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**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**GOVERNMENT AMENDMENTS TO THE CRIMES (INTIMATE IMAGE ABUSE)
AMENDMENT BILL 2017**

SUPPLEMENTARY EXPLANATORY STATEMENT

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Introduction

This explanatory statement relates to Government amendments to the *Crimes (Intimate Image Abuse) Amendment Bill 2017* (the Bill). It has been prepared to assist the reader of the amendments and to inform debate on the Bill. It does not form part of the amendments to 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 amendments. 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

Technological advancements, including ubiquitous digital cameras and mobile phones, the ease of distributing content online and the routine use of cloud services to store personal information have contributed to a rise in the non-consensual sharing of images.¹ Images can be distributed by various means including through the use of technology as well as physically, for example sharing a hard copy or showing an image on a screen to another person.

The non-consensual sharing of intimate images can cause considerable harm to victims and the community. Victims are often subject to harassment and abuse following the distribution of intimate images. Where victims are easily identifiable, victims have reported significant abuse online and offline, the loss of professional and educational opportunities and exposure to stalking.² This can cause a crisis of identity for victims, as they lose the ability to control how they are presented to the world.³ Tragically, there have been cases reported in the United States and Canada where young women have committed suicide when their images were disseminated without their consent.⁴

The contexts in which people may lose control over their intimate images are varied. In some cases, it might be that a person who received or recorded an image with the consent of the subject later breaches that trust by sharing it more broadly. The non-consensual sharing of intimate images often occurs in the context of family violence and sexual abuse. However, it can also involve acquaintances or strangers. Images may also be obtained with, or without, the consent of the victim.

The distribution of such images without consent, or threatening to do so, is associated with a range of motivations. Images may be shared for a range of reasons including to coerce, control, blackmail, humiliate or harass another person, or for sexual gratification, fun, social notoriety or financial gain.

¹ Commonwealth Senate Legal and Constitutional Affairs References Committee, *Inquiry into the phenomenon colloquially referred to as 'revenge porn'*, February 2016, p 3; NSW Legislative Council Standing Committee on Law and Justice, *Remedies for the serious invasions of privacy in NSW*, March 2016, p 19

² Danielle Keats Citron and Mary Anne Franks, 'Criminalizing Revenge Porn' (2014) 49 *Wake Forest Law Review* 347–52.

³ Ganaele Langlois and Andrea Slane, 'Economies of Reputation: The Case of Revenge Porn' (2017) 14 *Communication and Critical/Cultural Studies* 120, 126–7.

⁴ Law Reform Committee, Parliament of Victoria, *Inquiry into Sexting* (2013) 191–2 ('*Inquiry into Sexting*').

The Commonwealth Senate Committee released its report, the *Phenomenon colloquially referred to as 'revenge porn'* on 25 February 2016. The Senate Committee observed that the non-consensual sharing of intimate images is a growing problem in Australia and expressed concern about the limited capacity of the criminal law to cover this type of behaviour and that submissions to the inquiry expressed overwhelming support for legislative change.⁵

At the 19 May 2017 Law, Crime and Community Safety Council meeting of Attorneys-General and Justice and Police Ministers from around Australia, a set of national principles for legislation to address this type of offence was agreed.

On 7 June 2017 Jeremy Hanson MLA introduced a Private Members Bill, the *Crimes (Intimate Image Abuse) Amendment Bill 2017* (the Bill), in the Legislative Assembly.

The Bill would amend the *Crimes Act 1900* (the Act) and seeks to establish three new criminal offences:

- distributing an intimate image of another person without their consent
- threats to distribute intimate images
- threats to capture intimate images.

Consultation

The proposed amendments were subject to targeted consultation about operational and human rights issues with a broad range of stakeholders, including the Human Rights Commission. The submissions received have been taken into consideration by the Government in formulating these amendments.

