2017

LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

CRIMES (INVASION OF PRIVACY) AMENDMENT BILL 2017

EXPLANATORY STATEMENT

Presented by

Caroline Le Couteur MLA

Member for Murrumbidgee

Table of Contents

CRIMES (INVASION OF PRIVACY) AMENDMENT BILL 2017

OUTLINE

Background

New technologies and the ubiquitousness of cameras - on our phones, on our computers, in our houses and stores - have enabled increased levels of photography and video and audio recording of people without their knowledge or consent. Social media and the internet make these images easy to share and distribute widely. Our Commonwealth and ACT laws have not evolved to adequately and consistently address the use and impacts of these changes and innovations in technology. This Bill seeks to protect our community from the non-consensual sharing of intimate images and documents.

In May 2017, a meeting of Attorneys-General from across Australia and New Zealand endorsed a National Statement of Principles Relating to the Criminalisation of the Non-Consensual Sharing of Intimate Images ("National Principles"). These National Principles outlined a model for the form and substance of criminal offences that each state and territory should investigate.

This explanatory statement relates to the Crimes (Invasion of Privacy) Amendment Bill 2017 ("the Bill") as presented in exposure draft format to the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly. The statement is to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill.

Purpose of the Bill

The Crimes (Invasion of Privacy) Amendment Bill 2017 provides amendments to address a number of criminal justice legislation issues that have arisen in the ACT through advancements in technology and associated cultural changes. The Bill will amend criminal laws to make key improvements to the criminal justice system to provide protections for our community from the non-consensual sharing of intimate images and documents.

In summary, the Bill will:

1. create a new Part of the *Crimes Act 1900* ("the Act") to directly address invasions of privacy;

2. move and amend section 61B of the Crimes Act (that was originally inserted to address certain "voyeuristic behaviours" including the phenomenon known as "upskirting");

3. create two new offences being the non-consensual distribution and the threat of distribution of intimate images;

4. create a new power for the Courts to order the take-down or rectification of intimate images that have been distributed non-consensually;

5. clarify and expand the definition of consent for both invasions of privacy and sexual offences;

6. create a new provision that would protect victims of "stealthing" and other deceptive sexual practices;

7. clarify child pornography offences to ensure that images consensually shared by young people will not result in their prosecution, similar to the 2-year rule for sexual offences;

8. implement further technical and procedural amendments to ensure an efficient and clear criminal law; and

9. incorporate the National Statement of Principles relating to the Criminalisation of the Non-Consensual Sharing of Intimate Images agreed to by the ACT Attorney-General on 19 May 2017.

These National Principles, as published on the Commonwealth Attorney-General's website as at 19 May 2017 are:

General principles

1. *The distribution of, or threat to distribute, intimate images without consent is unacceptable and breaches community standards of acceptable behaviour.*
2. *The protection and respect of victims and minimisation of harm to victims is essential in responding to the non-consensual sharing of intimate images.*
3. *The non-consensual sharing of intimate images may involve a variety of responses as each jurisdiction considers appropriate, including criminal offences of specific or general application, civil responses, education, awareness, prevention and support for those impacted.*
4. *Responses to the non-consensual sharing of intimate images should be designed to encompass the broad range of conduct, motivations, relationships and means of distribution that such behaviour can involve.*

Scope of criminal offences

5. *Any criminal offence framework for non-consensual sharing of intimate images should not capture conduct that does not warrant criminal sanctions, such as the sharing of intimate images between consenting adults and the initial taking or sharing of the intimate image by the person depicted in the image.*
6. *Any offence framework should consider whether, and if so, how, it applies to distributors who are minors. An offence should be clearly distinct from criminal conduct already captured by existing child sexual exploitation laws.*
7. *Jurisdictions should consider whether offences address threats to distribute intimate images without consent, irrespective of whether or not the intimate image exists.*
8. *Offences should contemplate existing and emerging technologies.*
9. *Concepts of sharing or distribution should be kept broad and inclusive to capture the various ways in which intimate images are or might in the future be shared, including public distribution and one-on-one sharing.*
10. *The form of the intimate images covered by the offences should be defined broadly and inclusively to cover still images and visual recordings.*
11. *Concepts equivalent to a reasonable expectation of privacy or community standards of acceptable behaviour may be reflected in an offence as each jurisdiction deems appropriate.*

Consent and harm

12. *Consideration should be given to the merits and risks of offence structures to address the lack of consent to distribution by the person depicted in the intimate image as each jurisdiction deems appropriate.*

a. *The issue of consent may be addressed in a variety of ways, whether by inclusion as an element of the offence, as an available defence, or considered when determining whether conduct is contrary to community standards of acceptable behaviour.*

b. *Where an offence addresses the issue of a lack of consent, criminal liability may apply where a defendant either knew that there was no consent to distribute the image or was reckless as to whether consent had been obtained.*

13. *An offence for sharing intimate images should not require proof that harm has been caused to the person depicted in the image by the sharing of the intimate image.*

14. *If appropriate for the relevant jurisdiction, an offence for sharing intimate images should not require proof of an intention to cause harm or distress or another outcome.*

Investigative powers

15. *Noting that the non-consensual sharing of intimate images is predominantly committed using technology and telecommunications devices, jurisdictions should have regard to the sufficiency of investigative powers under procedural laws to allow adequate investigation.*

16. *Consideration should be given to the challenges of enforcement, noting the online nature of the majority of this conduct and its prevalence across jurisdiction boundaries.*

Penalties

17. *Penalties should reflect a proportionate and necessary response to the seriousness of this criminal conduct. Depending upon the jurisdiction and recognising judicial discretion in sentencing practices, aggravating factors that increase the subjective seriousness of the conduct may be relevant to penalties.*

Human Rights Considerations

We recognise this Bill will have human rights implications. Based on feedback from the Human Rights Commission and other stakeholders, a number of changes were made to the Bill to address human rights concerns.

As a priority, this Bill intends to address parts of the ACT law where the following rights are lacking or where improvements could be made:

- Protection of the family and children (section 11) - "every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind".
    - This Bill seeks to provide greater protection to young people than under existing legislation. The reforms to the child sex and pornography offences will ensure that young people are not unfairly prosecuted for consensual activity.
- Privacy and reputation (section 12) - "everyone has the right to not to have his or her privacy…or correspondence interfered with unlawfully or arbitrarily".
    - This Bill is substantively concerned with extending this right to all Canberrans. The absence of effective protections for victims of intimate image abuse was a major limitation on the ability for Canberrans to exercise their right to privacy. In particular, the law had very limited protection for victims of domestic

violence or those fleeing violent or abusive relationships whose abuser used intimate image abuse as a way to control, disempower or punish those victims.

- Children in the criminal process (section 20) - "an accused child must be treated in a way that is appropriate for a person of the child's age who has not been convicted".

    - This Bill seeks to provide greater protection to young people than under existing legislation. It includes a new requirement to seek leave from the DPP in order to proceed with a prosecution of a person under the age of 18 years old.

This Bill engages and places limitations on the following rights:

- Freedom of expression (section 16) - "everyone has the right to freedom of expression …[which] includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her."

    - The breadth of the previous definition of "intimate document" was viewed by the Human Rights Commission as potentially an "unjustifiable limitation" on the right to freedom of expression. While the Human Rights Commission and many other submissions raise the importance of interpreting "intimate" against community standards and specific cultural contexts and agree that some sort of offence should exist to address this form of abuse, an issue arose from the specific construction of the offences as "act-centric" rather than "intent-centric" or "harm-centric".

