



23 January 2012

C62, 82.7  
RB;rp

Humiliating Filming Discussion Paper  
c/- Legislation and Legal Services  
Attorney-General's Department  
DX 336  
ADELAIDE SA

Dear Sir/Madam

**Discussion Paper – Online thuggery**

I refer to a letter of 23 November 2011 from the Attorney-General inviting the Society to consider the above Discussion Paper. Thank you for providing the Society with an extension of time for the provision of comments in relation to the Paper.

The Discussion Paper has been considered by the Society's Children and the Law Committee and Criminal Law Committee. We support the proposed Bill in principle but make the following comments.

In recent times events taking place on school premises have received attention in the media. It is suggested that the relationship between the proposed Bill and existing legislation such as the *Children's Protection Act 1993* may need to be further considered as some training for mandatory notifiers may be necessary.

The offences created by the Bill do not remedy the effects of the offending on the victim, as they do not address the humiliation victims suffer as a result of the taking and distribution of the images. Furthermore, while the offences punish the act of distribution, they are unlikely to address the reasons why such filming occurs in the first place.

The statutory defences in s26B(4)(b) and s26B(7)(b) are expressed in subparagraphs (i) and (ii). As currently drafted, they both must be established by the defendant in order for the defence to be made out. It should be sufficient for the defendant to show that he/she did not know/have reasonable cause to suspect that the victim did not consent to *either* the particular distribution of the image the subject of the offence *or* to the distribution generally.

We regard the notion of "apparent consent" (s26E) as limited, in that it only protects those aged under 16 if an alleged perpetrator is arguing they believed the minor consented. The Bill does not give adequate attention to the position of minors and we are concerned s26E will not go far enough to cover situations of intense peer pressure where actual consent to the distribution of material may be given, but for all the wrong reasons. Amongst young people today, it is highly likely that consent will be given to simply fit in and be accepted by the group. Under any other circumstance or at the request of any other person, the young person would not have provided his/her consent.

In addition this concept does not engage fully with the idea of consent itself. Would it or should it be possible for an 11 year old child to consent to either the commission of a humiliating or degrading act or the filming of such act? We believe more thought may need to be given to the idea of consent and whether or not there is a minimum age below which a minor should not be able to consent. Again the relationship between the proposed Bill and the *Children's Protection Act* requires further consideration as some acts and the filming of those acts may amount to child abuse.

Further the Bill does not address the question of whether or not there are some acts to which consent cannot be given and therefore logically consent cannot be given to the filming of such acts. In *R v Brown* [1994] 1 AC 212 the House of Lords noted that there were limits to the types of acts to which one could consent. It would be possible for a broad interpretation of degrading or humiliating acts to cover situations one believed outlawed by *R v Brown*. We believe the legislation should make it clear that the filming of acts that are otherwise unlawful is itself unlawful.

We refer to page 4 of the discussion paper and the explanation of "public place"

*"...An image is not invasive if it depicts a person in a public place, meaning a place that anyone can go to, even if the person is depicted is engaged in a private act or is undressed".*

The definition of "public place" includes "*places that anyone can enter free of charge and also places for which you need to buy a ticket, if there is no other test for entry*".

On our understanding of the Bill, a public pool would be deemed to be a public place, as there is no other test for entry. As such, an invasive picture could be taken of a person in a state of undress in the changing rooms of the pool complex. Distributing pictures or films taken in such a location should be included as an offence. We recommend such ambiguities in the drafting of the Bill be clarified with a narrower definition adopted for the purposes of Part 5A.

I trust these comments are of assistance. Please do not hesitate to contact me, should you wish to discuss them further.

Yours sincerely



Ralph Bönig  
**PRESIDENT**