

2017

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

CRIMES (INTIMATE IMAGE ABUSE) AMENDMENT BILL 2017

EXPLANATORY STATEMENT

**Presented by
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CRIMES (INTIMATE IMAGE ABUSE) AMENDMENT BILL 2017

This explanatory statement relates to the Crimes (Intimate Image Abuse) Amendment Bill 2017 (the Bill) as presented to the Legislative Assembly. It has been prepared to assist the reader of the Bill to understand the policy rationale and the scope of the amendments and to help inform debate. It does not form part of the Bill and has not been endorsed by the Legislative Assembly.

The Statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Background

This Bill has been prompted by community concern on the practice of sharing intimate images of a person, using online communication, without that person's consent. It has been referred to in public discourse as 'revenge porn.' The issue appears to be widespread, with an RMIT study citing that as many as 1 in 5 Australians will become victim to this abuse.¹

Victoria and South Australia currently have legislation passed to address this issue, while NSW has tabled a Bill. The Commonwealth is currently undergoing consultation for national frameworks.

Public Consultation

An Exposure Draft was developed and placed on the legislation register on 18 May 2017.

Feedback and submissions were received from many groups and stakeholders, including

- The Bar Association of the ACT
- The ACT Law Society
- Human Rights Commissioner
- Victims of Crime Commissioner
- Public Advocate and Children and Young People Commissioner
- Discrimination, Health Services and Disability and Community Services Commissioner
- Have Your Say public website

The Bill as presented to the Assembly includes amendments from those consultations.

¹ [Not Just 'Revenge Pornography: Australians' Experience of Image-Based Abuse](https://www.rmit.edu.au/content/dam/rmit/documents/college-of-design-and-social-context/schools/global-urban-and-social-studies/revenge_porn_report_2017.pdf), accessed at : https://www.rmit.edu.au/content/dam/rmit/documents/college-of-design-and-social-context/schools/global-urban-and-social-studies/revenge_porn_report_2017.pdf on 31 May 2017.

Overview

The Bill seeks to create a new offence, stating that a person (the **offender**) commits an offence if—

- (a) the offender distributes an intimate image of another person (the **affected person**); and
- (b) the offender—
 - (i) knows the other person does not consent to the distribution; or
 - (ii) is reckless as to whether the other person consents to the distribution.

The maximum penalty is 300 penalty units, imprisonment for 3 years or both. This has been drafted in line with NSW legislation.

The Bill also includes provisions that cover threats to capture or distribute intimate images, with similar penalties.

Given the difficult and complex nature of the behaviour that may be otherwise captured under this type of legislation, consultation has indicated the need to include specific exemptions, and they are included in this Bill. These include:

Protections for young people

An offence against section 72D does not apply to a person (the **defendant**) if—

- (a) the defendant is younger than 18 years old when the offence is alleged to have been committed; and
- (b) the person on whom the offence is alleged to have been committed (the **complainant**) was at the time of the offence—
 - (i) at least 14 years old; and
 - (ii) not more than 2 years younger than the defendant; and
- (c) the complainant consented to the conduct required for the offence.

Also, a new provision has been added that a proceeding for an offence against this part must not be commenced without the consent of the director of public prosecutions if the person charged with the offence was under the age of 16 years at the time the offence is alleged to have been committed.

Both these provisions seek to remove doubt that young people are not automatically captured by the legislation without consideration to their consent, and all the surrounding circumstances. It is designed to allow the legislation to be only applied in appropriate situations.

There are also a range of specified exceptions in other circumstances “in which a reasonable person would consider the conduct of the defendant acceptable.”

These include, but would not be limited to;

- by a law enforcement officer acting reasonably in the performance of the officer’s duty; or
- for a lawful and common practice of law enforcement, criminal reporting or a legal proceeding; or
- for the purpose of reporting unlawful conduct to a law enforcement officer; or
- for a scientific, medical or educational purpose.

The Bill also requires the following be considered:

- the nature and content of the image;
- the circumstances in which the image was distributed;
- the age, cognitive capacity, vulnerability or other relevant circumstances of the person shown in the image;
- the extent to which the defendant’s actions affect the privacy of the person depicted in the image;
- the relationship between the defendant and the person shown in the image.

Combined, these provide reasonable limitations on the exercise of the legislation.

Rectification.

Research, both anecdotal and academic, has indicated that one of the primary remedies that victims of intimate image abuse seek is to have the offending images removed.

Notwithstanding the plenary powers of the courts, NSW has included specific abilities to order rectification. Those provisions are mirrored in this Bill.

The rectification provisions state that “The court may order the person to take reasonable action to remove, retract, recover, delete or destroy an intimate image involved in the offence within a stated period.”