      In order to mitigate this limitation on the right to freedom of expression, the clause at issue was removed from the final Bill. A number of exceptions were built into this Bill to ensure that, as far as possible, the right to freedom of expression was extended, including by a new "public interest" exception.

      There was discussion that an additional offence for serious reckless or malicious invasions of privacy with a more general purpose. A tighter construction might be able to address this issue, but it was felt that introducing an additional offence without returning to consultation would be inequitable to the groups who provided submissions at this stage, and to the marginalised groups likely to be affected by this change.

- Rights in Criminal Proceedings (s22) - "everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to the law".

    - There was concern raised by the Human Rights Commission that the particular construction of the new definition of "consent" would have placed the burden of proof on the defendant to prove they got consent from the other party and would thus be incompatible with the right to be presumed innocent. A number of submissions wrote in support of placing the burden of proof on the defendant, but it was recognised there was a construction that could be adopted that would, on balance, satisfy this right while also bringing about the policy intent of this Bill. The definition of consent was revised accordingly.

The substantive improvements to human rights this Bill affords, combined with the mitigation of the limitations on sections 16 and 22 detailed above, should ensure that this Bill is compliant with section 28 of the *Human Rights Act 2004* (ACT).

CRIMES (INVASION OF PRIVACY) AMENDMENT BILL 2017

CONSULTATION REPORT

Consultation Process

The exposure draft of the Crimes (Invasion of Privacy) Amendment Bill 2017 was listed on the ACT Legislation Register on Friday, 2 June 2017, along with the original explanatory statement and the consultation arrangements. Simultaneously, the accompanying Discussion Paper went online at *scribd.com/document/350132862/ACT-Greens-Discussion-Paper-on-Invasions-of-Privacy-Technology-Facilitated-Abuse*.

The consultation period was between 2 June 2017 and 28 July 2017, with the proviso that, where possible, all submissions made before the closing date would be considered for incorporation into the final presented Bill.

The exposure draft, and supporting materials, of the Crimes (Invasion of Privacy) Amendment Bill 2017 was presented to the Assembly on Wednesday, 7 July 2017.

As part of the consultation process, an email was sent to 66 stakeholders inviting them to contribute and drawing their attention to the Discussion Paper, Exposure Draft of the Bill and the accompanying Explanatory Statement. The stakeholders contacted were across all relevant sectors - legal academics and peak bodies, community services, and privacy and domestic violence reform advocates.

Submissions closed formally on Friday, 28 July 2017. Submissions made after the closing date were accepted, however contributors were informed that, due to the lateness of their submission, not all recommendations and concerns raised in their submission were able to be incorporated in the final Bill. They were informed that their submission would be valuable in preparing amendments for debate and would be provided to the ACT Government for future reforms.

Submissions Received

The consultation process returned 17 submissions from stakeholders and members of the community.

We thank the following for their submissions and for their time, effort and contribution to the final draft of this Bill:

1. ACT Human Rights Commission and co-signed by:
    - the Human Rights Commissioner;
    - the Victims of Crime Commissioner ;
    - the Public Advocate and Children & Young People Commissioner; and,
    - the Discrimination, Health Services, Disability & Community Services Commissioner.
2. Australian Women Against Violence Alliance;
3. Tim Wilson-Brown;
4. Legal Aid ACT;

5. AIDS Action Council of the ACT;
6. Drs Asher Flynn, Nicola Henry & Anastasia Powell;
7. Women's Services Network (WESNET) Australia;
8. National Foundation for Australian Women;
9. Toora Women Inc.;
10. Women with Disabilities ACT;
11. YWCA Canberra;
12. ACT Domestic Violence Prevention Council;
13. Women's Centre for Health Matters;
14. ACT Women's Services Network;
15. Australian Privacy Foundation;
16. Electronic Frontiers Australia; and
17. Mr Rhys Michie, ANU.

Copies of these submissions are available by request to the office of Caroline Le Couteur MLA at *LECOUTEUR@parliament.act.gov.au.*

In addition to formal submissions, a representative of Caroline Le Couteur MLA attended a workshop hosted by the Commonwealth Department of Communications & the Arts on the design and implementation of proposed national civil penalties regime for victims of non-consensual sharing of intimate images on Tuesday, 25 July 2017. In addition to contributing to the workshop, the representative met with a number of stakeholders (notably, the Women's Legal Service Australia, Australian Women Against Violence Alliance, the Law Council of Australia, representatives of the Office of the eSafety Commissioner, and policy and project offices from a number of Commonwealth Departments), provided a hard-copy of the consultation materials, and workshopped a number of changes and improvements to both this Bill and to the Commonwealth regime. Where possible, feedback from the workshop, and from the formal consultation process undertaken by the Commonwealth (including submissions made in response to the Commonwealth Discussion Paper on the proposed civil penalties regime for non-consensual sharing of intimate images) have been incorporated into the final Bill.

All recommendations and notes made by the contributors were implemented, where possible. In cases where recommendations were impossible, contradictory to other recommendations, or outside of the scope of the Bill, reasoning for their exclusion has been made below.

For the sake of clarity, notes and recommendations below for sections 67 and 72B are taken to apply to both equally.

Key Notes, Issues & Takeaways

- There is concern across the community that the impact of child sex and pornography offences on consenting young people are out-of-step with community expectations (submissions 1, 4, 5, 6, 8, 9, 11, 12, 13, 16 and 17). Submission 1 welcomed the amendments to the child pornography offences as addressing "long-standing concerns that young people who engage in consensual, and non-predatory and non-exploitative behaviour, such as sexting", were at risk of inappropriate criminalisation in the ACT. Submission 6 welcomes "specific measures to avoid criminalising young people and to recognise their autonomy". Submission 9 notes a "need to focus more on harm-minimisation principles rather than promotion of abstinence' when talking about consensual intimate image sharing amongst young people. Submission 17 is supportive, in principle, and recommends making the provision more explicit that this protection only applies to situations "where the parties are lawfully engaged n sexual relations" and further notes that, where "there are no aggravating circumstances present", whether a party is over the age of 18 years old should not be a relevant factor.

  Submission 15 notes that the approach to consent with young people both in this Bill and in the *Crimes Act 1900* (ACT) is generally inconsistent, and recommends aligning legislation with the Gillick Competence Standard (the test that determines whether a person under 16 years of age is capable of consenting to their own medical treatment without parental intervention, established in *Gillick v West Norfolk and Wisbech Area Health Authority [1985] UKHL 7* and adopted in Australia in *Marion's Case (1992) 175 CLR 218 at 237*). This is an important distinguishment and recognises that there are substantive differences in capacity and vulnerability among people in the same cohort. Further investigation of the repercussions of this Bill in light of this note is recommended.

- Submissions 1 and 11 support a multi-faceted approach to addressing intimate image abuse, recognising that purely legislative responses are ineffective without also providing outlets for support for victims, education campaigns, improving access to therapeutic services and expanding restorative justice programmes. Submission 11 refers to the development of juvenile conferencing and trials of integrating restorative justice processes into the school system.

- Submission 5 specifically acknowledges the growing problem of intentional "outing" of LGBTIQ young people as an abusive or coercive behaviour. It is acknowledged that this Bill does not address this problem, and it remains an issue for the Assembly to address with expediency.

- A number of submissions (6, 10, 12) note that victimisation is more common among marginalised groups, including young people, the LGBTIQ community, Indigenous Australians and people disclosing a disability.

