



Ms. Caroline Le Couteur MLA
Member for Murrumbidgee
GPO Box 1020
Canberra ACT 2601

Dear Ms. Le Couteur,

RE: Crimes (Invasions of Privacy) Amendment Bill 2017

Thank you for seeking the Human Rights Commission's input on the exposure draft of the *Crimes (Invasion of Privacy) Amendment Bill 2017* (the Bill). Our comments have been primarily drafted with respect to an earlier version of the Bill that was provided to us for comment. However, where relevant we have addressed any changes that have been made to the latest version of the Bill, and taken into account the related explanatory material. We commend the provision of explanatory material to accompany the exposure draft Bill that has been released for public consultation, as it will assist to inform community understanding of the nature of the changes that are being proposed and their human rights implications.

Several cases of intimate image abuse for which there has been no appropriate recourse to the law have come to the attention of the Victims of Crime Commissioner in recent years. This behaviour is a serious invasion of a person's right to privacy, which is protected in s 17 of the *Human Rights Act 2004* (HR Act). It not only violates community norms, it also causes significant psychological harm to victims. Intimate image abuse is a rapidly growing phenomenon and the amendment of the law to address this modern form of technology-facilitated abuse is a matter of urgency. The Commission is therefore supportive of the criminalisation of intimate image abuse.

However, we note that the Bill seeks not only to criminalise the non-consensual distribution of intimate images, but to develop a broader scheme, which will, among other things, re-frame existing provisions in relation to intimate observations, and change the definition of consent with respect to invasion of privacy offences as well as all relevant sexual offences in Part 3 of the *Crimes Act 1900*. The legal definition of consent in particular is a sensitive area of law that requires careful consideration before being changed. The Commission considers these to be major changes that require in-depth analysis and extensive consultation before a position can be formed and amendments developed. In our view, the proposals with regard to amending the current definition of consent would benefit from detailed consideration separate to law reform in relation to criminalising intimate image abuse.

The comments that follow focus mainly on the proposed offences for dealing with intimate image abuse. We are pleased to see that several of our recommendations, which were made in relation to an earlier iteration of the Bill, have since been incorporated into the version of the Bill that has been released for public consultation. Where relevant, those aspects are identified in the comments below.

1. Age of consent

The Bill will allow consent to operate as a defence irrespective of a child's age. We appreciate that the Bill seeks to align the operation of consent for the proposed distribution offences with the current offences in section 61B of the *Crimes Act 1900*, concerning the non-consensual observation or capturing of intimate visual data. The Commission considers that it is important to ensure that both sets of provisions will operate coherently. The application of consent as a general defence or exception, irrespective of a child's age, is also consistent with a best practice approach under the HR Act.

However, the concept of 'consent' for children and young people is complex, and will raise issues of maturity and capacity to make a particular decision. It is important to strike a balance between protecting children and young people's vulnerability and respecting their autonomy. The Commission proposes that consent remain a defence to the offences where the target was of or above the age of 16 years, or where the alleged offender is no more than 2 years older than the target where the target is under the age of 16 years.

In our advice in relation to the initial version of the Bill, we recommended that consideration should 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 are considered, including any available alternatives to prosecution, including referrals to Restorative Justice where appropriate (see for example, the NSW [Crimes Amendment \(Intimate Images\) Bill 2017, s 91Q](#)). We are therefore pleased to see that the current version of the Bill has gone some way to address this issue. However, we recommend that the requirement to obtain the DPP's consent be extended from the proposed 16 years of age to 18 years of age to ensure consistency with the protections afforded under the HR Act to children and young people (s 11(2)), in conjunction with the right to non-discrimination (s 8).

It will also be important to ensure that people, including young people, are not placed on the Sex Offender Register as a result of these offences.

New exception to child pornography offences

The Commission notes that the exposure draft Bill that has been released for public consultation contains provisions which will create an exception to existing child pornography offences in ss 64, 65 and 66 of the *Crimes Act 1900*. Specifically, a person will not have committed an offence under these provisions if there is no more than 2 years difference in age between the person and the child, and the child consented to the act constituting the offence. The Commission welcomes these provisions as they will address long-standing concerns that young people who engage in consensual, and non-predatory and non-exploitative behaviour, such as sexting, have been at risk of inappropriate criminalisation by current child pornography laws in the ACT. Similar concerns were addressed in Victoria over two years ago following the Victorian Parliament's Law Reform Committee's Inquiry into Sexting.

2. Burden of proof

The Commission is concerned that the Bill proposes to place a legal burden on the defendant to prove that the person consented to the distribution of the image. 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 (which would ordinarily 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 a relevant factor for reversing the burden in these circumstances, it must also be shown that the defendant’s right to a defence is retained – that is, it must relate to matters that the defendant is in fact able to prove. By placing a legal burden on the defendant to prove an essential element of the offence, there is a serious risk that a person may be convicted, not because he/she committed the criminal act, but because they were unable to overcome the burden placed upon them to show they did not.

