covered by this reference, although the primary focus of these Acts is on regulating surveillance undertaken for law enforcement purposes and surveillance by the media, rather than voyeurism.

A65 Both the Victorian and Western Australian Surveillance Devices Acts create offences for installing, using or maintaining optical surveillance devices to record or observe "private activity". In Western Australia, this is an offence even if the person is a party to the activity, although, in Victoria, the offence applies only if the person is not a party to the activity. Exceptions apply in the event of certain consents from the parties, or if the surveillance is conducted under a warrant or other authorisations relating to law enforcement and protection of lawful interests. Western Australia also specifically excludes "unintentional observance or recording".<sup>212</sup> It is an offence to communicate or publish a recording made in such circumstances unless certain consents are obtained from the parties or unless done for various law enforcement or public interest reasons.<sup>213</sup> In Victoria, the maximum penalty is imprisonment for two years, with a maximum of 12 months in Western Australia.<sup>214</sup> The Western Australian legislation provides, in addition, that, when a person is convicted, the Court may order the forfeiture of any related device and recordings.<sup>215</sup>

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<sup>209</sup> Law Reform Commission (Ireland), above n 14, 87.

<sup>210</sup> McClurg, above n 28, 996-1009. See also Gault P (Blanchard J concurring) in *Hosking v Runting*, above n 3, paras 73-75.

<sup>211</sup> Email message, above n 107.

<sup>212</sup> Surveillance Devices Act 1999 (Vic), s 7; Surveillance Devices Act 1998 (WA), s 6.

<sup>213</sup> Surveillance Devices Act 1999 (Vic), s 11; Surveillance Devices Act 1998 (WA), s 9.

<sup>214</sup> Surveillance Devices Act 1999 (Vic), ss 7 and 11; Surveillance Devices Act 1998 (WA), ss 6 and 9.

<sup>215</sup> Surveillance Devices Act 1998 (WA), s 40.

- A66 The Acts have a similar definition of “private activity”, that is:
- ... activity carried on in circumstances that may reasonably be taken to indicate that any of the parties to the activity desires it to be observed only by themselves, but does not include an activity carried on in any circumstances in which the parties to the activity ought reasonably to expect that the activity may be observed.
- A67 In Victoria, it is further specified that an activity “carried on outside a building” is not a “private activity”.<sup>216</sup> The Northern Territory Surveillance Devices Act 2000 is very similar to these other two Acts. Like the Western Australian legislation the Northern Territory Act provides for forfeiture of devices and recordings upon conviction.<sup>217</sup>
- A68 In New South Wales, the Law Reform Commission was given a surveillance reference in 1996 and produced an Issues Paper in 1997, and an Interim Report in 2001. Again, the focus has not been on voyeuristic instances of surveillance, but rather on overt or covert surveillance for the purposes of law enforcement, public order, private investigations, protection of private property, and surveillance in the workplace and by the media.<sup>218</sup> The Commission has proposed new legislation to regulate all surveillance, both overt and covert, including surveillance in the workplace. Unlawful overt surveillance would be dealt with through the complaints process of the Privacy Commissioner, and unlawful covert surveillance through criminal proceedings. For the latter, the aggrieved person would also have access to the complaints process of the Office of the New South Wales Privacy Commissioner. This involves conciliation or an Administrative Decisions Tribunal hearing if no agreement is reached. Potential remedies would include damages, injunctions or a mandatory order. Officials of the New South Wales Government are currently reviewing the recommendations of this report.<sup>219</sup>
- A69 The Victorian Law Reform Commission also has a reference on privacy. Its current focus is on the workplace privacy aspect of this reference.<sup>220</sup>
- A70 The Australian courts provide limited options for civil action against invasions of privacy. Some types of covert filming and distribution may be covered by the torts of battery, assault, trespass to goods and breach of confidence. The existence of a tort of invasion of privacy was left open by the High Court of Australia in *Australian Broadcasting Corporation v Lenah Game Meats*,<sup>221</sup> with indications in several of the judgments that the long-standing decision in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*<sup>222</sup> may not necessarily restrict its development in a suitable case.
- A71 There appears to be a level of concern about, and awareness of, the problem of covert filming. The *Sydney Morning Herald* reported, on 28 February 2004, that this issue would be considered at the March meeting of the Standing Committee

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<sup>216</sup> Surveillance Devices Act 1999 (Vic), s 3; Surveillance Devices Act 1998 (WA), s 3.