Purpose of the Government amendments to the Bill

The Government amendments ensure that the Bill effectively criminalises the distribution of intimate images without consent and threats to distribute or capture intimate images, including achieving greater consistency with the sexual offences listed in part 3 of the Act. The amendments fall into five broad categories and are outlined in more detail below.

Definitions

The definitions of key terms in the Bill have been amended to ensure consistency with existing definitions in the Act and to clarify the conduct being criminalised.

The proposed definition of ***capture visual data*** in the Bill is inconsistent with the definition of this term in section 61B of the Act. The proposed definition omits the words 'a moving or still' from the definition of the term to achieve consistent terminology with the Act.

⁵ Commonwealth Senate Legal and Constitutional Affairs References Committee, *Inquiry into the phenomenon colloquially referred to as 'revenge porn'*, February 2016, pp 49 - 51

The Bill proposes that *engage in private act* means in a state of undress, using the toilet, showering or bathing, engaged in sexual activity of a kind not ordinarily done in public or engaged in any other like activity. The amendments remove the wording ‘any other like activity’ as it is not sufficiently certain to assist in providing a clear definition of the behaviour.

The amendments subsume the definition of *image* into the definition of *intimate image* to avoid repetition.

The definition of *intimate image* includes a reasonable person test in relation to circumstances where a person would expect the person depicted to be given privacy. The term privacy is not defined elsewhere in the part. The use of this test is not sufficiently certain. The definition of *intimate image* is amended to remove the reasonable person test and ensure that the definition includes altered images.

The definition of *private parts* in the Bill is replaced with the definitions of *genital or anal region* and *breasts* which also appear in section 61B(10) of the Act. Anatomically correct definitions ensure that key terms are factually correct and consistent with other provisions.

The definition of *distribute* in the Bill provides that a person is taken to have distributed an image regardless of whether or not the other person views or accesses the image. This wording is too narrow and anticipates that distribution is always directly intended for a particular person. In some cases, distribution will be wide with no specific intended ‘other person’. The amendments ensure the provision captures a wider form of distribution.

Threat based offences

The Bill creates an offence of threatening to capture or distribute intimate images. Observing or capturing visual data of another person without their consent is criminalised by section 61B of the Act. The proposed threat based offence uses terminology that is inconsistent with the substantive offence provided by section 61B. This criminalises different behaviours for the threat based offence and the substantive offence. All other threat based offences are consistent with the substantive offence. The amendments make some technical amendments to key terms to avoid inconsistency with the Act.

The Bill provides a fault element of knowledge for the offence of threatening to capture visual data. The amendments provide an additional fault element of recklessness for this offence in order to criminalise circumstances where:

- the offender makes a threat and intends that the victim fears that the threat is carried out; and
- the offender makes a threat and is reckless as to whether the victim will fear that the threat is carried out.

The Bill provides that a threat offence can be made whether or not the visual data existed when the threat was made. The amendments insert the term *intimate image* into this offence to ensure consistency with the remainder of part 3A. The amendments also provide that a person may be found guilty even if carrying out the threat is impossible. Two examples are provided to clarify that the offence can still be made out where:

- technical limitations mean the threat cannot be carried out; or
- where an image does not exist.

This amendment more accurately represents the criminal nature of this offence, as a victim may not have knowledge of whether an image exists or if there are technical limitations which mean the image cannot be distributed in the way threatened.

Consent

The amendments to the Bill omit the statutory definition of consent and related provisions in order to ensure consistency with other sections of part 3 of the Act which do not include a definition of consent.

The provisions relating to consent have been amended to align with the factors which negate consent in section 67 of the Act.

Exceptions

The Bill provides a list of exceptions to all three offences in new part 3A. These exceptions ensure that people performing lawful functions are not captured by the offence. The amendments limit the application of these exceptions to the offence of non-consensual distribution of intimate images. The threat based offence requires the person to threaten to distribute an intimate image and intend that the person fears the threat will be carried out or be reckless as to that fact.

