

Legislative Council Hansard – 21 June 2017 – Proof

CRIMES AMENDMENT (INTIMATE IMAGES) BILL 2017

Second Reading

The Hon. BRONNIE TAYLOR (17:32): On behalf of the Hon. Don Harwin: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Crimes Amendment (Intimate Images) Bill 2017. The bill implements the Government's commitment to reforms that address the non-consensual sharing of intimate images. I was privileged to sit on the Committee chaired by the Hon. Natasha Maclaren-Jones that looked into many of these issues. I point out that fantastic work emanates from the Legislative Council committees and that everything is done by a team and every team requires very good leadership. The leadership provided by the Hon. Natasha Maclaren-Jones when she chaired this inquiry has resulted in this legislation; it has come from a very thorough and good process. I seek leave to incorporate the remainder of the second reading speech in *Hansard*.

Leave granted.

The non-consensual sharing of intimate images—also known as "revenge porn" or alternatively image-based abuse—involves a person distributing an intimate or sexual image of a person without that person's consent. These include images emailed or texted to others, posted online on platforms like Facebook, or even forwarded to the victim's family or employer.

Technological advances have facilitated a rise in this type of behaviour and may exponentially increase the extent to which an image is distributed and viewed. Images can "go viral" with long lasting consequences for the person in the image. A recent report by Dr Nicola Henry, Dr Anastasia Powell and Dr Asher Flynn from RMIT found that one in five survey respondents reported being victims of some kind of image-based abuse.

Non-consensual sharing of intimate images is a serious invasion and violation of a person's privacy. It can have severe impacts on the victim, causing the victim shame, embarrassment and humiliation and potentially having adverse consequences for the victim's reputation, family, friends and employment.

Parliamentary inquiries in both New South Wales and at the Commonwealth level have expressed concern about the harm done to victims through non-consensual sharing of intimate images, and the lack of an effective criminal law response to date.

In particular, these inquiries have highlighted the prevalence of this behaviour in the context of domestic violence and abuse and controlling relationships.

The Government takes these concerns seriously and strongly condemns the non-consensual sharing of intimate images.

On 19 May 2017 the Law, Crime and Community Safety Council, representing the Commonwealth and each State and Territory, agreed to the national statement of principles relating to the criminalisation of the non-consensual sharing of intimate images. The statement sets out non-binding best practice principles for nationally consistent criminal offences relating to non-consensual sharing of intimate images in each jurisdiction. The new offences proposed in this bill are consistent with those principles.

This bill introduces new offences to deter and punish the non-consensual sharing of intimate images, and ensure that victims are adequately protected under the criminal law. The new offences are indictable offences and will carry maximum penalties of three years imprisonment to reflect the seriousness of the conduct and the potential harm done to the victim.

The bill reflects the Government's commitment to strengthen this area of the law and to provide a clear remedy for such a serious invasion of privacy. Overall, the reforms will send a strong message that this behaviour is unacceptable in our society.

I will now outline the details of the bill and the new offences it will introduce.

The first offence introduced by the bill is the new offence of recording an intimate image without consent, in section 91P.

The offence will apply if a person intentionally records an intimate image of another person while knowing that the person did not consent, or being reckless as to whether the person consented to the recording. Because "intimate image" is defined to include still or moving images, the new offence will apply to both taking photos and recording a video of a person.

New section 91O specifies how consent is to be understood for the purposes of this offence. It provides that consenting to a recording of an intimate image means that the person freely and voluntarily agrees to the recording. Consent can be express or implied. A person cannot consent if they are under the age of 16 years or otherwise do not have the cognitive capacity to consent, or if they are unconscious or asleep, or if they have only consented because of threats of force or terror, or if they have only consented because they have been unlawfully detained.

Section 91O also specifies that consenting to the recording of an image on a particular occasion does not, by reason only of that fact, mean that the person has consented to the recording of an image on another occasion. This recognises that a person is entitled to make decisions about their own privacy, including allowing a specific intimate image to be recorded on one occasion, without losing the protections under the law that prohibit other intimate images from being recorded without their consent.

It will be an exception to the new offence of recording an intimate image without consent if the conduct was done for a genuine medical or scientific purpose, by a law enforcement officer for a genuine law enforcement purpose, or was required by a court or reasonably necessary for the purpose of legal proceedings. It will also be an exception to the offence if a reasonable person would consider the person's conduct acceptable, having regard to relevant factors including the nature and content of the image, the circumstances in which the image was recorded and the degree to which the recording affected the privacy of the person depicted in the image.

This "reasonable person" exception will ensure that the new offence does not criminalise socially acceptable activities.

The new offence will be punishable by a maximum penalty of imprisonment for three years, or a fine of 100 penalty units, or both.

The new offence in section 91P is similar in some ways to the existing unlawful filming offences in sections 91K and 91L of the Crimes Act 1900. These offences criminalise filming a person who is engaged in a private act and filming a person's private parts without the person's consent. However, the offences in sections 91K and 91L are narrower offences that only apply if the filming is done for the purposes of sexual arousal or sexual gratification.

Research published by RMIT University has confirmed that image-based abuse can occur for a diverse range of motivations. These existing offences do not protect victims where the non-consensual recording of the intimate image was done with motives of revenge, or to embarrass and humiliate the victim, or to attempt to control their behaviour. The new offence in section 91P will address this gap in the law.

The second offence introduced by the bill is the new offence of distributing an intimate image without consent, in the proposed section 91Q.

The offence will apply if a person intentionally distributes an intimate image of another person while knowing that the person did not consent, or being reckless as to whether the person consented to the distribution. "Distribute" is defined broadly to include sending, supplying, transmitting, communicating or making available for viewing or access by another person whether in person or by electronic, digital or any other means.