However, it would be unsatisfactory if an order could be defied or not complied with without an appropriate consequence.

Therefore the provision also states that the person commits an offence if the person fails to comply with the order. The maximum penalty is 200 penalty units, imprisonment for 2 years or both.

Human Rights

During the exposure draft period, some potential human rights issues were raised.

Joint correspondence was received from Dr Helen Watchirs OAM, Human Rights Commissioner; John Hinchey, Victims of Crime Commissioner; Jodie Griffiths-Cook, Public Advocate and Children and Young People Commissioner; and Karen Toohey, Discrimination, Health Services, and Disability and Community Services Commissioner.

That correspondence raised several potential concerns, including “children’s rights to freedom of expression (s 16) and to protection on the basis of being a child (s 11(2)).”

They also stated; “Limitations on rights must conform to the requirements of s 28 of the HR Act, that is, they must be aimed at a legitimate objective, and be rationally and proportionately connected to that objective.”

“The Commission recommends that the bill should include appropriate exceptions that apply to young people under the age of 18 years, which go towards ensuring that non-predatory and non-exploitative sharing of intimate images is not captured by the implementation of these provisions and to prevent the inappropriate application of criminal laws to children and young people.”

This Bill has included just such a provision.

They also state: “Consideration could also be given to requiring the consent of the DPP to commence proceedings where the defendant is under 18 years of age to ensure that best interests of the juvenile is considered.”

A provision to that effect has been incorporated.

The exposure draft also included a defence of consent, however, the Commissioners stated that

“This is likely to give rise to issues of incompatibility with the right to be presumed innocent in s 22(2) of the HR Act as (i) the issue of consent is an essential element of the offence (so would normally be for the prosecution to prove beyond reasonable doubt), and (ii) the penalty includes imprisonment.

“While whether the matter is ‘peculiarly within the defendant’s knowledge’ is relevant factor for reversing the burden in these circumstances, it must also be shown that the defendant’s right to a defence is retained, ie it must relate to matters that the defendant is in fact able to prove.

“In our view, an evidential burden is more likely to be considered proportionate in accordance with the reasonable limits test in s 28 of the HR Act, provided that it can be demonstrated that a full-fault offence is not appropriate in these circumstances.”

The tabled Bill has been amended in line with NSW legislation that makes knowledge of lack of consent, or recklessness as to consent, an essential element of the offence.

The Commissioners also stated a preference for specific exceptions, as “These are necessary to protect freedom of expression (section 16 of the *Human Rights Act 2004*) and also to avoid inadvertently capturing behaviour that does not violate community norms.”

A list of exceptions has been included.

The Bill does not include strict or absolute liability provisions, each case must be seen and assessed on its merits, with the full due process of the law. Together, these changes have created a reasonable response to the problem. The importance of this legislation in preventing future harm, providing a direct means of rectification, yet offering a range of safeguards and protections, that provide a suite of remedies which will be effective in protecting victims, reasonable and limited in scope, and be human rights compatible.

CLAUSE NOTES

Clause 1 **Name of Act**

This Act is the *Crimes (Intimate Image Abuse) Amendment Act 2017*.

Clause 2 **Commencement**

This Act commences on the day after its notification day.

Clause 3 **Legislation amended**

This Act amends the *Crimes Act 1900*.

Clause 4 Offences against Act—application of Criminal Code etc

The Act inserts

s 72D (Non-consensual distribution of intimate images)

s 72E (Threaten to capture or distribute intimate images)

Clause 5 **New Part 3A**

The Act inserts a new part 3A into the *Crimes Act 1900*. *These include*

72A Definitions—pt 3A

This section provides definitions for

- engaged in a private act
- image
- intimate image
- private parts

These are included to provide clarity for those terms as they apply in the new part of the Act.

72B – meaning of distribute

This clarifies what ‘distribute’ constitutes for the purposes of the Bill, and includes any of the following conduct whether done in person, electronically, digitally or in any other way:

- (i) send, supply, exhibit, transmit or communicate to another person;
- (ii) make available for viewing or access by another person, whether in person or by electronic, digital or any other means.

There is an exception for service providers, who should not necessarily or solely be held criminally responsible for others’ actions.

72C – meaning of consent

Given the complex nature of this area, consent is clarified in this section. It states:

“In this part, *consent*, of a person, for distribution of an intimate image of the person by another person, means free and voluntary agreement to the distribution of the image expressed or communicated by the person to the other person.”