The amendments insert an additional exception where a person has distributed an image in the course of reasonably protecting premises owned by the person. This exception is consistent with section 61B(8)(b)(v) of the Act and is necessary to ensure the offence does not have the unintended consequences of criminalising conduct that is otherwise permissible.

The amendments also omit the exception contained in section 72G(e) which requires the prosecution to prove that the intimate image was distributed in circumstances a reasonable person would consider the conduct unacceptable taking into account any of the following:

- (i) the nature and content of the image
- (ii) the circumstances in which the image was distributed
- (i) the age, cognitive capacity, vulnerability or other relevant circumstances of the person shown in the image
- (ii) the extent to which the defendant's actions affect the privacy of the person depicted in the image.

This exception is too broad and is unnecessarily complicated given the existing definition of *intimate image*. This exception also addresses issues which can be appropriately taken into consideration in an assessment of whether the distribution is captured by the defence available to young people or occurred without consent through section 67 (Consent) and section 72EA (Consent).

Application to children and young people

The Bill provides that the offence of non-consensual distribution of intimate images applies to people regardless of age (section 72D). However, section 72F provides an exception to section 72D for consenting young people where the defendant is under 18 years and the complainant is at least 14 years but not more than two years younger than the defendant. The effect of this provision is that children under the age of 14 years are not be able to consent to the distribution of an intimate image. This section appears to conflict with proposed section 72C(3)(a) which states consent is negated if the person is under 16 years old.

The Government amendments create a separate offence of distributing an intimate image of a young person under 16 years, including a specific defence for the distribution of intimate images of a young person between 10 and 16 years. The defendant must prove that at the time of the offence he or she believed on reasonable grounds that the complainant was 16 years or above or at the time of the offence the complainant was between 10 and 16 years old and the complainant was in fact not more than two years younger than the defendant. In addition, the defendant must prove the complainant consented to the distribution of the intimate image.

This amendment strikes an appropriate balance between acknowledging the autonomy of young people while recognising that children and young people should be held to account for the non-consensual distribution of such images. These amendments also achieve consistency with the age of consent in other provisions in the Act, including section 55 (sexual intercourse with a young person) and section 61 (sexual intercourse with a young person) and the specific defences which apply in relation to those offences. This is an important protection due to the potentially reduced capacity of children and young people to fully understand the implications of non-consensual image sharing.

The amendments also provide the court with a rectification power on conviction of an offence of distributing an intimate image of a young person. This allows the court to order that a person take reasonable action to remove, retract, recover, delete or destroy an intimate image involved in the offence within a stated period. The person commits an offence, punishable by 200 penalty units and or imprisonment for two years or both, if they fail to comply with the order.

The amendments also omit the requirement in the Bill for the Director of Public Prosecutions (DPP) to consent to the prosecution of children and young people under the age of 16 years. It is not desirable that children under 16 years be held in custody while a decision is being made about whether to lay charges.

Human Rights

The amendments made to this Bill have been carefully considered in the context of the purpose and intent of the legislative change. The amendments aim to address inconsistencies with the Act and potential human rights issues.

The amendments have been developed in line with the ‘doctrine of positive obligations’ which encompasses the notion that governments not only have the responsibility to ensure that human rights are free from violation, but that governments are required to provide for the full enjoyment of rights.⁶ Consideration of this responsibility supports the positive protection of the right of children, families, and the community to enjoy their human rights.

Specific attention was given to the overarching objectives of promoting the protection of a person's privacy and reputation while protecting the right to freedom of expression where an adult has consented to the distribution of their intimate image. In particular the amendments focus on the rights of children and young people through the creation of a separate offence and omission of DPP consent.

