

Statement of Compatibility with Human Rights

Prepared in accordance with the Thirteenth Assembly Sessional Orders (Part 12.3) as adopted on 24 August 2017.

Criminal Code Amendment (Intimate Images) Bill 2017 **Serial No. 38**

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

Overview of the Bill

The Bill amends the Criminal Code to introduce three new offences to respond to the problem of 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.

Human rights implications

The Bill promotes or engages the following rights referred to in the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC).

The right to equality and non-discrimination – Articles 2, 16 and 26 ICCPR

The rights of equality and non-discrimination are contained in Articles 2, 16 and 26 of the ICCPR. The rights to equality and non-discrimination encompass a positive obligation to protect and advance the fulfilment and enjoyment of the rights to equality and non-discrimination for all people. The Bill engages the rights of equality and non-discrimination in a positive way.

The UN Committee on the Elimination of All Forms of Discrimination Against Women has stated that gender-based violence, including domestic violence, is a form of discrimination that inhibits women's ability to enjoy rights and freedoms on an equal basis with men.

The conduct targeted in the Bill can be a form of violence against women, can cause harm and distress to women, and can inhibit the ability of women to enjoy rights and freedoms on an equal basis with men.

The right to privacy and attacks on reputation – Article 7 ICCPR

Article 17 of the ICCPR prohibits unlawful or arbitrary interference with a person's privacy, family, home and correspondence. It also prohibits unlawful attacks on a person's reputation. It provides that persons have the right to the protection of the law against such interference or attacks. The Bill engages the right to privacy and the prohibition on attacks to reputation in a positive way.

The Bill promotes the right to protection of the law against interference with the right to privacy and attacks on reputation. The offences proposed in the Bill protect people from having

intimate images of them distributed without their consent, which would be an interference with privacy and may constitute an attack on reputation.

The right to freedom of expression – Article 19 ICCPR

Article 19(2) of the ICCPR protects freedom of expression in any medium, for example written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. The right protects not only favourable information or ideas, but also unpopular ideas including those that may offend or shock, but is subject to limitations. Freedom of expression carries with it special responsibilities, and may be restricted on several grounds. Article 19(3) provides that freedom of expression may be limited as provided for by law and when necessary to protect the rights or reputations of others, national security, public order, or public health or morals. Limitations must be prescribed by legislation necessary to achieve the desired purpose and proportionate to the need on which the limitation is predicated.

The Bill may engage the right to freedom of expression because it places a restriction on communication. However, the limitation is reasonable and necessary for the purpose of protecting the rights of victims, for example the rights to privacy and the prohibition on attacks to reputation. The purpose of the Bill is to protect people from having intimate images of them distributed without their consent or to having threats made to distribute such images.

The Bill uses the least restrictive approach because it confines the prohibition against distributing images to images that fit within the definition of 'intimate images' and when the distribution is without consent. It further provides specific exceptions to the application of the offence, which protect the freedom of expression and avoid inadvertently capturing behaviour that does not violate community norms, and requires that the prosecution of children can only be commenced with the consent of the Director of Public Prosecutions.

The Rights of the Child: children in the criminal process – Article 14(4) ICCPR and Articles 37 and 40 CRC

Under Article 14(4) of the ICCPR, criminal proceedings involving children must take into account their age and the desirability of promoting their rehabilitation. Under Article 37 of the CRC, the arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time. Article 40 of the CRC recognises the right of a child alleged as, accused of, or recognised as having committed a criminal offence to be treated in a manner that takes into account the child's age and the importance of supporting their rehabilitation. Article 40(3) further provides that procedures specifically applicable to children should be promoted as should measures for dealing with accused children without resorting to judicial proceedings.

The Bill engages these rights and, in particular, the requirements contained in Article 40(3) of the CRC in a positive way. The requirement in the Bill that the prosecution of a person under the age of 18 cannot be commenced without the consent of the Director of Public Prosecutions recognises the desirability of providing procedures specifically applicable to children and guards against the over-criminalisation of the behaviour of young people. As the offences will not be prescribed as 'serious offences' for the purposes of section 39 of the *Youth Justice Act*, the first recourse for police regarding children should be diversionary measures rather than prosecution.

Conclusion

This Bill is compatible with human rights because it promotes human rights under the ICCPR and the CRC and, to the extent that it limits human rights, those limitations are reasonable, necessary and proportionate.