  Submission 10 further notes "the gross over-representation of women and girls with disabilities who are victims of this abuse, and the nature, extent, under-reporting and consequences that are often opaque to law reformers and policy makers". To expand further, "women who are dependent on others for personal care, those with communication challenges, cognitive impairments, and those women with disabilities who live in residential care settings" are significantly more at risk of intimate image abuse, and that "whilst the shift from the systematic

institutionalisation of people with intellectual disabilities to community living has brought many benefits, it can increase the risk of criminal victimisation due to social vulnerability." Research also indicates that, in the cases of intimate image abuse of people with a disabilities, the most common perpetrators were care providers and health care professionals.

- Submission 6 notes that there needs to be judicial discretion to be able to penalise instances of recordings of sexual assault regardless of the age of the alleged perpetrator.

- Submission 1 notes that the application of consent as a general defence or exception, irrespective of a child's age, is consistent with a best practice approach under the *Human Rights Act 2004* (ACT).

- Submission 1 emphasises that offenders under the new offences in this Bill should not be placed on the Sex Offenders Register.

- Submissions 4 and 15 note that "privacy" is poorly-defined in ACT law and this "marked lack of precision" raises and will continue to raise problems in the enforcement of these offences.

- Submission 6 recommends that diversionary and restorative programs be available to the Courts when sentencing, and further notes that, even in cases where diversionary sentencing has been used, the Court should still order a take-down under revised section 72G.

- Submission 6 draws our attention to the "Safe Harbour Provisions" in the *Harmful Digital Communications Act 2015* (NZ) and recommends the ACT Government investigate implementing similar guidelines in the ACT.

- A number of submissions discuss wider public education campaigns:

  - Submission 6 recommends implementation of a wide education and community engagement campaign similar to the UK's "be aware b4 you share" campaign with a focus on bystander responses, and an accompanying "helpline".

  - Submission 8 emphasises the importance of the ACT Government working with community organisations, service providers, and experts to "develop evidence-based, best practice initiatives to prevent the occurrence of image-based abuse", including "respectful relationships education and public cultural change campaigns".

  - Submission 9 emphasises the need for "multi-agency collaboration" to "reduce stigma and provide guidance to victims to ensure that they are adequately supported and are made to feel empowered once they come forward".

  - Submission 10 emphasises the need for all education programmes to be accessible, and in a variety of settings, formats and languages, including Easy English, to accommodate all disadvantaged groups.

  - Submission 11 emphasises the need for education programmes to "tackle the structural and systemic causes of gender inequality and the objectification of women's bodies". Turning to details of such programmes, submission 11 notes that "it is clear that messages of abstinence not only do not work, but they can be

damaging" and "in the context of abstaining from intimate images, recent anti-sexting campaigns have targeted women not to share photos rather than educating about consent". The "no means no" campaign was pointed to as a successful education campaign and submission 11 recommends a similar approach for digital spaces and cyber safety.

- Submission 14 emphasises the need for "funding for education and awareness campaigns for the Canberra community by multiple different local community groups, including groups serving culturally diverse communities, the LGBTIQ community, people with disabilities, young people, and women" and "funding for training resources for police and the justice system" for similarly diverse groups.

- Submission 15 emphasises the need to "actively encourage community understanding of [the use of drones, and other recent advances in surveillance technology]" and that, ultimately, "in practice, self-help by individuals whose privacy may be disregarded is of fundamental importance". Submission 15 further notes, in relation to young people, "efforts to assist young people should include an emphasis on helping them visualise and understand the reality of harms and effects of privacy abuses that might not seem imminent or close in time and space".

- Submission 17 recommends a consultative and engagement approach to educating the community on these changes and that involving members of the community with the making and implementation of new laws, as well as the development of the education and awareness materials, encourages creativity, community engagement and investment in legislative changes.

- Submission 9 notes that it is important that "victims have the right to choose which legal pathway they are most comfortable with", and that the "stress of undergoing formal legal actions… may deter them" and that they "may opt to seek a DVO or Personal Protection Order as a quicker and less-intrusive option". What options are available to victims needs to be clearly communicated, with an easy analysis of the pros and cons of each option available to the public.

- Submission 10 recommends that the Australian Bureau of Statistics, service and support providers, health professionals and the legal and justice sectors "collect data that reflects the diversity of the disabled population, rather than recording them as an asexual homogenous mass", recognising that one of the major difficulties in addressing entrenched social disadvantage and domestic and family violence for people with a disability is the lack of reliable data.

- Submission 11 details examples:

  - to emphasise the importance of this reform - where law enforcement have not taken intimate image abuse seriously, stating that "previous scenarios of technology-facilitated abuse have demonstrated that the police have been less sympathetic to a woman when she has originally taken the photo";

  - to emphasise the importance of a public education campaign – where internalised social factors were an impediment to reporting - "one youth worker commented that for young women who had been victim to the non-consensual sharing of images, there was a fair amount of self-blame, where they "just needed to get over

it”” and “this speaks to the victim blaming and internalisation characteristic of other instances of rape and sexual assault”;

- where the severity of penalties deterred reporting - “young people [did] not want to send the perpetrator to jail or put them on a sex offenders list”; and

- where the seriousness, complexity or intrusion of the legal system was an impediment to reporting - “young people were unlikely to pursue legal channels, from shame and humiliation of admitting to parents and authority figures that the individual had consensually taken photos”, that “there are significant barriers to young people seeking legal help” and that “soft entry points are needed including the ability to access confidential, free legal advice, ideally in an outreach model that is both accessible and non-intimidating to this group”.

- Submission 11 notes that anonymity during the investigation and proceedings of prosecutions of intimate image abuse are essential to ensure that members of the public do not seek out the intimate documents, “furthering the distress and harm caused of the victim”, as well as preventing on-sharing and the related difficulties when a take-down order is made. Further, submission 11 notes that anonymity is “crucial to protect victims as well as ensuring reporting and prosecution of perpetrators”.

- Submission 12 notes that “in the context of family violence, it is important to recognise that victims in this situation may not feel able to refuse to participate in the production of images or materials and/or to consent to their subsequent distribution”, highlighting the need for an ability to revoke consent.

- Submissions 13 and 14 recommend additional guidance be provided to the Courts to ensure that young people are not “unfairly listed” on the Child Sex Offenders Register.

- Submissions 13 and 14 recommend additional guidance be provided to defendants to understand the new definition of consent, and creating a “clear understanding of the type of positive actions” that fall under revised sections 67(1)(b) and 72B(1)(b).

- Submissions 13 and 14 recommend the ACT Government commission “further research…into ways to remove an image that has been published online”.

- Submission 14 recommends that further consultation with marginalised groups and cultural groups should be undertaken in conjunction with the implementation of this Bill.

- Submission 14 emphasises the importance of a single, consistent definition of consent in the *Crimes Act 1900* (ACT).

- Submission 15 notes the “difficulties in use of the criminal pathway in dealing with offences that are envisaged in the Bill… in relation to investigation, prosecution, conviction and publicity”.

- Submission 16 raised concerns with the existing negating factor in the definition of consent - (e) “the effect of intoxicating liquor, a drug or an anaesthetic” - and notes that the provision is very broad and should be revised in

order to "not necessarily capture individuals who have consented to sexual activity but were affected by a small amount of alcohol, such as one standard drink".

- Submission 16 notes that, while a power for the Court to order a rectification is important, the amount of time between distribution and the eventual decision may limit the effectiveness of such a provision and as such "proposes that the sentencing guidelines for the proposed offences should include a strong and explicit incentive for the defendant to take-down/remove the image(s) in question at the earliest opportunity, without that being considered to be in any way an admission of guilt".