Broadly, the Bill engages, and places limitations on, the following *Human Rights Act 2004* (the HR Act) rights:

- Section 11 – Protection of family and children
- Section 12 – Right to privacy and reputation
- Section 16 – Freedom of expression
- Section 20 – Children in the criminal process

The Bill also engages, and supports, the following HR Act rights:

- Section 12 – Right to privacy and reputation
- Section 16 – Freedom of expression
- Section 20 – Children in the criminal process
- Section 22 – Rights in criminal proceedings

Consent

Criminalising the distribution of an intimate image without consent is justified in order to protect the freedom of expression under section 16 of those who are pictured in the intimate image themselves. However, the detailed definitions in the Government amendments of key terms provide sufficient particulars as to enable the community to ascertain what sorts of expression are properly restricted and what sorts are not.

The right to the protection of the family and children under section 11 is engaged and limited by the amendments to the Act as it criminalises the non-consensual distribution of intimate images and threats to do so, which often occurs in the context of family violence and sexual abuse.

⁶ Colvin, M & Cooper, J, 2009 ‘Human Rights in the Investigation and Prosecution of Crime’ Oxford University Press, p. 424-425.

The right also engages and supports the protection of children through the maintenance of the age of consent which is applied throughout part 3 of the Act. This operates to ensure consistency with existing provisions while also protecting young people who may be vulnerable to coercion or pressure to give their consent to distribute images by people who are more than two years older than them. Any less restrictive means to protect children would not provide consistency with part 3 of the Act or protect children who may not provide free and voluntary consent because of their level of immaturity, development and understanding of the consequences of their intimate images being distributed.

Wider form of distribution

The amendment to widen the definition of *distribute* acknowledges that distribution may not have a specific or intended recipient however the outcome of the offence is not less significant than if a recipient is known. This amendment engages section 12 as it permits and limits the interference with the private conduct of individuals, but does so with the intention of protecting the right to privacy and reputation by protecting people who may be affected by the distribution of intimate images without consent and threats to do so.

The prevention of crime and the protection of the rights of others is a legitimate ground for placing restrictions on the right to privacy⁷ and there is no less restrictive means reasonably available to achieve this purpose.

The amendment acknowledges that the right to privacy needs to be balanced against other rights, particularly the right to freedom of expression, and it can be limited as long as it can be demonstrated that the limitation is necessary, reasonable and proportionate. It reflects a person's reasonable expectation of privacy but does not attempt to regulate the right to freedom of expression under section 16 by excluding the consensual distribution of intimate images such as "sexting".

Creation of a separate offence

The creation of a separate offence of distributing an intimate image of a young person under 16 years, including a specific defence for the distribution of intimate images of a young person between 10 and 16 years, aims to ensure that non-predatory and non-exploitative sharing of intimate images is not criminalised. It prevents the inappropriate application of criminal laws to children and young people in accordance with children's right to freedom of expression under section 16, and protection on the basis of being a child under section 11(2).

The creation of this offence ensures that the limitations on rights are demonstrably justified with a legitimate objective and are rationally and proportionately connected in accordance with the requirements under section 28. This amendment strikes an appropriate balance between acknowledging the autonomy of young people while recognising that children and young people should be held to account for the non-consensual distribution of such images. There is also a requirement to achieve consistency with the age of consent in other provisions in the Act, including section 55 and section 61.

⁷ Starmer, K, 1999, *European Human Rights Law: the Human Rights Act 1998 and the European Convention on Human Rights*, p. 416.

Omission of Director of Public Prosecutions (DPP) consent

The amendment to omit the requirement for the DPP to consent to the prosecution of children and young people under the age of 16 years is made to ensure the best interests of children and young people are upheld under section 16 and section 11(2).

By legislating DPP consent as a mandatory requirement, there is the potential unintended consequence of the young person or child being detained or having charges unresolved for an undisclosed period of time while awaiting the DPP's decision. This is due to the inherent time delay that occurs between the police referring the matter to the DPP for consent to commence proceedings and a decision being made. This delay does not ensure proper consideration is given to the expedition of criminal charges involving children under section 20 or section 22, as the young person or child may not be told promptly about the nature and reason for the charge, or tried without reasonable delay.