<sup>217</sup> Surveillance Devices Act 2000 (NT), ss 5, 6, 40 and 48.

<sup>218</sup> New South Wales Law Reform Commission, *Surveillance and Surveillance: An Interim Report*, above n 106.

<sup>219</sup> Email message, above n 107.

<sup>220</sup> Email message of 1 March 2004 from Sue Coleman, Research and Policy Officer, Victorian Law Reform Commission.

<sup>221</sup> *Australian Broadcasting Corporation v Lenah Game Meats* [2001] HCA 63.

<sup>222</sup> *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.

of Attorneys-General for Australasia, with a national taskforce having been set up in August 2003 to assess whether existing State laws covered adequately the privacy threats of camera phones.

- A72 According to the newspaper report, the YMCA imposed an Australia-wide ban on camera phones in its swimming pools in June 2003, while a number of pools in Sydney display prominent signage telling patrons they cannot use cameras. The YMCA's ban is reported to have "raised public awareness and ... worked very well".<sup>223</sup> No doubt this concern is reflected in the intention of the New South Wales Government to introduce the new "indecent filming or photographing" offence.

## UNITED KINGDOM

- A73 Much of the discussion of the right to privacy and the need to legislate for such has been focused on the role of the press. Significant examinations of the issues were undertaken in 1972 (the "Younger Report"), in 1989 ("Calcutt I") and in 1993 ("Calcutt II" and "National Heritage Committee").<sup>224</sup> Although not specifically concerned with voyeurism these reports did touch on the type of behaviour that is the concern of this reference. Although the Younger Report was published 32 years ago, its comments on the impact of technology on privacy could well have been written in 2004. The report states:

It should be unlawful to use an electronic or optical device for the purpose of rendering ineffective, as protection against being overheard or observed, circumstances in which, were it not for the use of the device, another person would be justified in believing that he had protected himself or his possessions from surveillance whether by overhearing or observation.<sup>225</sup>

- A74 It goes on to recommend that "[u]nlawful surveillance by device should, where it is done surreptitiously, be an offence punishable by imprisonment or fine and triable both summarily and on indictment".<sup>226</sup> There were similar recommendations from the succeeding reports.

- A75 In 2003, the United Kingdom Parliament passed a new Sexual Offences Act that includes the new offence of "voyeurism". This was one of many provisions proposed in *Setting the Boundaries: Reforming the Law on Sex Offences*, a review of sexual offences published in July 2000. In its discussion of voyeurism,<sup>227</sup> the committee that undertook the review (the Review Committee) notes the examples brought to their attention. These include landlords fixing spyholes into tenants' bathrooms, covert observations in changing rooms (in shops, market stalls and schools) and hidden cameras filming in public changing areas and beaches.<sup>228</sup> The Review Committee acknowledges that this has traditionally been regarded as nuisance behaviour, but points to research evidence that voyeurism

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<sup>223</sup> Sue Lowe "Law Struggles to Deal With Pervy Snappers" (28 February 2004) *Sydney Morning Herald* Sydney <<http://www.smh.com.au/articles/2004/02/27/10776971578.html>> (last accessed 24 March 2004).

<sup>224</sup> Younger Report, above n 20, *Report of the Committee on Privacy and Related Matters* (Calcutt I), (1990) Cmnd 1102; *Review of Press Self-Regulation* (Calcutt II), (1993) Cmnd 2135; and National Heritage Committee of the House of Commons, *Privacy and Media Intrusions* (London, 1993).