However, it also provides specific guidance based on the types of activity that has been reported as being particular to these types of offences, as follows:

- (a) a person who consents to the distribution of an image on a particular occasion must not, by reason only of that consent, be taken to have consented to the distribution of the image or any other image on another occasion; and
- (b) a person who consents to the distribution of an image to a particular person or in a particular way must not, by reason only of that consent, be taken to have consented to the distribution of the image or any other image to another person or in another way; and
- (c) a person who distributes an image of themselves is not, by reason only of the distribution, to be regarded as having consented to any other distribution of the image.

Without limiting the grounds on which it may be established that the consent of a person to the distribution of an intimate image is negated, the consent is negated if any of the following apply:

- (a) the person is under 16 years old;
- (b) the person does not have the capacity to consent, whether as a result of cognitive incapacity or otherwise;

- (c) the person does not have an opportunity to consent because the person is unconscious, asleep, or otherwise physically helpless;
- (d) the person consents because of actual or threatened violence, force or terror directed at the person or someone else;
- (e) the person consents because the person is unlawfully detained.

Whilst these may be seen as self-evident, consultation and experience in other jurisdictions has shown clarity in these areas is preferable to ambiguity.

72D – Non consensual distribution of intimate images

This is the main operative clause of the Bill. It provides that:

A person (the *offender*) commits an offence if—

- (a) the offender distributes an intimate image of another person (the *affected person*); and
- (b) the offender—
 - (i) knows the other person does not consent to the distribution; or
 - (ii) is reckless as to whether the other person consents to the distribution.

Maximum penalty: 300 penalty units, imprisonment for 3 years or both.

This has been amended after comments during the exposure draft period, and includes some important considerations, most pertinently that the issue of knowledge of lack of consent or recklessness as to consent is required as an essential element of the offence. This properly places the burden and onus on the prosecution.

72E – Threaten to capture or distribute intimate images

Part of the policy addressed in this Bill is the activity where the taking or distributing of intimate images is used as a tool to harass, coerce or intimidate the affected person.

These provisions are included to address this issue.

The maximum penalty is 300 penalty units or imprisonment for 3 years or both, which is in line with the corresponding offences in the NSW legislation.

It is important to note that lack of consent is essential to all these provisions, and is included as a safeguard against the misapplication of the legislation for innocent purposes or where consent is present.

Exceptions and Protections.

There has been considerable discussion about the inclusion of appropriate protections for young people, including human rights considerations. The Bill is not intended to capture innocent or consensual activity, but the predatory or harmful use of intimate images. As such, several protections have been built into the Bill, as follows.

72 F – Exception to s72D for consenting young people

This section provides specific exceptions for consenting young people. Consent, as noted in the title of the section and ss (c) is specifically required.

An offence against section 72D does not apply to a person (the *defendant*) if—

- (a) the defendant is younger than 18 years old when the offence is alleged to have been committed; and
- (b) the person on whom the offence is alleged to have been committed (the *complainant*) was at the time of the offence—
 - (i) at least 14 years old; and
 - (ii) not more than 2 years younger than the defendant; and
- (c) the complainant consented to the conduct required for the offence.

72 G – Exceptions for reasonable distribution

As has been noted previously, clarity has been preferred over ambiguity in the drafting of this Bill. The exceptions for reasonable distribution include:

- by a law enforcement officer acting reasonably in the performance of the officer's duty; or
- for a lawful and common practice of law enforcement, criminal reporting or a legal proceeding; or
- for the purpose of reporting unlawful conduct to a law enforcement officer; or
- for a scientific, medical or educational purpose.

The Bill also requires the following be considered:

- the nature and content of the image;
- the circumstances in which the image was distributed;

- the age, cognitive capacity, vulnerability or other relevant circumstances of the person shown in the image;
- the extent to which the defendant’s actions affect the privacy of the person depicted in the image;
- the relationship between the defendant and the person shown in the image.

72H – Court may order rectification

This is an important addition to the Bill as it provides a remedy that many reported victims have stated as being their preferred outcome, and offering reasonable alternatives other than only a criminal sanction.

The rectification provisions state that:

The court may order the person to take reasonable action to remove, retract, recover, delete or destroy an intimate image involved in the offence within a stated period.

A person commits an offence if the person fails to comply with the order. The maximum penalty is 200 penalty units, imprisonment for 2 years or both. This is to provide a serious and appropriate sanction if a person, already found guilty, fails to comply.

72I – DPP consent for prosecution of children

This section provides for another protection for young persons. It states:

A proceeding for an offence against this part must not be commenced without the consent of the director of public prosecutions if the person charged with the offence was under the age of 16 years at the time the offence is alleged to have been committed.

This is intended to ensure that the best interests of the young person, and all the surrounding circumstances, should be fully considered and formally approved before any action commences.

Clause 6 – Dictionary, new definitions

This clause includes references for the new definitions included in this Bill.