Incorporated Recommendations

Consent

- Submission 1 was concerned that the structure of the consent provision in the exposure draft placed a legal burden on the defendant to prove that the other person consented to the distribution of the image, beyond a reasonable doubt, and that this would be incompatible with section 22(2) of the *Human Rights Act 2004* (ACT). Submission 1 recommended that an evidential burden in line with section 2 of the *Abusive Behaviour and Sexual Harm Act 2016* (Scotland) would be more appropriate. Additionally, submission 1 noted that these concerns had been raised when section 61B of the *Crimes Act 1900* (ACT) was introduced.

  Many submissions (5, 6, 8, 9, 10, 12, 13, 16 and 17) wrote in support of the original construction, favouring the legal burden being on the defendant. Submission 6 noted that "like all forms of explicit or communicative consent, it is important that the focus in the legislation and in practice (as applied by police, lawyers, judges and the community) is on what actions the perpetrator took to actively gain the victim's consent to observe, capture or distribute the intimate document, as opposed to the actions (or inactions) of the victim".

  Submissions 4 wrote in support of a formulation that is in line with other jurisdictions.

  In order to address these concerns, sections 67(1) and 72B(1) were amended to adopt a "reasonableness" approach, adapted from section 273.2 of the *Criminal Code 1985* (Canada).

- Submission 1 proposed that consent remain a defence to offences where the victim was of or above 16 years old or where the alleged offender is no more than 2 years older than the victim where the victim was under 16 years old. Submissions 6, echo the wider implementation of the "2-year rule", and revised sections 66A and 72B(4) give effect to this recommendation.

- Submissions 4, 6, 9, recommend an explicit provision that clearly demarcates that the provision of consent to one person, at one time, by one means, or for one purpose, cannot be assumed to give consent to any other person, or at any other time, by any other means, or for any other purpose. New section 72B(3) gives effect to this recommendation.

- Submissions 8, 9, 15 and 16 recommend that a provision be included that, upon the termination of an intimate relationship, previous consent to the observation, capture or distribution of intimate images or documents is

assumed to be revoked. Revised section 72B(3)(b) gives effect to this recommendation by inserting an assumption of revocation of consent upon the termination of an intimate relationship.

Submission 17 dissents and notes that, conceptually, if consent is taken to only be valid through explicit communication, then revocation must also be taken to only be valid through explicit communication.

- Submission 10 recommends that "increased attention be given to women with disabilities who are disproportionally victimised by this form of abuse" and that a "disability-specific example" be included in revised section 72B to explain the applicability of sections 72D(2)(d and i) and in the new definition of "engaged in a private act" to give cultural context to the state of undress. A series of examples have been included under the definition of "engaged in a private act" to consider cultural, religious and gender identity considerations to give effect to this recommendation.

- Submission 10 recommends the inclusion of a new negating factor being "the threat of or denial of access to a person's mobility aids, medication, personal care or rights to social and medical appointments". Sections 72D(2)(d and i) encompasses this, and an example has been inserted under subsection (d) to provide context.

- Submission 10 recommends adding "or cognitive" to revised sections 67(1A)(j) and 72B(2)(j). This recommendation was adopted.

Definitions

- Submission 1 raised concerns at the breadth of subsection (d) of the definition of "intimate document" and that, without an intent or harm provision, this provision would pose an unjustifiable limitation on section 16 of the *Human Rights Act 2004* (ACT).

  Several submissions (2, 5, 9, 12, 13, and 15) supported this broad definition, noting, like submission 1 did, that what is "intimate" can vary considerably based on community standards and the context, with submission 5 further noting that it should be expanded to include "HIV status, previous gender markers and sexual preferences".

  Submission 6 suggests the original broad definition had a potential to be abused, and that extension of "intimate" to include, for example, a photo of a non-consenting Muslim woman without her hijab, may be overreach and recommends a separate offence or civil approach be taken to address this, but nonetheless supports the broad definition of "intimate" in principle to give judicial discretion to consider cultural contexts within a narrower scope. Submission 6 recommends applying a "reasonable person" test. Submission 16 raises similar concerns noting that the definition "broadens the scope of the proposed criminal sanctions beyond what is appropriate", but "significant judicial discretion should ensure that the particular circumstances of each case are considered in the appropriate context" including based on "age, cultural background, religious affiliation and location".

  Submission 17 disagrees with the use of the term "intimate" over "sexual" and notes that "the injury a person experiences, when their ability to define where the boundary of sexual autonomy lies, is categorically different to

other violations of intimacy". Submission 17 further notes that "the wider definition could be used by vexatious litigants to make claims in non-sexual situations, such as being photographed at the beach wearing bathers".

On the basis of the advice in submission 1, subsection (d) of the definition of "intimate document" has been removed from the final tabled Bill. This Explanatory Statement further notes that "engaged in a private act" is intended to be interpreted to consider cultural, religious and gender identity issues, as do the examples under the definition of "engaged in a private act". Future reform is necessary in this area to reflect the views of the submissions who spoke in favour of the original construction.

- Submission 3 notes a discrepancy between the former definition for "capture of visual data" and the terminology used in former section 72E. The new definition for "capture" addresses this problem.

- Submission 6 notes that the preferred terminology is "intimate images" but "recognises that the proposed legislation includes a relatively clear definition of the term 'document' and is attempting to ensure… that 'text messages and audio recordings are included under this offence, recognising that not all intimate documents are images". In the revised Bill, all instances of the term "intimate document" have been substituted with "intimate images and documents", and the definition amended to that effect, to recognise the ubiquitousness of the term "intimate images" while also ensuring a sufficiently broad definition is included in the final Bill.

- Submission 4 recommends a revision of definitions to expand "intimate document" (now "intimate image or document") to apply to "private acts" and that, noting that a person's clothing is "often fundamental to a person's identity", that the definition be expanded to include cultural and/or religious considerations. The omission of the previous definition of "intimate body area", revised definition for "intimate image or document" and new definition for "engaged in a private act" give effect to this recommendation.

- Submissions 4, 6 recommend that the definition of "intimate document" (now "intimate image or document") explicitly includes "digitally altered or doctored images or videos". Subsection (b) of the new definition gives effect to this recommendation.

- Submission 6 recommends inclusion of an example of "physical" distribution, and explaining the terms "share" and "show" in the definition of "distribution". An example has been included to give effect to this recommendation.

- Submission 11 recommends explicit definition of "text messages" under the definition of "intimate image or document" noting that "the expansion of the definition to include SMS's is critical, as "the primary use of text messaging is to begin, maintain, escalate or in other ways impact interpersonal relationships" and that the definition encompass "all other digital text formats, including SMS, private messaging apps, and email". An example has been included to give effect to this recommendation.

Offences

- Submissions 4 and 6 recommend removal of the term "indecent" from section 72C on the basis that there is a "dearth of jurisprudence" on the term, that it is poorly defined, and is offensive to the victim. Revised section

72C gives effect to this recommendation. Further, the omission of former section 72D is made on the basis that, without the "indecent" provision, the two offences are functionally identical.

- Submissions 6 and 10 recommends amended former section 72G to make it clear that the offence will apply "irrespective of whether or not the intimate image exists" to give effect to Principle 7 of the *National Statement of Principles on the Criminalisation of the Non-Consensual Sharing of Intimate Images*. The revised section 72F(d)(iii) gives effect to this recommendation.