<sup>225</sup> Younger Report, above n 20, 15.

<sup>226</sup> Younger Report, above n 20, 16.

<sup>227</sup> *Setting the Boundaries: Reforming the Law on Sex Offences*, above n 44, 120-122.

<sup>228</sup> One instance of such conduct was the case of Vigon, see above n 8.

and similar behaviours are often part of a pattern of more serious sexual behaviour. The authors of the report quote research amongst those convicted of serious sex offences that showed that many had also committed these “nuisance” offences. In particular, they quote one study that found that 14 per cent of child molesters and 20 per cent of rapists had committed voyeurism.<sup>229</sup> Also of relevance was the reported experience of victims, especially those observed in their own homes, who felt violated in terms of privacy and in their sense of personal safety and integrity.

- A76 Having surveyed provisions in other jurisdictions, the Review Committee concluded that the essential elements must be “a reasonable expectation of privacy” on the part of those observed, including that they must be inside a building or other structure, and observed without their knowledge or consent. The Review Committee considered whether a sexual intent should be required but, noting the difficulty of proving this, decided that this was not necessary because “observation in the circumstances of privacy was sufficient, and the fear and distress its discovery could cause was sufficient in itself to justify the offence”. Other concerns were the need to exclude authorised surveillance and to not curtail the freedom of the press to investigate issues of public concern. The Review Committee 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, whether by remote or mechanical means or not. There should be an exception for authorised surveillance.<sup>230</sup>

Consultation on this recommendation revealed that most who expressed views agreed in principle, but a number of issues were raised regarding the definition of the offence.<sup>231</sup> These related to what constitutes “a private area”, proposals that the protection should extend to outdoor areas such as gardens, vehicles and caravans, and the need for those observed to take care as to their privacy. Other issues were the need to avoid unintentional sight of someone, the necessity of including a test of sexual intent or a sexual element, and the desire not to hinder the legitimate activities of the press.

- A77 The Government responded in particular to the latter two points:

We intend to criminalise the covert observation, whether by remote, mechanical or manual means, of another person or persons performing acts of a sexual and/or intimate nature without his or her consent in circumstances where he or she has a reasonable expectation of privacy. The offence will apply where the person carried out the covert observation for his or her own sexual gratification or for the sexual gratification of others. This offence will not interfere with or hinder the legitimate operations of the press.<sup>232</sup>

- A78 This position was reaffirmed in the Government White Paper, *Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences*, published in 2002, where it was further noted that, “We would want cases where a photographer takes indecent photographs of someone without

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<sup>229</sup> *Setting the Boundaries: Reforming the Law on Sex Offences*, above n 44, 119, n 142 and 143, 121.

<sup>230</sup> *Setting the Boundaries: Reforming the Law on Sex Offences*, above n 44, 123.

<sup>231</sup> Home Office *Government Response to the Review Report* (London, nd) <<http://www.homeoffice.gov.uk/dosc2/sexconres.pdf>> (last accessed 5 March 2004).

<sup>232</sup> *Government Response*, above.

their consent and for example posts them on the Internet or in a pornographic magazine to be treated particularly seriously by the courts”.<sup>233</sup>

A79 This policy has now passed into law as the offence of voyeurism, as defined at section 67 of the Sexual Offences Act 2003 (UK). The elements of this offence are:

- observing without consent another person doing a “private act”, or
- operating equipment to enable someone else to observe a third person doing a “private act”, or
- recording another person doing a “private act”, with the intention that a third person will look at the images.

A80 All of this conduct must be done without the consent of the person observed and for the purposes of “obtaining sexual gratification” on the part of either the person doing the observing or recording, or the person for whom the images are being captured. It is also an offence to install equipment or construct or adapt structures to enable anyone to commit the above offence. Voyeurism may be prosecuted as either a summary offence with a penalty of up to six months’ imprisonment and/or a fine; or it may be prosecuted indictably, with a sentence of up to two years’ imprisonment.

