

2017

LEGISLATIVE ASSEMBLY OF THE
NORTHERN TERRITORY

ATTORNEY-GENERAL AND MINISTER FOR JUSTICE

Criminal Code Amendment (Intimate Images) Bill 2017

SERIAL NO. 38

EXPLANATORY STATEMENT

GENERAL OUTLINE

The Criminal Code Amendment (Intimate Images) Bill 2017 amends the Criminal Code to address the non-consensual sharing of intimate images. It will introduce new offences of non-consensual sharing of an intimate image and threatening to share an intimate image, each with a maximum penalty of 3 years imprisonment. It will also introduce an ancillary power for a court to order rectification when a person is found guilty of one of the new offences. Breach of the court order will carry a maximum penalty of 2 years imprisonment.

The Criminal Code Amendment (Intimate Images) Bill 2017 is a response to the growing community concern about the sharing of intimate images of a person without that person's consent.

NOTES ON CLAUSES

Clause 1. Short Title

This is a formal clause which provides for the citation of the Bill. The Bill, when passed, may be cited as the *Criminal Code Amendment (Intimate Images) Act 2017*.

Clause 2. Commencement

This is a formal clause which provides when the Act will commence. The Act will commence on a day fixed by the Administrator by Gazette notice.

Clause 3. Act amended

This clause identifies the Bill will amend the Criminal Code.

Clause 4. Section 1 amended

Clause 4 inserts signpost definitions in section 1 of the Criminal Code, the main definition section of the Criminal Code, for the following words and expressions: 'distribute'; 'image'; 'intimate image'; and 'law enforcement officer'. The signpost definitions refer the reader to the relevant section of the Criminal Code where the terms are defined.

Clause 5. Section 149B amended

Clause 5 inserts further signpost definitions in section 149B of the Criminal Code, which is the definition section for Part VI of the Criminal Code, for the following words and expressions: 'distribute'; 'image'; 'intimate image'; and 'law enforcement officer'. The signpost definitions refer the reader to the relevant section of the Criminal Code where the terms are defined.

Clause 6. Part VI, Division 7A inserted

Clause 6 inserts new Division 7A (Distributing intimate images) into Part VI of the Criminal Code. Division 7A inserts new sections 208AA to 208AE.

Section 208AA Definitions

New section 208AA defines words and expressions used in new Division 7A, namely 'distribute', 'image', 'intimate image' and 'law enforcement officer'.

'Distribute' is given a wide and non-exclusive definition. It is deliberately broad to capture the different ways that intimate images may, now and in the future, be shared. It includes both physical and cyber forms of sharing. It also covers distribution that does not have a specific or intended recipient, for example posting an image on Facebook.

'Image' is defined broadly and generally, to cover still and moving images.

The focus of the definition of 'intimate image' is on sexual images, which is reflected in particular in paragraphs (a) and (b) of the definition, namely an image of a person engaged in a sexual act or of a person in a manner or context that is sexual. However, it also includes, in paragraphs (c) and (d), the genital and anal regions of the body and the breasts of a female, or of a transgender or intersex person who identifies as female. Images

of these parts of the body may not necessarily be sexual but their non-consensual distribution, whether bare or covered by underwear, would constitute such a degree of invasion of privacy as justifying criminalisation. An 'intimate image' includes an image that has been altered, for example where the person's head has been 'photoshopped' onto the naked body of another person.

'Law enforcement officer' covers police officers from all the Australian jurisdictions, including the Australian Federal Police, and members of staff of the Australian Crime Commission.

Section 208AB Distribution of intimate image without consent

New section 208AB(1) creates the offence of distributing an intimate image without consent and prescribes a maximum penalty of 3 years imprisonment. The penalty is consistent with penalties for like offences in other Australian jurisdictions and proportionate to the seriousness of the conduct. The offence is indictable but triable summarily.

It is important that the offence applies only to conduct that so far transgresses societal norms that it justifies criminalisation and that it not interfere with the performance of legitimate functions. Accordingly, subsection (2)(a) – (g) sets out a list of circumstances in which the offence does not apply.

The circumstances include law enforcement and investigation; medical, scientific and education purposes; and distributing an intimate image of a child or other person incapable of giving consent with the important proviso that a reasonable person would regard the circumstances of the distribution acceptable. An example of this third category would be parents sharing a photograph of their naked newborn baby.

The offence also does not apply where the image is shared only with the person depicted in it, although such sharing could amount to evidence of a threat to distribute (new section 208AC). Finally, the offence does not apply to distribution by a person solely acting in their capacity as an internet services provider, internet content host or carriage service provider. The reason for this exclusion, which is consistent with the position in other jurisdictions in Australia, is that a state or territory offence criminalising such distribution would be virtually unenforceable and is more properly addressed by the Commonwealth.