- Submissions 6 and 9 recommend increasing the penalty for former section 72H to "act as a deterrent". The revised section 72G raises the penalty to 200 penalty units, 2 years imprisonment, or both, to give effect to this recommendation.

- Submissions 9, 15, 16 and 17 recommend that the Bill make clearer that "threats" under revised section 72F include implicit threats, with submission 9 noting that "threats to distribute intimate documents are used as a tool of coercion against women to stay in a violent relationship". Submission 16 cautions that a higher threshold should apply to implicit threats. Revised section 72F(d)(i and ii) give effect to this recommendation.

Exceptions

- Submissions 1, 6 and 13 recommend inclusion of a general "reasonableness" exception in line with section 91T(1)(d) of the Crimes Amendment (Intimate Images) Bill 2017 (NSW). This recommendation was adopted.

- Submission 1 recommends restructuring former sections 72C(4), 72D(3) and 72E(3) as exceptions rather than defences. This recommendation was adopted.

General

- Submissions 1, 13 and 14 propose increasing the age for referred matters under section 72H "DPP's approval for prosecution of children" to 18 years old in accordance with sections 8 and 11(2) of the *Human Rights Act* (ACT) and to align with the *Children & Young Peoples Act 2008* (ACT). Submission 4 proposed increasing the age to 17 years old. The revised section 72H incorporates the first recommendation of 18 years old to afford the maximum possible protection for young people.

Unincorporated Recommendations

- The proposed amendments to section 66A "Consenting young people−exception to s 64, s 65 and s 66 offences" were supported by submissions 1, 6, 7, 8, 12 and 13. Submission 11 supported the change in principle but recommended the minimum age be raised to 12 in line with the *Children & Young People Act 2008* (ACT). On the basis of the number of submissions in favour of the amendment, the recommendation in submission 11 was not incorporated, but is noted and such a change in the future will be supported.

- Submissions 1, 6 and 17 recommend an exception to the offences where "the image had previously been disclosed for a reward and [the person] had no reason to believe that the previous disclosure for reward was made without consent". The purpose of this exception, among other things, is to protect publishers from prosecution for

images they published on the basis that they understood the depicted person consented to the image being taken. It is our opinion that this is sufficiently protected by sections 72E (a, b and h).

- Submission 4 recommends the inclusion of an exception for "genuine academic, artistic or any other genuine purpose in the public interest", in effect a translation of a similar provision in the *Racial Discrimination Act 1975* (C'th), however this is sufficiently protected by sections 72E (g and h).

- Submissions 6, 11 and 15 recommend an additional offence for instances where a person consensually distributes an intimate image or document, the depicted person revokes the consent and requests the person take all reasonable steps to take down the intimate image or document, and the person refuses. Submission 6 recommends adopting the approach taken in the German prosecution of Max Mosley in 2014. Submission 15 further recommends "subjects of stored digital documents should be able to prevent unauthorised sharing of those documents during and at the end of a relationship". Introducing a new offence without further consultation could be inequitable to those parties who have made submissions, but this option should be more fully explored moving forward.

- Submission 6 recommends discretion in sentencing to ensure that a broad choice of penalties are available to the Court when sentencing, and that the Court should take into account "the nature of the distribution, the motivations of the perpetrator, the likely impacts on the victim, the nature of the imagery, and repeat offences". Although the sentencing process is outside the scope of this legislation, this reform should be examined in the near future.

- Submissions 6, 15, 16 and 17 recommend that offences under this Bill be considered a "relevant offence" in line with section 26 of the *Working with Vulnerable People (Background Checking) Act 2011* (ACT). As the offences in this Bill are "offences against a person", no amendment to the *Working with Vulnerable People (Background Checking) Act 2011* (ACT) is necessary as they are covered by the definition of "relevant offence" in section 26 of that Act.

- Submission 7 raises the concern that these reforms do not address non-consensual "obtaining" of intimate images, through "hacking" or misuse of personal details to access a person's device or online accounts. We note that "hacking" generally falls under Commonwealth jurisdiction, and it is unclear at this stage what the ACT Government could do to effectively combat this behaviour. This Bill allows for prosecution however, if the "hacked" image is distributed further. The ACT Government should investigate this matter in more detail.

- Submissions 11 and 16 recommend "distinguishing between cases where two consenting individuals under the age of 18, with circumstances where one person is over the age of 18". We recommend that the ACT Government investigate this further in relation with the reforms arising from the Royal Commission into Institutional Responses to Child Sexual Abuse.

- Submission 11 recommends that a clear distinction be made "between an individual showing an intimate document to a friend without first seeking consent" (an example has been included of this scenario) "compared to an individual gaining financially from sharing the image, or publically identifying the victim with the intentions

of encouraging public shaming and harassment (commonly referred to as virtual mobbing) or the intentional release of personal information (doxing)". This type of invasion of privacy should be dealt with under different legislation and is outside of the scope of this Bill. However, noting the importance of this, the ACT Government should investigate a general invasion of privacy offence for serious malicious or reckless invasions of privacy.

- Submission 11 recommends that "where there is a clear indication of malice and where the purpose is to humiliate, threaten, intimidate or punish the individual, these must be distinguished as "aggravated" incidences, and be accompanied with the higher maximum penalties". We note that sentencing process is outside the scope of this legislation, but welcome this future reform.

- Submissions 13 and 14 raise concerns that the "public interest" exception under revised section 72E(2)(g) may be too broad and "there may be public interest in non-criminal activity depicted in an intimate document in some circumstances, but again it may not be necessary to share the images to report on the behaviour". Submission 13 recommends that "to mitigate this potential for misuse… further clarification of this exception in the legislation would be appreciated".

  Submission 16 dissents and believes that "the public interest exception needs to be as wide as possible to avoid unnecessary suppression of free expression, particularly in relation to public interest journalism".

  Further detail on the exception is provided in the Explanatory Statement and the Court should take into account the legislative intent of the exception by reference to this Explanatory Statement.

- Submissions 15 and 16 recommend the creation of a complementary Bill to introduce a statutory tort for serious invasions of privacy. While it is outside of the scope of this Bill, further reforms should be implemented towards this recommendation as a matter of priority.

- Submission 16 recommends a "higher threshold for consent" for young people which should be further investigated.

- Submission 16 recommends removing subsection (b) in the definition of "distribute" noting that "the operators of content hosts that are at least partly dedicated to the sharing of non-consensual intimate images should be liable for criminal prosecution", but that "the criteria for defining such hosts must be carefully-worded to ensure that legitimate expression is not unintentionally suppressed, particularly in the context of public interest journalistic reporting". Although this is important, this bill includes this provision to align with other Australian jurisdictions.

- Submission 17 recommends revising all offences to align with Marthe Goudsmit's typology of "revenge pornography" (see Goudsmit, M. 2017. *Revenge Pornography: A Conceptual Analysis*. Leiden University. Pg 22) and focus on the key foundational offence of "making a sexual document observable without consent".

- Submission 17 recommends deleting the term "by another person" in subsection (a)(ii) of the definition of "distribute" on the basis that it should be irrelevant "whether a person existed to be capable of receiving the image, for the offence to be committed". We agree with this sentiment, but it is our opinion that this provision does not preclude this eventuality.

- Submission 17 recommends extending the exception at revised section 72E(1)(b)(vii) to "cover an agent of the owner" where a scenario may arise where "the person is not the legal title holder" of the premises they are protecting. This is an important point which should be incorporated in the future. These exceptions are a non-exhaustive list, and the Court has the discretion to interpret this clause to the effect of this recommendation. Further, this circumstance is included by operation of revised section 72E(1)(b)(viii).