The European Court of Human Rights has held that the moment at which the “clock starts running” ‘may precede the trial and could be the “date of arrest”, the date when the person concerned [is] officially notified that he would be prosecuted or the date when preliminary investigations were opened’ (*Eckle v Germany* 5 EHRR 1). ACT Courts have held that ‘the time must begin to run as soon as the young person becomes aware that he is the subject of a police investigation’.⁸

This section may also impact on the young person or child's rehabilitation, and may potentially impact on the protection of the victim by interfering in the prompt resolution of the matter, and their expectation to be treated fairly and compassionately throughout the process.

The police retain the discretion to decline to lay charges against children or young people and refer appropriate matters to restorative justice.

The DPP is separately obligated to decide whether it is appropriate for a prosecution to continue. In making such decisions, prosecutors are guided by the procedures and standards which the law requires to be observed, and in particular by the Prosecution Policy and Guidelines promulgated by the Director under section 12 of the *Director of Public Prosecutions Act 1990*. The Policy was updated in 2015 to acknowledge and encompass the *Human Rights Act 2004* and provides as follows:

It is not the case that every allegation of criminal conduct must culminate in a prosecution. The decision to prosecute should not be made lightly or automatically but only after due consideration. An inappropriate decision to prosecute may mean that an innocent person suffers unnecessary distress and embarrassment. Even a person who is technically guilty may suffer undue hardship if, for example, he or she has merely committed an inadvertent or minor breach of the law. On the other hand, an inappropriate decision not to prosecute may mean that the guilty go free and the community is denied the protection to which it is entitled. It must never be forgotten that the criminal law reflects the community's pursuit of justice and the decision to prosecute must be taken in that context....

⁸ *Perovic v CW*, ACT Children's Court, unreported (1 June 2006)

The decision to prosecute can be understood as a two-stage process. First, does the evidence offer reasonable prospects of conviction? If so, is it in the public interest to proceed with a prosecution?⁹

⁹ ACT DPP - Prosecution Policy and Guidelines
http://www.dpp.act.gov.au/data/assets/pdf_file/0006/715506/PROSECUTION-POLICY-OF-THE-AUSTRALIAN-CAPITAL-TERRITORY.pdf

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Detail

Amendment 1 — Clause 4 – Section 7A note 1, proposed new dot points Page 2, line 13

This clause omits the reference to the proposed new offence in section 72E (Threaten to capture or distribute intimate images) and substitutes the following:

- s 72D (Non-consensual sharing of intimate images)
- s 72DA (Distribution of intimate image of young person)
- s 72E (Threaten to capture or distribute intimate images)
- s 72H (Court may order rectification)

These are technical amendments which clarify that the *Criminal Code 2002* applies to the three new offences and the court order for rectification.

Amendment 2 — Clause 5 – Proposed new section 72A, new definition of *breasts* Page 2, line 19

This clause inserts a new definition for the term *breasts* as follows:

breasts, of a female or a transgender or intersex person who identifies as a female, means the person’s breasts whether covered by underwear or bare.

This mirrors the definition in section 61B(1) of the *Crimes Act 1900* and ensures consistency throughout part 3. It is also anatomically correct and inclusive of transgender and intersex people.

Amendment 3 — Clause 5 – Proposed new section 72A, definition of *capture visual data* Page 2, line 20

This clause omits the definition of *capture visual data*. This is no longer required as a result of the amendments to section 72E proposed by amendment 14.

Amendment 4 — Clause 5 – Proposed new section 72A, definition of *engaged in a private act*, paragraphs (c) and (d) Page 3, line 7

This clause amends the definition of *engaged in a private act* by omitting paragraphs (c) “engaged in sexual activity of a kind not normally done in public” and (d) “engaged in any like activity” and substituting a new paragraph (c) as follows:

- (c) engaged in an act of a sexual nature of a kind not ordinarily done in public.

