



Mr. Jeremy Hanson MLA
Member for Murrumbidgee
Shadow Attorney General
GPO Box 1020
Canberra ACT 2601

Dear Mr. Hanson,

RE: *Crimes (Revenge Porn) Amendment Bill 2017*

Thank you for seeking the Human Rights Commission's input on the exposure draft of the *Crimes (Revenge Porn) Amendment Bill 2017* (the Bill). The Commission welcomes the introduction of legislation to address the non-consensual distribution of intimate images.

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.

While the Commission is supportive of the introduction of legislation to criminalise intimate image abuse, we have some comments in relation to the content of the Bill. These are primarily concerned with ensuring that the offences are not drawn so broadly as to result in people being convicted when their actions are far removed from the intended scope of these measures.

1. Terminology

The Commission considers the term 'revenge porn' inappropriate for describing the types of behaviours captured by the Bill. The distribution of the image need not be revengeful to be captured by the offence. Other intentions include notoriety, financial gain, providing entertainment for others, or causing emotional harm and humiliation to the targets. The term 'revenge' does not capture the range of motives. Further, it is a victim-blaming term as it implies the behaviour was provoked.

The term 'porn' is also misleading as an image may be intimate, but not necessarily pornographic. Additionally, it implies that the material was produced with the victim's consent, whereas this is often not the case.

The Commission prefers the term 'intimate image abuse,' or another similar term which is less emotive and appropriately captures the seriousness of the offence.

2. Age of consent

The Bill criminalises all distributions of intimate images of persons under the age of 18, irrespective of consent. In our view, this is too broad and dismissive of young person's autonomy, and is likely to give rise to issues of incompatibility with the HR Act, including children's rights to freedom of expression (s 16) and to protection on the basis of being a child (s 11(2)). 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 approach of excluding minors from the application of the consent exception may ostensibly be aimed at protecting young people. However,

the proposed laws are likely to disproportionately impact upon this cohort and lead to minors being convicted of criminal offences arising from consensual behaviour. We appreciate that the concept of 'consent' for children and young people is complex, and will raise issues of maturity and capacity to make a particular decision. However it is important to recognise that consensual peer-to-peer sexting by young people is categorically distinct from the actions sought to be proscribed by these measures.

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. 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.

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, 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](#)). 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.

3. *Burden of proof*

We are 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 (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. 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.

4. *Specific exceptions required*

Legislation in other jurisdictions, such as the United Kingdom, Victoria and South Australia, creates specific exceptions to the offence to cover a range of activities. 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. In particular, the Commission believes a specific exception should be included for the following purposes:

- Where the disclosure is made for the publication of journalistic material and the person believed that it was in the public interest;
- 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;
- Where distributed for a scientific or medical purpose; and

- Where distributed by a law enforcement officer acting reasonably in the performance of their duties.

5. *Use of the word 'indecent'*

The Commission believes the use of this word 'indecent' in sections 61C(1)(b) and 61C(3) is emotive and superfluous. It does not appear necessary for the operation of the offence.

The Commission understands that the Bill is based on existing Victorian legislation. However, the effectiveness of that legislation is currently unknown. It would be useful to obtain data from Victoria on their provision and any related evaluations in order to assess the utility of the provision.

The [Crimes Amendment \(Intimate Images\) Bill 2017](#) recently introduced in the NSW parliament is more aligned with the above suggestions and the *Human Rights Act 2004* than the *Crimes (Revenge Porn) Amendment Bill 2017*. In the absence of evidence demonstrating the effectiveness of the Victorian provisions, it is worth considering whether the NSW model may be a more appropriate scheme.

In addition, the Commission would like to emphasise that the Bill does not provide any mechanism for intimate images to be removed or destroyed. Section 91Q of the NSW bill makes provision for the court to make a rectification order requiring a person who is guilty to take reasonable actions to remove or destroy the intimate image. This provision goes some way to facilitating the removal or destruction of intimate images, and the Commission supports the inclusion of a similar provision 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 is an issue that will require further research and practical solutions.

Of course, this is a multi-faceted issue which 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

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