The offence uses the same meaning of consent as the recording offence. Again, section 91O specifies that consenting to an image being distributed on a particular occasion does not, by reason only of that fact, mean that the person has consented to it being distributed on another occasion. Similarly, a person consenting to an image being distributed to a particular person or in a particular way does not, by reason only of that fact, mean the person has consented to the distribution of that image or another image to another person or in another way. Section 91O also provides that the fact that a person has distributed an intimate image of themselves does not necessarily mean that they have consented to any other distribution of the image.

The "reasonable person" exception will also apply to the offence in section 91Q. A person's actions will not be an offence if a reasonable person would consider their conduct acceptable having regard to relevant factors. Again, this is to ensure the offence does not capture socially acceptable activities.

The new distribution offence will be punishable by the same maximum penalty as the recording offence—that is, a maximum penalty of imprisonment for three years, or a fine of 100 penalty units, or both.

The third offence introduced by the bill is a new offence of threatening to record or distribute an intimate image without consent. This offence in the proposed section 91R is particularly directed at domestic violence contexts, where threats to record or distribute intimate images may be used to control a victim's behaviour or prevent them from leaving an abusive relationship.

The offence will apply if the person intends to cause the victim to fear that the threat will be carried out. The offence will apply to threats to distribute intimate images whether or not the images actually exist, as often the victim may not know whether or not an image in fact exists.

The threat offence will carry a maximum penalty of imprisonment for three years, or a fine of 100 penalty units, or both.

Section 91N sets out the definitions that apply to the new offences.

An image is defined as a still or moving image, whether or not altered. "Intimate image" is defined as an image of a person's private parts or of a person engaged in a private act. It also includes an image that has been altered to appear to show a person's private parts or a person engaged in a private act. This would, for example, cover photo-shopping of person A's face with the private parts of person B in a way to suggest that the composite image is truly an image of person A.

The terms "private parts" and "engaged in a private act" are already used in the Crimes Act 1900 in the context of the existing unlawful filming offences in division 15B.

In the bill, a person's "private parts" is defined to include a person's genital or anal area (whether bare or covered by underwear) or breasts, including the breasts of a transgender or intersex person identifying as female. The bill also introduces this new definition of private parts into the existing unlawful filming offences, to modernise the way this term is understood for these offences.

In the bill, "engaged in a private act" is defined to mean in a state of undress, using the toilet, showering or bathing, or engaged in a sexual act of a kind not ordinarily done in public or any other like activity. This is the same definition as is already in place for the existing unlawful filming offences.

For the purpose of the new offences, to fall within the definition of an "intimate image", the image must depict a person in circumstances where a reasonable person would reasonably expect to be afforded privacy. This requirement will give the new offences the appropriate scope and is similar to the requirement that is already part of the unlawful filming offences. Images depicting activities that may otherwise fall within the definition of "intimate image" will not be captured, if the activities are commonly done without a reasonable expectation of privacy.

The three new offences introduced by the bill will apply to children and young people as well as adults. This recognises that children can be victims, and perpetrators, of the non-consensual sharing of intimate images.

As previously stated, a person under the age of 16 years will not be able to consent to the recording or distribution of an intimate image. This is consistent with the general principle that a person under the age of 16 years cannot consent to sexual activity.

However, the bill has been drafted so the proposed offences in sections 91P and 91Q do not apply to a young person who records and distributes an intimate image of their own body, as the offences only apply when the image is of another person.

The approval of the Director of Public Prosecutions will be required for prosecutions of children under the age of 16 years. This is to ensure the new offences do not inappropriately criminalise activity by, or between, children. Applicable diversionary measures under the Young Offenders Act 1997 will also be available for a young person who is charged with an offence.

Lastly, the bill introduces a new power for courts to order a person convicted of recording or distributing an intimate image without consent to take reasonable actions within a specified time period to remove, retract, recover, delete or destroy an intimate image the person unlawfully recorded or distributed.

It will be an offence for a person to contravene such an order without reasonable excuse, punishable by imprisonment for two years, or a fine of 50 penalty units, or both.

This power will offer victims a remedy and greater peace of mind, although I acknowledge that for many victims, it will not repair the harm they have experienced as a result of the perpetrator's actions.

This bill is the product of detailed consultation with stakeholders on the appropriate form and scope for the new offences. Consultation included the release of a public discussion paper in late 2016 and submissions from members of the community, Government, non-government and legal stakeholders. Almost all submissions expressed strong support for new offences to ensure victims are protected.

Dr Nicola Henry of RMIT University, an expert in image-based abuse, has commented that the Government's bill "is an excellent model that can serve as an inspiration for other jurisdictions both in Australia and internationally".

Women's Legal Service NSW has commented: By introducing these laws the New South Wales Government is showing its commitment to addressing domestic and family violence and sexual violence in all its forms".

Maria Le Breton, the director of the Women's Domestic Violence Court Advocacy Service NSW Inc. has commented: "This bill identifies the very damaging and criminal nature of these acts and provides greater protection to victims of domestic violence and our community as a whole. This bill enables the justice system to better keep astride of and respond to the evolving techniques employed by perpetrators of violence".

The distress caused to victims by intimate image abuse is palpable, but their passion and perseverance to achieve reform is inspiring. I would like to extend the Government's thanks to the victims and advocates who have worked tirelessly to bring about reform in this area.

I would like to particularly acknowledge the brave efforts of Ms Noelle Martin and Ms Brieana Rose (to whom I have referred by a pseudonym) in advocating reform. I also acknowledge the former Attorney General, the Hon. Gabrielle Upton, MP, for her leadership in the reform.

Overall, the reforms in this bill will make sure the criminal law can respond appropriately to such violations of privacy, and remedy at least some of the harm done to the victim.