This amendment provides further certainty regarding the definition of engaged in a private act. Technological advancements and the development of sophisticated equipment continue to pose an ongoing threat to individual privacy. Ascertaining the scope of the legal right to privacy is difficult due to the ongoing tension between freedom of expression and the privacy

rights of an individual. As a result, it is not possible to conclusively define the concept as the characteristics of privacy change over time to remain consistent with community values.

In *R v Broadcasting Standards Commission ex parte BBC*¹⁰, Lord Mustill attempted to define the essence of privacy as follows:

‘To my mind the privacy of a human being denotes at the same time the personal ‘space’ in which the individual is free to be itself, and also the carapace, or shell, or umbrella, or whatever other metaphor is preferred, which protects that space from intrusion. An infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolate.’

It is neither possible nor appropriate to further define privacy as the concept of privacy can mean different things to different people and in defining ‘privacy’ the concept would lose its relevance.

Amendment 5 — Clause 5 – Proposed new section 72A, new definition of *genital or anal region* Page 3, line 9

This clause inserts a new definition for the term *genital or anal region* as follows:

genital or anal region, of a person, means the person’s genital or anal region whether covered by underwear or bare

This mirrors the definition in section 61B(1) of the *Crimes Act 1900* and ensures consistency throughout part 3.

Amendment 6 – Clause 5 – Proposed new section 72A, definition of *image* Page 3, line 10

This clause omits the definition of *image*. This is no longer required as a result of the amendments to section 72A proposed in amendment 7.

Amendment 7 – Clause 5 – Proposed new section 72A, definition of *intimate image* Page 3, line 11

This clause omits the definition of *intimate image* in section 72A and inserts a new definition of *intimate image* to include a still or moving image, in any form—

- (i) of the person’s genital or anal region; or
- (ii) for a female or a transgender or intersex person who identifies as a female—of the person’s breasts; or
- (iii) of the person engaged in a private act; or
- (iv) that depicts the person in a sexual manner or context.

This definition includes images in any form, such as those that have been digitally altered. It also removes the limitation provided in the Bill ‘in circumstances in which a reasonable

¹⁰ *R v Broadcasting Standards Commission ex parte BBC* [2001] QB 885 at 48.

person would reasonably expect the person to be given privacy’ as this duplicates the limitations provided by the definition of engaged in a private act and the exception provided in proposed section 72G(e).

Amendment 8 – Clause 5 – Proposed new section 72A, definition of *private parts* Page 3, line 19

This clause omits the definition of *private parts*. This is no longer required as a result of the amendments to section 72A proposed in Amendments 2 and 5.

Amendment 9 – Clause 5 – Proposed new section 72B (1)(a)(i) Page 4, line 6

This clause amends the definition of distribute to include “show”. This amendment clarifies that the distribution of intimate images includes , for an intimate image on a mobile phone, showing the phone with the image displayed on it to another person or printing an intimate image and showing it to another person or putting it up on a community notice board.

Amendment 10 – Clause 5 – Proposed new section 72B (2) Page 4, line 14

This clause omits the proposed new section 72B (2) which provides that a person is taken to have distributed an image to another person whether or not the other person views or accesses the image and substitutes the following subsection:

(2)A person is taken to have distributed an image whether or not another person views or accesses the image.

This amendment provides that a person can be taken to have distributed an intimate image regardless of whether another person has viewed or accessed the image. The position in the Bill is too narrow and anticipates that distribution is always directly intended for a particular person. In some cases distribution will be extremely wide with no specifically intended ‘other person’.

Amendment 10 – Clause 5 – Proposed new section 72C Page 4, line 16

This clause omits section 72C. Part 3 of the *Crimes Act 1900* does not include a statutory definition of consent. Any statutory definition of consent inserted into new part 3A could have unintended consequences on the operation of part 3 of the Act.

Amendment 12– Clause 5 – Proposed new section 72D (a) Page 5, line 23

This clause omits the reference to *affected person*. This is unnecessary in the context of the provision.