We note that similar provisions in comparable jurisdictions are drafted as either full-fault offences (see for example, [UK Criminal Justice and Courts Act 2015](#), s 33; [NSW Crimes Amendment \(Intimate Images\) Bill 2017](#), s91Q, and [CTH Criminal Code Amendment \(Private Sexual Material\) Bill 2015](#), new s 474.24E) or at most place an evidential burden on the defendant to adduce the necessary evidence (see [Abusive Behaviour and Sexual Harm \(Scotland\) Act 2016](#), s 2).

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. We note that similar issues arise with regard to the formulation of the offences in ss 72C and & 72D, which are based on current s 61B of the *Crimes Act 1900*. The Commission had raised these concerns when s 61B was introduced.

3. Definition of ‘intimate document’

In addition to a document that shows (i) ‘the person engaged in sexual activity’, (ii) ‘the person in a sexual manner or context’, or (iii) ‘an intimate body area’ (whether covered by underwear or bare), the Bill defines an ‘intimate document’ as a document that shows, ‘an area of the person’s body that, in the person’s circumstances, is private in nature’ (s 72A). According to the examples provided in the Bill, this includes parts of a Muslim woman’s body without the hijab; or if a person is changing in the change room of a gymnasium, parts of the person’s body that are usually clothed about which the person may feel particularly self-conscious because of age, weight, injury or surgical procedure.

The Commission appreciates that what constitutes an intimate image can vary according to community standards. However, we are concerned that the extension of the Bill to cover the non-consensual distribution of private, non-sexual material beyond intimate body areas, particularly in the context of a scheme that does not require proof of any intent (or recklessness) to cause harm, may be an unjustifiable limitation on the right to freedom of expression (s 16, HR Act). We are unaware whether any consultation has taken place with the Muslim community about this approach, or whether the non-consensual distribution of these types of images has been identified as a pressing problem in the community.

4. Exceptions to the offences

The Bill provides various exceptions to the offence of distributing an intimate document (s 72F). These include where an intimate document was distributed (i) by a law enforcement officer acting reasonably in the performance of the officer’s duty; (ii) for a lawful and common practice of law enforcement, criminal reporting or a legal proceeding; (iii) for the purpose of reporting unlawful conduct to a law enforcement officer; (iv) for a scientific, medical or educational purpose; or (v) in the public interest.

To avoid inadvertently capturing behaviour that does not violate community norms and to ensure consistency with the right to freedom of expression, the Commission believes specific exceptions are also required to address the following circumstances:

- Where the subject is a child or other person incapable of giving consent, and in the particular circumstances, a reasonable person would regard the distribution of that image as acceptable. It would also be helpful to include a list of factors along the lines of s 91T(1)(d)(i)-(v) in the NSW bill to provide guidance as to the types of issues that should be taken into account.
- Where the person believed that the image had previously been disclosed for a reward and had no reason to believe that the previous disclosure for reward was made without consent.

We note that the example of a doctor sharing medical images with another doctor for a second opinion would appear to be in connection to the exception contained in para (d) (that is, for a scientific, medical or educational purpose), and not para (b) (for a lawful and common practice of law enforcement, criminal reporting or a legal proceeding) as stated in the Bill.

5. Rectification orders

The Commission welcomes that the latest iteration of the Bill now provides for a mechanism for intimate images to be removed or destroyed along the lines of section 91Q of the NSW bill. A court may make a rectification order requiring a person who is guilty to take reasonable actions to remove or destroy the intimate image (new s 72H). This provision goes some way to facilitating the removal or destruction of intimate images, and the Commission supports its inclusion in the Bill. However, it is unlikely to be effective in many situations due to the inability to 'retract' an intimate image once it has been published on an online medium that is not controlled by the offender. This broader issue is one that will require further research and practical solutions.

Of course, this is a multi-faceted issue that requires initiatives beyond a purely legislative response. The Commission considers it vital that legislative provisions be accompanied by initiatives to support victims, as well as initiatives to change the attitudes of young people through education, therapy and restorative justice.

Once again, we thank you for seeking our input on this Bill and we look forward to the criminalisation of intimate image abuse in the ACT.

Yours sincerely,



Dr Helen Watchirs OAM

President and Human Rights Commissioner



John Hinchey

Victims of Crime Commissioner



Jodie Griffiths-Cook

Public Advocate and Children and Young People Commissioner



Karen Toohey

Discrimination, Health Services, and Disability and Community Services Commissioner

8 June 2017