A81 Section 68 defines “private act” for the purposes of this offence:

... 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 genital, buttocks or breasts are exposed or covered only by 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.

A82 This new offence does not extend to Scotland.

## HONG KONG

A83 In 1999 the Law Reform Commission of Hong Kong, Sub Committee on Privacy, published its *Consultation Paper on Civil Liability for Invasion of Privacy* (the “Consultation Paper”).<sup>234</sup> This is one of the reports produced by the Commission under its general privacy reference. To date, the final report on this topic has not been issued. Despite dealing with wider issues than those covered by intimate covert filming, some aspects of this discussion are of relevance, in particular, intrusion upon the seclusion or solitude of another, public disclosure of private facts and the consideration of defences and remedies.

A84 The Consultation Paper proposes the creation of specific torts to protect particular privacy concerns rather than trying to frame a general right to privacy.<sup>235</sup> As part of the consideration of intrusion upon the seclusion or solitude of another, the results of a Baseline Opinion Survey commissioned by the Hong

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<sup>233</sup> Home Office *Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences* (London, 2002) 32.

<sup>234</sup> *Consultation Paper on Civil Liability for Invasion of Privacy*, above n 45.

<sup>235</sup> *Consultation Paper on Civil Liability for Invasion of Privacy*, above n 45, 62–63.

Kong Privacy Commissioner are reported. Respondents considered, inter alia, that an outsider taking of pictures of them through a window would be “highly invasive”.<sup>236</sup>

A85 The discussion restates the dominant position that intrusion on privacy through visual observation depends “mainly on whether the individual has a reasonable expectation of privacy in the area in which he ... is located”, and that such an expectation is held to be unlikely when the subject is in a public place. It is noted, however, that it has been held to be an invasion of privacy if a technical device collects data that would otherwise be hidden to the naked eye. Further, it is acknowledged that, despite the person being in a public place, there are some matters, specifically “a person’s underwear or lack of it” about which they would have an expectation of privacy. The conclusion drawn is that:

... where a woman has taken precautions to protect her underwear from public view by wearing a skirt, other persons should not use covert means to observe or record data relating to her underwear. A person who takes a picture of her underwear should be liable for infringing her right of privacy no matter where the infringement takes place.<sup>237</sup>

A86 The Consultation Paper suggests that the intrusion would not be upheld if the skirt was blown up by the wind,<sup>238</sup> or that a woman wearing a very short skirt may have a lower (or no) expectation of privacy compared with those wearing a longer skirt.

A87 The discussion concludes with the recommendation that:

... any person who intentionally or recklessly intrudes, physically or otherwise, upon the solitude or seclusion of another or into his private affairs or concerns, should be liable for a statutory tort of invasion of privacy, provided that the intrusion is seriously offensive and objectionable to a reasonable person of ordinary sensibilities.<sup>239</sup>

A88 The objective test is proposed in order to limit actionable intrusions to those that amount to “a substantial and unreasonable infringement of the right of privacy”.<sup>240</sup>

A89 The Consultation Paper proposes a statutory tort against public disclosure of private facts,<sup>241</sup> noting in particular its potential to respond to internet publication. The recommendation is that:

... any person who gives publicity to a matter concerning the private life of another should be liable for a statutory tort of invasion of privacy provided that the disclosure in extent and content is of a kind that would be seriously offensive and objectionable to a reasonable person of ordinary sensibilities and he knows or ought to know that such disclosure is seriously offensive and objectionable to such a person.<sup>242</sup>

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<sup>236</sup> *Consultation Paper on Civil Liability for Invasion of Privacy*, above n 45, 73 and n 24.

<sup>237</sup> *Consultation Paper on Civil Liability for Invasion of Privacy*, above n 45, 74.