Amendment 11 – Clause 5 – Proposed new section 72D(b)(ii) Page 6, line 1

This clause omits the phrase “as to” in relation to the fault element of recklessness for the offence of non-consensual distribution of intimate images. This is replaced with “about” in order to clarify in plain language that the prosecution must prove that the offender distributed an intimate image of another person and was reckless about whether the other person consents to the distribution.

Amendment 12 – Clause 5 – Proposed new section 72DA Page 6, line 4

This clause inserts a new offence of distributing an intimate image of a young person under 16 years.

The maximum penalty is 500 penalty units, imprisonment for five years, or both.

This offence includes a specific defence for the distribution of intimate images of a young person between 10 and 16 years. The defendant must prove that at the time of the offence he or she believed on reasonable grounds that the complainant was 16 years or above; or at the time of the offence the complainant was between 10 and 16 years old and not more than two years younger than the defendant. In addition, the defendant must prove the complainant consented to the distribution of the intimate image.

Amendment 13 – Clause 5 – Proposed new section 72E Page 6, line 5

This clause omits the proposed section 72E and substitutes a revised new section 72E.

The amended section is consistent with the definitions in new part 3A and includes a threat to capture as well as distribute an intimate image. A definition of *capture intimate image* is included in this provision to mean by a camera or by any other means in such a way that a recording is made of the image, the image is capable of being transmitted in real time, with or without retention or storage in a physical or electronic form, or the image is otherwise capable of being distributed.

The Bill provides that a person commits the offence of threatening to capture or distribute intimate images if the offender threatens to capture or distribute an intimate image of another person and intends the threatened person to fear that the threat would be carried out. The amendments insert an additional fault element of recklessness. This is intended to criminalise circumstances where an offender threatens to capture or distribute an intimate image of another person and is reckless about whether the other person would fear that the threat would be carried out.

The Bill provides that a threat offence can be made out whether or not the visual data existed when the threat was made. Visual data is an undefined term. The amendments omit this term and clarify that a person may be found guilty even if carrying out the threat is impossible. The amendments include two examples to make clear that situations in which technical limitations mean the threat cannot be carried out or where an image does not exist are caught by the offence. This amendment more accurately represents the criminal nature of this offence as a victim may not have knowledge of whether an image exists or of technical limitations which mean the image is unable to be captured or distributed in the way threatened.

Amendment 14 – Clause 5 – Proposed new clause 72EA Page 7, line 5

This clause inserts a new section 72EA which outlines the factors on which apparent consent may be negated for this part. These amendments are intended to ensure alignment with section 67(1)(a) to (j) of the *Crimes Act 1900* by reference.

Section 72EA(2) provides additional guidance regarding the factors that cannot be taken alone to constitute consent. This provision provides that a person does not consent to the

distribution of an intimate image of the person by the offender only because the person had previously consented to the offender distributing the image or another intimate image on another occasion, consented to someone else distributing the image or another intimate image, or consented to the offender or someone else distributing the image or another intimate image in a different way to the way the offender distributed the image; or distributed the image or another intimate image to someone else.

These amendments are intended to ensure that the distribution of intimate images is criminalised in circumstances where apparent consent has been negated by any of the above factors.

Amendment 15 – Clause 5 – Proposed new section 72F Page 7, line 6

This clause omits the proposed new section 72F. This provision is no longer required given the insertion of the new offence in section 72DA (distribution of intimate images of a young person).

Amendment 18 – Clause 5 – Proposed new section 72G (1) Page 7, line 20

This clause inserts “or section 72DA” after “section 72D” into the heading for this provision. This amendment clarifies that the exceptions for reasonable distribution also apply to distribution of intimate images of a young person pursuant to section 72DA (Distribution of intimate image of young person).

Amendment 19 – Clause 5 – Proposed new section 72G (1) Page 7, line 20

This clause omits “or section 72E”. It is not appropriate that any of the exceptions for reasonable distribution apply to the offence of threatening to capture or distribute intimate images.

