



Submission on the Exposure Draft of the *Crimes (Invasion of Privacy)* *Amendment Bill 2017*

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Introduction

The Women's Centre for Health Matters Inc. (WCHM) welcomes the opportunity to make a submission to the inquiry into insecure employment in the ACT by the Standing Committee on Education, Employment and Youth Affairs.

WCHM is a community-based organisation that works in the ACT and surrounding region to improve women's health and wellbeing. WCHM believes that health is determined not only by biological factors, but by a broad range of social, environmental and economic factors known as the 'social determinants of health'. We acknowledge that the environment and life circumstances that each woman experiences have a direct impact on her health, and in many cases, women's poor health is rooted in social disadvantage. For these reasons, WCHM is committed to taking a whole-of-life and social approach to women's health that is also firmly situated within a human rights framework.

WCHM focuses on groups of women who experience disadvantage, social isolation and marginalisation and uses social research, community development, advocacy and health promotion to:

- Provide women with access to reliable and broad ranging health-related information which allows informed choices to be made about each woman's own health and wellbeing; and
- Advocate to influence change in health-related services to ensure responsiveness to women's needs.

WCHM supports the introduction of this draft legislation. In particular, WCHM supports:

- The definition of "intimate document", accounting for diverse cultural and personal concepts of privacy;
- The inclusion of threats to create and distribute images;
- The definition of "consent" used; and
- Exceptions that prevent the unreasonable prosecution of young people.

WCHM's submission and recommendations focus on the following issues:

- Definition of "intimate document";
- Offences in relation to young people;
- Consent;
- Exceptions to offences;
- Rectification orders; and
- Other considerations.

Further information on the potential impacts of the legislative change on women in the ACT can be provided, if required.

Response to Feedback Questions

WCHM congratulates the ACT Greens on drafting legislation that refers to non-consensual image sharing using language that does not imply any blame on the victim, and puts the onus on people who create and distribute intimate documents to ensure they have the consent of the person/s depicted.

References in the media to “revenge porn” are not helpful in understanding the impact of creating and sharing intimate images, or threatening to do so, without consent. “Revenge porn” as a description can mask the real reasons offenders are engaging this behaviour by implying that the victim has done something to cause it.

WCHM also supports the draft legislation not requiring any evidence of intent or motivation for creating or distributing intimate documents. Damage can be done to victims regardless of the intent of the defendant, and this legislation clearly seeks to make it clear that the behaviour is not acceptable.

In response to the comprehensive feedback questions listed in the Discussion Paper accompanying the Exposure Draft of the legislation, WCHM makes the following comments.

Definition of “intimate document”

WCHM supports the definition of “intimate document” in the draft legislation, and notes that it is independent of technology used to create or share the document. Including in the definition an example of hard copy image creation or sharing (eg sharing a printout of an image found online, literal cutting and pasting of images on paper to make an image that looks like the victim) would be helpful to ensure that non-digital image distribution is also covered by the legislation.

WCHM support that the definition of “intimate document” in the draft legislation is wider than that in the NSW legislation, including areas of the person’s body that are private in nature with consideration of the person’s circumstances. This may include a Muslim woman who normally wears a hijab being shown without it, or a person who normally covers parts of their body in public for reasons relating to age, weight, injury, surgical procedure, or gender transition.

It is important that consultation on the wording of the legislation includes people from diverse cultural backgrounds, including Muslim women; people with disabilities; and transgender and intersex people. This consultation may also provide feedback on other considerations, such as general community education to understand the diverse circumstances in which a person may consider parts of their body private.

Offences in relation to young people

WCHM supports the definitions and exceptions to age of consent in the draft legislation as being consistent with the rules around age of consent for sexual intercourse.

WCHM recommends that the requirement for approval being required from the Director of Public Prosecutions for prosecution of persons under the age of 16 years, be extended to persons under 18 years of age. This would make the legislation consistent with the ACT Human Rights Commission’s advice on the rights of children in the criminal process¹.

¹ ACT Human Rights Commission, *Factsheet: Rights of Children in the Criminal Process* (s. 20), viewed 25 July 2017: <http://hrc.act.gov.au/wp-content/uploads/2015/03/Section-20-Rights-of-children-in-the-criminal-process.pdf>

WCHM also recommends that additional guidance be provided to courts to ensure that young people are not unfairly listed on the Child Sex Offenders register without proper consideration of the factors listed in *Crimes (Child Sex Offenders) Act 2005* (ACT) s 9(3):

In making a decision for subsection (2) (b), the court must consider—

- (a) the severity of the offence and the seriousness of the circumstances surrounding the commission of the offence; and*
- (b) the age of the person at the time of the offence; and*
- (c) the level of harm to the victim and the community caused by the offence; and*
- (d) any attempts at rehabilitation by the person; and*
- (e) whether the person poses a risk to the lives or sexual safety of 1 or more people or of the community; and*
- (f) any other circumstances that the court considers relevant.*

Consent

WCHM supports that the burden of proof of consent is placed on the defendant. However, guidance on how the burden of proof of consent can be met would be helpful to understand what would be required.

We note also that the offences do not require proof of intent to cause harm. This is important, as proof of intent does not negate the very serious impact that the behaviour can have on victims.

Having a clear understanding of the type of positive actions that can be used to provide free and voluntary agreement to the recording or distribution of an intimate document will reduce the number of situations in which subjective assessments need to be made by courts. Guidance will also assist in educating the community about what the new laws require for people who want to ensure that their imaging sharing meets the legal requirements for consent.