Subsections (3) to (7) provide a non-exhaustive list of circumstances in which consent to the distribution of an intimate image may be vitiated. These factors are specific to the offence of distribution of an intimate image and are designed to provide guidance as to circumstances where there is no consent.

Subsection (3) provides that persons under the age of 16 cannot give consent to the distribution of an intimate image of themselves. This is designed to protect young people, who may lack the capacity to make good decisions about the sharing of intimate images, and to achieve consistency with the age of consent for other offences in the Criminal Code.

Subsections (4) to (6) address the types of activity that have been identified as being specific to the sharing of images. They are included to provide clarity regarding some of the boundaries of consent and to promote the control of a person over intimate images of themselves. For example:

- a person (A) consents to the distribution of an intimate image on one occasion. That fact, of itself, does not mean A has consented to its distribution on another occasion;
- a person (A) consents to her partner (B) showing an intimate image to another person (C). That fact does not, of itself, mean that A has consented to B showing the image to a different person (D);
- a person (A) consents to a friend (B) using an intimate image of A in a photography exhibition. That fact, of itself, does not mean that A has consented to B posting the image on Facebook with a lewd caption; and
- a person (A) sends an intimate image of himself ('sexting') to his boyfriend (B). This does not equate to consent for B to further distribute the image.

Subsection (7) clarifies that the circumstances in which consent may be vitiated are not limited by subsections (3) to (6).

Subsection (8) provides a positive definition of consent that mirrors the definition in section 192(1) of the Criminal Code (Sexual intercourse and gross indecency without consent).

Section 208AC Threaten to distribute intimate images

New section 208AC(1) creates the offence of threatening to distribute an intimate image. The threat to distribute an intimate image can be used as a tool to intimidate, control or coerce a person, often in a domestic violence situation. The seriousness of this conduct and the harm it can cause is reflected in the maximum penalty of 3 years imprisonment, which is the same as that for the offence of distributing an intimate image without consent.

The exceptions in section 208AB(2) do not apply to the offence of threatening to distribute an intimate image, as the performance of a legitimate function or conduct that 'a reasonable person would regard as acceptable' could not include threatening behaviour. Lack of consent is not an element of the offence, as it is not relevant to an offence involving a threat.

Section 208AC(2) provides guidance as to the ambit of the offence. A threat may be explicit, implicit, conditional or unconditional. It can be made by any conduct, not just words. As the offence is targeted at the perpetrator's behaviour and state of mind, while the prosecution must prove an intention to cause the other person to fear that the threat would be carried out, it is not necessary to prove actual fear or that it was possible for the threat to be carried out. For example, a person (A) wants to leave her abusive partner (B). B threatens that he will send an intimate photograph of A to her employer unless she stays with him. As long as B intends A to fear that he will carry out the threat, it does not matter that there is no photograph. Nor does it matter that the threat does not, in fact, instil fear in A.

Section 208AD Prosecution of child to be approved

New section 208AD provides that the prosecution of a child cannot be commenced without the consent of the Director of Public Prosecutions. The offences in new sections 208AB and 208AC will apply to both adults and young people. New section 208AD provides a safeguard to ensure that the new offences do not inappropriately criminalise the behaviour of children. It provides an appropriate balance between guarding against overcriminalisation of children and protecting young people from harm.

An important reason for this safeguard is because a person under 16 cannot consent to the distribution of an intimate image. In many instances it will be a person under 18 who distributes an intimate image

of a person under 16. The requirement for the consent of the Director of Public Prosecutions can provide a buffer against the prosecution of non-exploitative behaviour of young people.

Section 208AE Court may order rectification

New section 208AE(1) empowers a court, where a person has been found guilty of an offence under either new section 208AB or new section 208AC, to order the person to take reasonable steps to remove, delete or destroy any images related to the offence within a time specified by the court.

Failure to comply with an order made under subsection (1) should incur a criminal sanction. Subsection (2) creates such an offence, with a maximum penalty of 2 years imprisonment, which is consistent with like provisions in other Australian jurisdictions. The fault elements are: knowledge of the person as being subject to an order made by a court under section 208AE(1); intention as to conduct; and recklessness as to the result that the conduct contravenes the court order.

Clause 7. Schedule 1 amended

This clause inserts 'Part VI (Offences against the person and related matters), Division 7A (Distributing intimate images)' into Schedule 1 of the Criminal Code. Schedule 1 lists the offences to which the criminal responsibility provisions in Part IIAA of the Criminal Code apply.

Clause 8. Repeal of Act

This is a standard clause which provides that the Act is repealed the day after it commences. As this is an amending Act, there is no need to retain the Act on the statute book, once the amendments to the Criminal Code have been effected.