These exceptions ensure that people performing legitimate functions are not captured by the offence. The threat based offence requires the person to threaten to distribute an intimate image and intent the person to fear the threat be carried out or be reckless as to that fact. Making threats to cause fear is not an activity that falls within the reasonable performance of an official duty or reasonably acceptable conduct.

Amendment 20 – Clause 5 – Proposed new section 72G (1)(ca) Page 7, line 27

This clause inserts a new exception for the reasonable distribution of intimate images by a licensed security provider acting reasonably in the performance of a security activity. This section includes definitions of key terms including *licensed security provider* and *security activity* but did not include the corresponding exception.

Amendment 21 – Clause 5 – Proposed new section 72G (1)(e) Page 8, line 8

This clause omits the exception contained in section 72G (1)(e) which requires the prosecution to prove that the intimate image was distributed in circumstances a reasonable person would consider the conduct unacceptable taking into account any of the following:

- (i) the nature and content of the image

- (ii) the circumstances in which the image was distributed
- (i) the age, cognitive capacity, vulnerability or other relevant circumstances of the person shown in the image
- (ii) the extent to which the defendant's actions affect the privacy of the person depicted in the image
- (iii) the relationship between the defendant and the person shown the image

This exception is too broad and is unnecessarily complicated given the existing definition of *intimate image*. This exception also addresses issues which can be appropriately taken into consideration in an assessment of whether the distribution is captured by the defence available to young people or occurred without consent through section 67 (Consent) and section 72EA (Consent).

This clause substitutes 72G (1)(e) with two new exceptions where an intimate image is distributed by a person in the course of reasonably protecting premises owned by the person or of a child or other person incapable of giving consent in circumstances in which a reasonable person would regard the distribution of the intimate image as acceptable.

Amendment 22 –Clause 5 – Proposed new section 72H (1) Page 9, line 5

This clause omits the proposed new section 72H(1) which provides that the rectification power applies if a person is found guilty of an offence against section 72D (Non-consensual distribution of intimate images).

The amendments insert a new provision which provides the court with a rectification power upon conviction of an offence pursuant to section 72DA (Distribution of intimate images of young person) and section 72D (Non-consensual distribution of intimate images).

This enables the court to order that a person take reasonable action to remove, retract, recover, delete or destroy an intimate image involved in the offence within a stated period. The person commits an offence, punishable by 200 penalty units and or imprisonment for two years or both, if they fail to comply with the order.

Amendment 23 –Clause 5 – Proposed new section 72I, Page 9, line 14

This clause omits section 72I (DPP consent for prosecution of children). This section is not required in the context of other amendments.

Amendment 24 –Clause 6 – Proposed new dictionary definition of *breasts* Page 9, line 21

This clause inserts the definition of *breasts* for part 3A (Intimate image abuse) in the *Crimes Act 1900* dictionary.

Amendment 25 –Clause 6 – Proposed new dictionary definition of *capture visual data* Page 9, line 22

This clause omits the proposed new definition of *capture visual data*. This is no longer required as a result of the amendments to section 72E.

Amendment 26 – Clause 6 – Proposed new dictionary definition of *consent* Page 9, line 24

This clause omits the proposed new definition of *consent*. This is no longer required as a result of the amendments to section 72E.

Amendment 27–Clause 6 – Proposed new dictionary definition of *genital or anal region* Page 10, line 2

This clause inserts the definition of *genital or anal region* for part 3A (Intimate image abuse) in the *Crimes Act 1900* dictionary.

Amendment 28 –Clause 6 - Proposed new dictionary definition of *image* Page 10, line 3

This clause omits the proposed new definition of *image*. This is no longer required as a result of the amendments to section 72EA.

Amendment 29–Clause 6 – Proposed new dictionary definition of *private parts* Page 10, line 6

This clause omits the proposed new definition of *private parts*. This is no longer required as a result of the amendments to section 72E.