Exceptions to offences

Crimes (Invasion of Privacy) Amendment Bill 2017 ACT s72F described situations in which a defendant can claim that recording or distributing an intimate document is not an offence. These include:

The exception for “in the public interest” is elaborated on in the Explanatory Statement as being:

...to protect whistleblowers or concerned members of the public who, using conventional public interest disclosure processes, release intimate images or documents to government officials or the media. For example, teachers who have confiscated images from students to provide to school administration...

WCHM suggest that “in the public interest” is too broad an exception as it stands in the draft legislation. It is important to allow an exception that enables persons to provide a confiscated intimate document to the appropriate authorities. However, the allowance of public interest for providing intimate documents to the media has the potential for misuse.

While there may be public interest in knowing that a person has engaged in a behaviour, this does not mean there is public interest in intimate documents being shared with publishers. For example, media reports on criminal activity relating to intimate documents are in the public

interest, but it may not be necessary to share the intimate document to report on the criminal behaviour. There may be public interest in non-criminal activity depicted in an intimate document in some circumstances, but again it may not be necessary to share the images to report on the behaviour.

To mitigate this potential for misuse of the public interest defence, further clarification of this exception in the legislation would be appreciated.

The *Crimes Amendment (Intimate Images) Bill 2017 NSW* s91T (1)(d) includes exceptions that may be helpful in avoiding unreasonable prosecution, particularly where the defendant is a young person:

a reasonable person would consider the conduct of the accused person acceptable, having regard to each of the following (to the extent relevant):

- (i) *the nature and content of the image,*
- (ii) *the circumstances in which the image was recorded or distributed,*
- (iii) *the age, intellectual capacity, vulnerability or other relevant circumstances of the person depicted in the image,*
- (iv) *the degree to which the accused person's actions affect the privacy of the person depicted in the image,*
- (v) *the relationship between the accused person and the person depicted in the image*

Similar exceptions could be helpful in the ACT legislation. However, as with the public interest defence, clear guidance on what a “reasonable person” would consider acceptable will be necessary. This legislation has become necessary primarily because it is not clear what is acceptable to reasonable members of the public.

Rectification orders

WCHM supports the rectification orders described in *Crimes (Invasion of Privacy) Amendment Bill 2017 ACT* s72H.

However, it may not be possible to remove an intimate document once it has been published or shared online. While a court can make a rectification order, the images may be published using services outside the jurisdiction of the courts, making the rectification order of little use to victims.

While it is important to be able to define the non-consensual recording or sharing of intimate images as a crime, and that removing the images would reduce the damage to victims, rectification orders that are not enforceable do not provide tangible remedy to victims.

Further research is needed into ways to remove an image that has been published online.

Other considerations

As this legislation seeks to create new criminal offences for behaviours already common within the ACT community, education and awareness campaigns will be needed to ensure that people understand what the new laws are and how to ensure they comply.

Police and courts will also need training and resources to ensure the new legislation is well understood. We must ensure that women who report cases to police or bring a case to the courts are taken seriously, and that the police and justice system are equipped to enforce the new laws.

Education will be needed on:

- the meaning of consent, and how to ensure it is obtained in a way that meets the burden of proof;
- how people from diverse cultural backgrounds, people who are transgender, people with disabilities, and other vulnerable groups may feel about the parts of their body that they define as intimate; and
- what can be done to remove an image after it has been shared or published online.

As has been seen with education and awareness campaigns on other issues in the past, resources developed and distributed by multiple community groups, whose membership and mission serves a diversity of local people, is an effective way to reach the maximum number of people in the Canberra region.

For example, community groups who work with people of a specific cultural background, the LGBTIQ community, people with disabilities, young people, and women, will be able to produce materials that are particularly well suited to their target audience. They will also be in a better position to distribute those materials to the community they serve.

When producing materials for the police and justice system, specialist community groups will be able to create resources that are sensitive to the cultural and personal needs of people who police and the justice system may be dealing with.

Funding for education and awareness campaigns will be needed to ensure that the new legislation is understood and accepted by the Canberra community.

Recommendations

WCHM makes the following recommendations to improve the draft legislation and ensure its successful implementation:

1. Ensure that representatives from appropriate cultural groups, members of the LGBTIQ community, and people with disabilities have been consulted, in particular about the definition of “intimate document” and any associated education that may be needed for the wider Canberra community.
2. Include an example of non-digital intimate images in the definition to ensure that hard copy image creation and sharing is also covered by the legislation.
3. Change the age under which the Director of Public Prosecutions must give approval for charging a young person from 16 to 18 years, consistent with the ACT Human Rights Commission’s advice on the rights of children in the criminal process.
4. Provide additional guidance to courts to ensure that young people are not unfairly listed on the Child Sex Offenders register without proper consideration of the factors listed in *Crimes (Child Sex Offenders) Act 2005* (ACT) s 9(3).
5. Provide additional guidance on how the burden of proof of consent can be met.
6. Provide additional guidance on what is “public interest” in *Crimes (Invasion of Privacy) Amendment Bill 2017* ACT s72F.
7. Give consideration, with additional guidance on what a reasonable person may consider acceptable, to inclusion of exceptions similar to those in *Crimes Amendment (Intimate Images) Bill 2017 NSW* s91T (1)(d) where it may help protect young people.
8. Research ways that an image can be removed from online services where it has been shared or published, including services outside the jurisdiction of ACT courts.
9. Funding for education and awareness campaigns for the Canberra community by multiple different local community groups, including groups serving culturally diverse communities, the LGBTIQ community, people with disabilities, young people, and women.
10. Funding for training resources for police and the justice system by multiple different local community groups, including groups serving culturally diverse communities, the LGBTIQ community, people with disabilities, young people, and women.