<sup>238</sup> Compare, however, the ruling of the Alabama Court in the 1964 case of *Daily Times Democrat v Graham*, which explicitly found that the taking and publication in the newspaper of a photograph of a woman, whose skirt was blown up by an air jet as she exited a funhouse was an invasion of privacy, as discussed in Rothenberg, above n 1, 1147–1148 n 92 and n 93.

<sup>239</sup> *Consultation Paper on Civil Liability for Invasion of Privacy*, above n 45, 77.

<sup>240</sup> *Consultation Paper on Civil Liability for Invasion of Privacy*, above n 45, 77.

<sup>241</sup> *Consultation Paper on Civil Liability for Invasion of Privacy*, above n 45, 89–102.

<sup>242</sup> *Consultation Paper on Civil Liability for Invasion of Privacy*, above n 45, 102.

- A90 “Matters concerning the private life of another” would “include information about an individual’s private communications, home life, personal or family relationships, private behaviour, health or personal financial affairs”.<sup>243</sup>
- A91 The paper discusses whether, in cases of surreptitious filming it should be a defence that the perpetrator is lawfully on the premises and could see the filmed conduct with the naked eye.<sup>244</sup> The authors conclude that secret filming is no less an invasion of privacy in circumstances where the person was invited into the home of the subject or shared a changing room with the subject:
- We consider that the surreptitious use of a visual device in such circumstances is offensive and objectionable whether or not the data are eventually disclosed. The permission for a person to enter and stay at a particular place rarely extends to the collection of visual data by means of a hidden device. Furthermore, the fact that an individual consented to being watched by another person does not necessarily mean that he also consented to that other person making a permanent record of what he saw or to his transmitting the visual images to a third party by electronic means.<sup>245</sup>
- A92 The authors make the point that a picture contains much more detail than is possible to observe with the naked eye and the risk of distribution is increased when there is a permanent record such as a photograph. The recommendation is:
- ... that for the purposes of the tort of invasion of privacy by intrusion, the surreptitious use of a device to collect visual data relating to an individual (“the data subject”) by a person who is otherwise lawfully present on the premises in which the data are located (“the data collector”) in circumstances where the data are visible to the naked eye of the data collector but are not open to public view should be deemed to be an intrusion upon the seclusion of the data subject or an intrusion into the private affairs or concerns of that data subject.<sup>246</sup>
- A93 Further recommendations advocate defences of lawful authority, and protection of persons and property in respect of such filming.<sup>247</sup>
- A94 With respect to remedies, it is recommended that both torts be actionable without proof of damage. Potential remedies would be: damages; injunction; an account of profits; destruction or delivery up of relevant material; and publication of an apology. It is recommended that, “damages in an action for invasion of privacy should include compensation for the mental distress, embarrassment and humiliation suffered by the plaintiff”. Relevant factors would include the effect of the invasion on the plaintiff or family with respect to health, welfare, social, business or financial position; any distress, annoyance or embarrassment they had suffered; and the conduct of the plaintiff and the defendant both before and after the invasion, including in respect of any apology or offer of amends.<sup>248</sup>
- A95 Further relevant recommendations concern the limitation period for actions (three years is proposed), and limiting actions for invasion of privacy to living individuals whose privacy has been threatened or infringed.<sup>249</sup>

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<sup>243</sup> *Consultation Paper on Civil Liability for Invasion of Privacy*, above n 45, 102.

<sup>244</sup> *Consultation Paper on Civil Liability for Invasion of Privacy*, above n 45, 121–124.

<sup>245</sup> *Consultation Paper on Civil Liability for Invasion of Privacy*, above n 45, 122.

<sup>246</sup> *Consultation Paper on Civil Liability for Invasion of Privacy*, above n 45, 123–124.

<sup>247</sup> *Consultation Paper on Civil Liability for Invasion of Privacy*, above n 45, 125–126.

<sup>248</sup> *Consultation Paper on Civil Liability for Invasion of Privacy*, above n 45, 161–162.

<sup>249</sup> *Consultation Paper on Civil Liability for Invasion of Privacy*, above n 45, 164–165.