- Submission 17 recommends a number of exceptions that may be of relevance to this Bill, including section 33(2) of the *Criminal Justice and Courts Act 2015* (UK) and section 2(5) of the *Abusive Behaviour and Sexual Harm Act 2016* (Scotland). Submission 17 further recommends inserting "genuine" and "artistic" into revised sections 72E(1)(b)(vi) and 72E(2)(f). Although these recommendations are of high merit, they are already given effect by operation of revised sections 72E(1)(b)(vii) and 72E(2)(h).

CRIMES (INVASION OF PRIVACY) AMENDMENT BILL 2017

DETAIL

Clause 1 - Name of Act

This is a technical clause that names the short title of the Act. The name of the Act would be the *Crimes (Invasion of Privacy) Amendment Act 2017*.

Clause 2 - Commencement

This clause provides that the Act commences the day after it is notified.

Clause 3 - Legislation Amendment

This clause identifies the legislation amended by the Act.

Clause 4 - Offences against the Act - application of Criminal Code etc

This clause removes reference to section 61B (Intimate observations or capturing visual data etc) from the clause regarding application of general principles of criminal responsibility under chapter 2 of the Criminal Code. This is discussed further at Clause 6.

Clause 5 - Section 7A, note 1

This clause inserts the new offences made by this Act to apply general principles of criminal responsibility under chapter 2 of the Criminal Code. The five offences inserted are:

- section 72C (Non-consensual intimate observations etc);
- section 72D (Non-consensual distribution of intimate documents);
- section 72F (Threat to distribute intimate document); and
- section 72G (Court may order rectification).

Clause 6 - Intimate observations or capturing visual data etc

This clause removes the offence under section 61B (Intimate observations or capturing visual data etc) of the Act. This offence will be reformed as sections 72C and 72D of the Act.

Clause 7 - New section 66A

This clause inserts an exception to certain child sex offences being (per subsection (1)):

- section 64(1) (Using child for production of child exploitation material etc)
- section 65(1) (Possessing child exploitation material)

- section 66(1) (Using electronic means to suggest a young person commit or watch an act of a sexual nature)
- section 66(2) (Using electronic means to send or make available pornographic material to a young person)

"Child exploitation material" is defined as "anything that represents (a) the sexual parts of a child; or (b) a child engaged in an activity of a sexual nature; or (c) someone else engaged in an activity of a sexual nature in the presence of a child; substantially for the sexual arousal or sexual gratification of someone other than the child". On a plain English reading of this clause, the definition of "child exploitation material" could include intimate images consensually shared between two young people, who, for example, may be in a sexually-active relationship. This change seeks to ensure that young people consensually engaging in this behaviour are not at risk of prosecution.

This clause adds an exception to address concerns from family violence and human rights advocates over the risk of young people who consent to the sharing of sexual material between each other but are nonetheless under the age of majority being prosecuted under child pornography offences. The exclusion operates in a similar manner to the "similarity of age" defence at clause 5.2.17 of the *Model Criminal Code*. The Australian Law Reform Commission investigated these similarity in age provisions at length in part 25 of the "Family Violence - A National Legal Response" Report (ALRC Report 114).

> *5.2.17 Defence—similarity of age*
>
> *1) A person is not criminally responsible for an offence against this Division in respect of an act if, at the time of the act, the child concerned was over the age of [no defence age] and:*
>
> *a) the person was not more than 2 years older than the child, and*
>
> *b) the person was not more than 2 years younger than the child.*
>
> *2) An offence of incitement under Part 2.4 is committed by a person who urges another person to engage in an act of sexual penetration or indecent touching or an indecent act even if the other person does not commit an offence by doing so because of subsection (1).*

Recent research from the Queensland Sentencing Advisory Council suggests that nearly half of all those prosecuted for child pornography offences are under the age of 17. While the exact breakdown of those caught nor the proportion that were causing real harm with exploitative material is not known, this exclusion and the provisions under Part 3A - Invasions of Privacy addresses this issue before it becomes a problem in the ACT.

This clause protects young people engaging in consensual behaviour and/or sharing consensually-produced and consensually-shared images. It is important that our criminal law focuses on wrongdoing and the potential for harm rather than on what consenting young people do regardless of their age.

Clause 8 - Section 67 heading

This clause changes the heading for section 67 from "Consent" to "Meaning of consent—sexual offence consent provisions". A definition for consent now appears in both Part 3-Sexual Offences and Part 3A-Invasion of Privacy, and it is appropriate that the heading of the section reflects this.

Clause 9 - Consent - Section 67(1)

This clause inserts a definition of consent with respect to sexual offences and substitutes a list of factors that are to be considered by the Courts when determining when consent can be negated.

This clause will be replicated by clause 72B to ensure that the definition of consent is consistent between sexual offences and invasions of privacy offences.

The current section 67(1) defines consent only by what would negate consent (for example, intoxication or the threat of violence), rather than defining consent by what it is and then listing negating factors.

Subsection 67(1) - Definition of Consent

This clause would define consent by these elements:

> *For a sexual offence consent provision, consent of a person to an act mentioned in the provisions by another person is—*
>
> *(a) the person gives free and voluntary agreement; and*
>
> *(b) the other person—*
>
> *(i) knows the agreement was freely and voluntary; or*
>
> *(ii) is satisfied on reasonable grounds that the agreement was freely and voluntarily given.*

This definition would help protect victims of sexual offences by ensuring that the communicative aspect of consent is relevant to a prosecution, and removing the possibility that consent can be "assumed".

Subsection 67(1A) - Factors that Negate Consent

This clause replicates the list of negating factors from the current section 67(1) and adds at subclause (1A)(g): "a mistaken belief as to the nature of the act, whether by fraud, deceit, or failure to provide reasonable information about the nature of the act" and at subclause (1A)(j) "or cognitive" after mental.

Subclause (1A)(g) would ensure that consent is taken to be negated where consent was only given on the provision that certain conditions agreed by both parties would be met and where those conditions are not. For example, where consent was given on the basis that a condom would be used during intercourse and the alleged offender removes the condom during intercourse without informing the other person, the other person's consent is assumed to have been revoked.

Clause 10 - Section 67(3)

This clause is a consequential amendment to rectify numbering due to these new provisions.

Clause 11 - New section 67(4)

This clause inserts a definition of "sexual offence provision" to enumerate which offences clause 7 subclause (1) affects, being:

- section 54 (sexual intercourse without consent);
- section 54(3)(b) (reasonable belief defence to sexual intercourse with a young person between the ages of 10 and 16);
- section 60 (act of indecency without consent);
- section 61(3)(b) (reasonable belief defence to acts of indecency with young people between the ages of 10 and 16); and
- section 66A(2)(c) (exceptions to offences for consenting young people).

The previous section 67(1) enumerated those offences by an in-text list being "For sections 54, 55 (3) (b), 60 and 61 (3) (b)". This drafting was not aligned with plain English drafting principles.

This clause creates a clear list of offences the definition of consent applies to.

Clause 12 - New part 3A Invasion of privacy

This clause creates a new part of the Act being "Invasion of privacy", and creates four new offences being:

- section 72C (non-consensual intimate observations etc);
- section 72D (non-consensual distribution of intimate documents);
- section 72F (threat to distribute intimate document); and
- section 72G (Court may order rectification)

Previous section 61B was moved from Part 3 - Sexual Offences to new Part 3A in recognition that the behaviours that previous section 61B and the new offences seek to address are not necessarily sexual in nature.

An example of an intimate observation that is not sexual in nature would be taking pictures of dead bodies in a morgue as interfering with a corpse has been viewed by the Courts as indecent. This also recognises that the motivation behind these offences is not necessarily sexual gratification but could be about power, humiliation or shame.

Section 72A - Definitions - part 3A

This section creates a list of definitions of terms that apply to the whole of Part 3A. Definitions that require further explanations have been included below.

***capture**, an image or document—a person **captures**, an image or document of another person if the person captures an image or document of the other person by any means in such a way that—*

b) a recording is made of the image or document; or

c) the image or document is capable of being transmitted in real time with or without retention or storage in a physical or electronic form; or

d) the image or document is otherwise capable of being distributed.

This definition is an adaptation of previous definition of "*capture visual data*" in section 61B(10), and extends the definition to align with the definition of "*intimate image or document*" below. The previous definition was limited in the sense that it only applied to visual data (primarily images or videos) and the intent of this Bill is to include documents that might not necessarily be visual, including audio recordings or texts.

***device** does not include spectacles, contact lenses or a similar device when used by someone with impaired sight only to overcome the impairment.*

The phrase "only to overcome the impairment" is to ensure that wearable technology devices, such as Google Glass, are excluded if they are only being used to correct vision and not for any other purpose. Similarly, as advancements in medical technology develop and bionic eye implants become more common, these implants are strictly speaking transmitting data but exist solely to correct eyesight. A device could include a drone, a camera, a smartphone, binoculars, etc.

This definition incorporates Principle 8 of the National Principles.

***distribute**—*

a) includes—

i) communicate, share, show, exhibit, send, supply, upload or transmit; and

ii) make available for access by another person; but

b) does not include distribution by a person solely in the person's capacity as an internet service provider, internet content host or a carriage service provider.

This definition includes "share, show" which do not appear in similar legislation. Research has indicated that the Victorian definition being "communicate, exhibit, send, supply, upload" may not cover "old-fashioned" distribution methods, including letterboxing, postering, or the physical showing of a photograph to another person. This definition of distribute is taken to apply "whether or not the image or document is viewed or accessed or is capable of being viewed or accessed by another person" (section 72A(2)).

This definition incorporates Principle 9 of the National Principles.

***engaged in a private act**, means—*

a) in a state of undress; or

b) using the toilet, showering or bathing;

c) engaged in an act of a sexual nature;

d) in a position, pose or scenario of a sexual nature or context that a reasonable person would not expect to be made public.

This definition is an adaptation of the definition in the Crimes Amendment (Intimate Images) Bill 2017 (NSW) and was recommended for inclusion by disability advocates. This definition is to be interpreted by references to the culture, religion, gender identity and personal circumstances of the victim, recognising what is "undress" or "of a sexual nature or context" differs considerably across cultures and faiths (section 72A(3)).

***intimate image or document**, in relation to a person—*

(a) means an image or document that shows, visually or otherwise—

(i) the person's genital or anal region whether covered by underwear or bear; or

(ii) for a female, or a transgender or intersex person who identifies as a female—the person's breasts whether covered by underwear or bear; or

(iii) the person engaged in a private act; and

(b) includes an image or document, in any form, that has been altered to appear to show any of the things mentioned in paragraph (a).

Examples—document

1. an email

2. a text message or other forms of electronic private messaging

3. an audio recording

The term "intimate" has been adopted over other terms like "sexual" to ensure that the offences encompass the range of behaviours designed to blackmail, humiliate or embarrass the victim, or to generate notoriety, financial gain or sexual gratification for the perpetrator. Likewise, limiting the offence to "sexual" imagery, as some jurisdictions suggest, constrains enforcement and fails to capture all wrongful behaviours.

The term "document" has been adopted as research and subsequent inquiries have identified that a wide definition must be adopted to encompass the multitude of forms that intimate documents and images can take. Using the term "document" ensures that text messages and audio recordings are included under this offence, recognising that not all intimate documents are images. Images are also documents for the purpose of this section.

This definition incorporates Principles 4, 10 and 11 of the National Principles.

Section 72B - Meaning of Consent - part 3A

Sections 72B(1) and 72B(2) replicate the definition of consent from sections 67(1) and 67(1A) but for "an intimate act" rather than "sexual offence consent provisions".

"Intimate act" is defined by section 72B(7) as:

a) the observation, or capture of an intimate image or document by X of Y; or,

b) the distribution by X of an intimate image or document relating to Y.

"Capture", "distribution" and "intimate image or document" are defined in section 72A.

This section ensures that the meaning of consent is consistent between Parts 3 (Sexual Offences) and 3A (Invasions of Privacy).

Subsection 72B(3) - No extension of consent

This section aims to remove any doubt as to any assumptions of consent, particularly where consent was previously given, given for another purpose, or given to another person. This is based on feedback that stakeholders were concerned that, even with the stronger definition of consent, perpetrators of abuse could claim that, because consent was given at another time, they could reasonably believe they would have it at another point in time.

Subsection 72B(4) - Termination of an Intimate Relationship

This section ensures that there cannot be an assumption of consent after the termination of an intimate relationship by explicitly stating that consent is taken to be withdrawn if the relationship ends. This is based on feedback that stakeholders were concerned that, for example, perpetrators of domestic violence could use intimate image abuse to "get back" a victim fleeing abuse.

Subsection 72B(5) - Consent of Young People

This section relates to young people - defined at section 72B(5) as "a child 10 years old or older but less than 16 years old. The clause reads:

> *The consent of a young person to an intimate act by another young person is not presumed to be negated only because of the age of the young person giving consent*.

As a general legal principle, it is assumed that persons under 16 years old cannot give consent to sexual acts. This principle becomes problematic when dealing with young people who have reached sexual maturity and are sexually active but have not yet reached the age of majority.

Principle 6 of the National Principles notes that "any offence framework should consider whether, and if so, how, it applies to distributors who are minors" and "an offence should be clearly distinct from criminal conduct already captured by existing child sexual exploitation laws" recognising that the treatment and exploitation of minors though technology-facilitated abuse is a major problem.

Current child sex legislation makes some attempts at ensuring two people under 16 years old who are within two years difference in age who consent to sexual activities (notwithstanding negating factors) with each other are not prosecuted under these offences. This exception only applies to sexual intercourse and indecent act offences and not child pornography offences, creating a risk that young people may be prosecuted under those child pornography provisions.

A report by the Queensland Sentencing Advisory Council, identified that, between 2006 and 2016, of the 3,035 people prosecuted under child pornography offences, 1,470 were between 10 and 16 years old and most of those related to "sexting" - filming and distributing explicit material of people under 17 years old. While we recognise that this problem is less pronounced in the ACT, it is desirable to avoid a situation where children remain at risk of prosecution for undertaking consensual sexual activities.

This legislation attempts to rectify some of these issues.

Section 72C - Non-consensual intimate observations etc

Sections 72C replaces the offences in previous section 61B "intimate observations or capturing visual data etc". This has two effects:

- The new section clearly demarcates a general invasion of privacy by the observation or capture of an intimate image or document without consent";
- The new section implements the recommendations that a separate offence for the capture or observation of intimate acts, which were not covered by the original offence; and
- The new section removes the element of "indecency" from the original offence based on feedback that such terminology is harmful to victims.

This section in practice replicates previous section 61B(1).