### *Covert filming case prosecuted as sexual harassment*

- A96 At least one case of intimate covert filming in Hong Kong has been successfully prosecuted under sexual harassment legislation. In 1999, the District Court in Hong Kong heard a case in which a male student concealed a camera in the university hostel room of a female friend. The camera was discovered after some months and contained tapes of the young woman getting changed. The defendant admitted he had shown the tapes to another friend. Proceedings were brought for unlawful sexual harassment under the Sex Discrimination Ordinance (Cap 480). The Court found that there had been an act of sexual harassment and awarded the plaintiff damages of \$50 000 for injury to feelings, \$20 000 exemplary damages and \$10 000 as aggravated damages, as well as ordering the defendant to tender a written apology to the plaintiff.<sup>250</sup>
- A97 On 28 February 2004, the *Sydney Morning Herald* reported that: "Police in Hong Kong have confirmed they are making monthly arrests of high-tech peeping Toms using camera phones to take photos up women's skirts, and they are not quite sure what to charge them with".<sup>251</sup> Hong Kong police had reportedly arrested one man with 200 pictures on his phone taken up women's skirts. According to the report, such offenders are usually charged with loitering, leading to a fine, although concern at the rising numbers of arrests has led the Hong Kong Justice Department to advise that, "a more serious charge of outraging public decency could be considered. The charge is usually used for people caught having sex outdoors or committing other lewd open-air activities. It carries a maximum jail term of up to seven years".

### IRELAND

- A98 Issues relevant to intimate covert filming were considered as part of the Irish Law Reform Commission's 1998 *Report on Privacy: Surveillance and the Interception of Communications*.<sup>252</sup> This report follows on from an earlier consultation paper. The Commission concluded that given the value of privacy,<sup>253</sup> the increasing threats posed by new technologies and the inadequacies of existing Irish law, there was a need for legislative reforms to protect what they refer to as the "privacy shield". Such protection is needed because "a person has a right to be protected against intrusion into his/her private space whenever he/she has a reasonable expectation of privacy".<sup>254</sup> To date, the recommendations of this report appear not to have been enacted.<sup>255</sup>
- A99 The Commission recommended the enactment of several new torts and also criminal offences. The core recommendation is for a tort of privacy-invasive

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<sup>250</sup> *Yuen Sha Sha v Tse Chi Pa*, above n 38.

<sup>251</sup> Sue Lowe "Law Struggles to Deal With Pervy Snappers", above n 223.

<sup>252</sup> Law Reform Commission (Ireland), above n 14.

<sup>253</sup> The Commission argues that privacy is worth protecting because of its inherent link with human dignity, its contributions to freedom, autonomy and self-determination, and its essential contributions to the organisation of civil society and to democracy, which rests on recognition of personal space and the requirement for those who enter public life to nevertheless have a "secluded space". See above n 14, 3-4.

<sup>254</sup> Law Reform Commission (Ireland), above n 14, 8.

<sup>255</sup> Website of the Law Reform Commission for Ireland <<http://www.lawreform.ie/>> (last accessed 9 March 2004).



surveillance in circumstances where a “reasonable expectation” of privacy exists. Surveillance in this instance is both aural and visual, and interception, third-party monitoring and participant monitoring are included. Secondly, the Commission recommended a related tort of harassment. Defences to these torts would be consent (express or implied), or the exercise of a legal duty, power or right by the defendant. In discussing remedies, the Commission stresses that the focus should be “more on prevention than on *ex post facto* remedies. In this way the law can play its part in fostering a climate of respect for privacy”. The new tort would be actionable without proof of damage. Courts may award damages or order preventive injunctions or “privacy orders” directed against impending acts of privacy-invasive surveillance or harassment. The right of action would lie with the person whose privacy is in issue or a person legally entitled to act on behalf of that person. There should be a three-year limitation period.<sup>256</sup>