Section 72D - Non-consensual distribution of intimate documents

This section implements recommendations 2 and 3 of the 2016 Senate Report into "the phenomenon colloquially referred to as 'revenge porn'", specifically creating an offence that criminalises "knowingly or recklessly sharing intimate images without consent".

In the construction of this offence, an "act-centric" conception of the offence was adopted that focuses on wrongfulness of the act of sharing intimate documents non-consensually.

This was chosen over an "intent-centric" conception that focuses on the perpetrators' motivation which fails to encompass the broad range of motivations behind this behaviour (Principles 4 and 14 of the National Principles).

It was also preferred over a "harm-centric" conception that focuses on harm to the person. This fails to recognise that not all of the behaviours encompassed by these offences may result in harm per se and are wrongful in and of themselves (Principle 13 of the National Principles).

For these reasons, these offences do not require proof of intent to cause harm nor proof of harm.

Section 72E - Exceptions to offences

This section details the exceptions/exclusions to the offences contained in Part 3A. This section incorporates Principle 5 of the National Principles.

Subsection (1) applies to section 72C "Non-consensual intimate observations etc". This section largely replicates the previous section 61B(8).

Subsection (1)(a) provides an exception to observing data that was previously captured, or in other words, the original observation is the criminal act, and subsequent observations (for example, by being shown non-consensual intimate images by another person) is not itself criminal. This ensures that the original observation/capture and the subsequent disclosure are criminal behaviours, but subsequent, or even inadvertent, observations are not.

Subsection (1)(b) lists the professions/activities where behaviours that would otherwise be criminal under sections 72C and 72D are either necessary for the function of society or are generally considered socially acceptable. The main examples used are a mother taking a photograph of her newborn baby and uploading it to social media, and a doctor taking a photograph of a mole on a patient's body for the purpose of seeking a second medical opinion from a colleague.

Subsections (1)(b)(i) and (1)(b)(ii) create new exceptions based on recommendations from the Human Rights Commission that constructing reasonable belief as to consent as a defence was problematic. It ensures that individuals who either reasonably believed the other person consented to the distribution, or who did not and could not reasonably be expected to know that the other person did not consent to the distribution will not be prosecuted. For example, a news broadcaster broadcasting footage of a public art performance featuring a number of naked participants would not be liable for prosecution as the broadcaster could reasonably assume each participant gave their consent.

Subsection (2) applies to section 72D "Non-consensual distribution of intimate documents". This section synthesises the exclusions from subsection (1)(b) and additional exclusions recommended by Drs Henry, Powell and Flynn in their submission to the 2016 NSW Justice Discussion Paper "the sharing of intimate images without consent", citing Danielle Citron's 2014 book "Hate Crimes in Cyberspace" at page 153, and based on feedback from consultation.

The exclusions are:

a) "by a person who believed on reasonable grounds that the affected person consented to the distribution" - to protect individuals who reasonably believed they had received consent to the act, for example " a person takes part in a public art event in which participants are naked [and a] news broadcaster publishes an image of the naked person participating in the event";

b) "by a person who did not know, and could not reasonably be expected to have known, that the distribution was without the affected person's consent" - to protect individuals who, based on the facts, did not know, could not have known or could not reasonably be expected to know, that the distribution was without the consent of the depicted party;

c) "by a law enforcement officer acting reasonably in the performance of the officer's duty" - to protect law enforcement officers in the collection of evidence or in undertaking surveillance. Note that this exclusion is subject to a reasonableness test and is held to common standard for law enforcement in the ACT;

d) "for a lawful and common practice of law enforcement, criminal reporting or a legal proceeding" - to protect individuals in legal proceedings who might bring certain images to the Court's or the Police's attention;

e) "for the purpose of reporting unlawful conduct to a law enforcement officer" - to protect members of the public who, in the reporting conduct to law enforcement or a legal representative. This protects individuals reporting complaints to local civil authorities or the Police;

f) "for a scientific, medical or education purpose" - to protect researchers, academics, health professionals and teachers who may use intimate images or documents reasonably and genuinely for these above purposes;

g) "in the public interest" - to protect whistleblowers or concerned members of the public who, using conventional public interest disclosure processes, release intimate images or documents to government officials or the media; for example, teachers who have confiscated images from students to provide to school administration;

h) "if a reasonable person would consider the distribution acceptable…" - to give the Court discretion in assessing if, in the person's circumstances and against community standards, the distribution was an invasion of privacy or an intimate image or document.

i) "in circumstances or for a purpose prescribed by regulation" - allows flexibility for additional or specific exclusions as necessary.

Subsection (3) replicates previous section 61B(9) and ensures that the exclusions do not prevent an alleged offender being found guilty by extension of criminal responsibility under the *Criminal Code 2002*. It is unclear what the purpose of this section was originally, but for the sake of consistency, it has been adopted along with the remainder of the previous section 61B.

Subsection (4) defines "law enforcement officer" as a "police officer" or a staff member of the Australian Crime Commission, a "licensed security provider" as a person licensed under the *Security Industry Act 2003*, and "security activity" as activities under section 7 of the *Security Industry Act 2003.*

Section 72F - Threat to capture or distribute intimate image or document

This section implements recommendations 2 and 3 of the 2016 Senate Report into "the phenomenon colloquially referred to as 'revenge porn'", specifically creating an offence that criminalises the "threatening to take and/or share intimate images without consent, irrespective of whether or not those images exist" and Principle 7 of the National Principles.

The offence is the threat to capture or distribute an intimate image or document, where a reasonable person would see the distribution as an invasion of privacy of the person depicted in the document, and that the offender intended for, or was reckless resulting in, the threatened person fearing the threat would be carried out.

This offence further ensures that the threat does not necessarily need to be aimed at the person depicted in the document. For example, the offence would cover threatening a person with the distribution of nude images of their partner.

Subsection 72F(2) makes it clear that the offence does not require proof that any such document exists or the perpetrator was capable of making good on their threat, as well as ensuring that implicit threats are also covered by this offence.

Section 72G - Court may order rectification

This section gives the Courts power to compel a person found to have committed an offence under sections 72C or 72D to take reasonable action to "remove, retract, recover, delete or destroy" instances of the intimate documents in question. This section incorporates Principles 15 and 16 of the National Principles.

This provision relies on the offenders' capability to remove, retract, etc the documents, which may be cached, downloaded, repackaged, etc, and beyond the ability of the offender to stop further distribution. It is likely enforceability will remain an issue.

This section attempts to address concerns about enforceability and cross-jurisdictional issues. Generally, the power to administer telecommunications and enforce takedown orders lies with the Commonwealth, therefore this legislation cannot create a power to compel a third party (for example, an Internet Service Provider) to take-down or block access to offending documents.

Failure to comply with an order under section 72G will result in a further offence under section 72G(3) and could result in up to 200 penalty units, 2 years' imprisonment or both. This penalty was recommended in a number of submissions.

Section 72H - DPP's approval for prosecution of children

This section ensures that the prosecution of young people under the age of 18 years old cannot be commenced without the approval of the Director of Public Prosecutions. This is a further safeguard to ensure that young people are not at risk of unwarranted prosecution, and implements a recommendation by the ACT Human Rights Commission and echoes recommendations made to the NSW inquiry into "revenge porn".

Clause 13 - Dictionary, note 2

This clause inserts into the Dictionary to the *Crimes Act* a note that the term "document" is defined in the *Legislation Act*, dictionary - part 1.

Clause 14 - Dictionary, new definitions

This clause inserts references to the new definitions created by this Bill.