A100 The Commission’s “main ancillary recommendation” is for a related statutory civil tort directed against the unjustified disclosure through publication or otherwise of material (including images) obtained as a result of the torts of unlawful surveillance or harassment.<sup>257</sup> The defences include if the defendant can show that he or she did not believe, nor had reasonable grounds to believe, that the information had been obtained through privacy-invasive surveillance or harassment; consent, whether express or implied; the exercise of a legal duty or power or the maintenance of a legal right; or if publication is justified by overriding considerations of the “public interest”.<sup>258</sup> Remedies would be preventive injunctions, “privacy orders”, damages, an account of profits or delivery up of all relevant material.

A101 The Commission supplemented these torts with proposals for criminal offences to counter “particularly offensive and socially unacceptable” forms of privacy-invasive surveillance, thereby creating “a deterrent element which can only be added by the criminal law to the mainly preventative and compensatory role of civil law”.<sup>259</sup> The criminal offences “target invasions of privacy in well-defined circumstances where the expectation of privacy is at its highest (that is, in a private dwelling) or where the activity in question (that is, conversations) is inherently private”. The recommended offences are:

- installing a surveillance device in a private dwelling or engaging in surveillance of a private dwelling;
- trespass on private property (either by unlawful entry or by unlawfully remaining) for the purpose of surveillance; and
- using aural or optical devices to spy on people’s conversations in circumstances where a “reasonable expectation of privacy” arises and where the consent of no party to the conversation has been obtained.

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<sup>256</sup> Law Reform Commission (Ireland), above n 14,100–105.

<sup>257</sup> Law Reform Commission (Ireland), above n 14,106–108.

<sup>258</sup> They endorse four specific – but non-exhaustive – strands to the “public interest” defence: the detection and prevention of crime; the exposure of illegality or serious wrongdoing; informing the public on a matter of public importance; and preventing the public from being misled by the public utterances of public figures (broadly defined) where private beliefs and behaviour are directly at variance with same. See Law Reform Commission (Ireland), above n 14, 107.

<sup>259</sup> Law Reform Commission (Ireland), above n 14, 109–113.

A102 The Commission recommended new ancillary offences aimed at the disclosure of information obtained as a result of these new criminal offences. The defences to all of the offences are similar to those for the torts: namely consent; necessary protection of one's own rights; necessary protection of the *person* (but not the property) of someone other than the alleged perpetrator; and exceptions for "neighbourhood watch" type arrangements under certain circumstances, or for law enforcement purposes and with lawful authority. In respect of the distribution offences, a defence would be bona fide ignorance of the fact that the information was obtained in contravention of these provisions.

## OTHER MEASURES AGAINST COVERT FILMING

A103 South Korea is reported to require cell-phone manufacturers to ensure that cell-phones give off a loud beep when the camera function is being used.<sup>260</sup> Both Japan and South Korea reportedly have laws that limit cell-phone cameras in areas where people expect privacy.<sup>261</sup>

A104 A report of January 2004 from *USA Today* highlights the threats to both worker privacy and commercial secrets posed by camera phones, with major companies such as DaimlerChrysler and General Motors said to be banning camera phones in the workplace.<sup>262</sup> BMW in Germany and Samsung in South Korea are reported to have instituted similar policies. The article also notes that the Oakland County Courthouse in Pontiac Michigan has banned camera phones because of concerns that witnesses, jurors and undercover agents may be photographed.

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<sup>260</sup> Sue Lowe "Law Struggles to Deal With Pervy Snappers", above n 223.

<sup>261</sup> Brad Wong "Voyeurism by Cell Phone Charged", above n 30.

<sup>262</sup> Stephanie Armour "Camera phones don't click at work" (12 January 2004) *USA Today*, <[http://www.usatoday.com/money/workplace/2004-01-12-phones\\_x.htm](http://www.usatoday.com/money/workplace/2004-01-12-phones_x.htm)> (last accessed 24 January 2004).

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