Australian
Privacy
Foundation

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28 July 2017

The Office of Caroline Le Couteur MLA
The ACT Legislative Assembly
196 London Circuit
Canberra ACT 2601

Dear Ms Le Couteur

Re: Consultation regarding *Crimes (Invasion of Privacy) Amendment Bill 2017*

The Australian Privacy Foundation (APF) is the country's leading privacy advocacy organisation. This document responds to the call for public comment on the *Crimes (Invasion of Privacy) Amendment Bill 2017* (ACT).

The following paragraphs provide information about the Foundation, address the Bill as a whole (including comments on its context in ACT and Commonwealth law and practice), and then deal with specific questions in the discussion paper released with the Bill.

The Foundation

The Australian Privacy Foundation is the nation's prime civil society organisation concerned with privacy.

The Foundation is politically independent. Its membership and board include legal, information technology, health, business and other specialists.

It has been recognised over several decades as a voice of the community and source of expertise, evident in for example invited submissions to major parliamentary inquiries and other law reform consultations. The Foundation for example provided testimony to the NSW Legislative Council's 2016 Inquiry into Remedies for the serious invasion of privacy in New South Wales and its submissions to successive Australian Law Reform Commission inquiries into privacy were cited in that body's reports.

Information about the Foundation, including copies of its submissions, is available at www.privacy.org.au.

The Bill

The Foundation commends the proposal to respect privacy through amendment of the *Crimes Act 1900* (ACT).

The Foundation offers four comments to contextualise the Bill.

Community Awareness

The Bill has a broad ambit and for example appears to cover the use of technologies such as drones that are becoming mainstream rather than exceptional. In anticipating rather than responding to offences it is both important and efficacious for the ACT government (and the governments of all

Australian jurisdictions, particularly the Commonwealth) to actively encourage community understanding of those technologies and their consequences. In practice self-help by individuals whose privacy may be disregarded is of fundamental importance.

Difficulties in use of the criminal pathway in dealing with offences that are envisaged in the Bill should be recognised, ie in relation to investigation, prosecution, conviction and publicity. Many or indeed most abusive incidents will not likely end up with a conviction. Any potential deterrent effect is useful to note, but that will by no means be effective if there are sporadic abuses which become frequent and widely distributed.

Any ACT legislation regarding privacy protection needs to be complemented with a coherent and sustained public education program that is tied to the *Human Rights Act 2004* (ACT) rather than centred on deterrence under the amended *Crimes Act 1900* (ACT) and that reflects the National Statement of Principles relating to the Criminalisation of the Non-Consensual Sharing of Intimate Images.

A failure to invest in that program will vitiate the Bill.

The ACT Privacy Regime

The Bill addresses matters of community concern and is commended on that basis. The Foundation considers that coherence in the development, implementation and understanding of privacy law that is proportionate, principle-based and effective is best achieved through law reform that deals with privacy on a holistic basis rather than as a reaction to issues that have gained the attention of the mass media.

In building an effective privacy regime for the ACT it is necessary to look beyond criminal law – an important but not sole component – and note the importance of strengthening privacy law in relation to the workplace, the health sector and ACT public administration

It is also important to strengthen capacity within the ACT public administration, in particular strengthening of expertise within JACS (and within individual agencies) and ensuring that the ACT Privacy Commissioner functions meaningfully rather than as an addendum to the national Privacy Commissioner. The ACT Commissioner should be benchmarked against the NSW Commissioner and Victorian Commissioner over the past five years, given the priority they have given to awareness building and timely responses to privacy problems in the public/private sectors.

Jurisdictions

The proposal importantly includes a new power for Courts to order the take-down or rectification of intimate images that have been distributed non-consensually. This is necessary and welcome as far as it goes, but its effectiveness is limited by the realities of abuses using borderless networked technology.

It is important to recognise that ACT Courts have no authority over corporations and individuals located outside Australia. In practice action to deal with online content will involve cooperation by the Australian jurisdictions and the involvement of the national government under the telecommunications and corporations powers in the Australian Constitution.

The Privacy Tort

Criminalisation is not the best or only response to the harms attributable to unauthorised creation, storage and dissemination of intimate images or other sensitive personal information. The Foundation draws your attention to reports by the Australian Law Reform Commission and other bodies regarding a statutory cause of action – otherwise known as the privacy tort – for serious invasions of privacy.

There is scope for the ACT to establish such a cause of action in order to deter disregard of the personal sphere, signal society's abhorrence of such invasions and provide compensation for the

victims of those invasions. It should not be necessary for victims to need to rely on a breach of confidentiality or other claim, as has been evident inconsistently in other jurisdictions.

On that basis the Bill should be complemented by statute law reform as part of the holistic approach recommended above

Discussion Paper Questions

General

1) Has this legislation incorporated all of the principles detailed in the National Statement of Principles relating to the Criminalisation of the Non-Consensual Sharing of Intimate Images

Yes. The inclusion appears to be adequate. The interpretation of the principles as incorporated in the Bill could be usefully clarified.

The Foundation notes that it is important to model every way in which unintended consequences can arise for young people from well-intentioned but heavy handed criminal sanctions

2) Does this legislation comply with the ACT's human rights obligations?

Yes. The Bill gives effect to the objectives underlying the Human Rights Act and more broadly to Australia's commitment to respect for human rights through adherence to salient international human rights conventions.

3) Should there be any changes to address infringements on human rights?

See above.

4) How will this legislation impact on other groups, especially young people and marginalised or disadvantaged communities?

The Bill appears oriented to fostering the well-being of all members of the ACT community, in particular both young people and their families.

Efforts to assist young people should include an emphasis on helping them visualise and understand the reality of harms and effects of privacy abuses that might not seem imminent or close in time and space. Much more explicit and effective warnings, notices and explanations of potential impacts needs to be a significant part of responding to their developmental needs, so legislation criminal or civil needs to be complemented with awareness efforts which are actually tested for effectiveness and driven by user centred design.

Offences in relation to Young People

In relation to proposed section 66A in the Bill:

1) How should the issue of consent be dealt with in relation to images of young people?

The Foundation notes that a formal age and capacity, exemplified for example through the legally-accepted principle of Gillick Competence, are not identical. The Foundation received a copy of the discussion paper and Bill very shortly before the closing date for submissions; it would be happy to discuss consent in more detail.

2) Do you think this section adequately protects young people under the age of 16 who consensually share intimate images?

See above comment regarding community education influencing practice. The proposal goes some way to addressing a conundrum and in isolation will not be wholly effective.

It is important to model every way in which unintended consequences can arise for young people from well-intentioned but heavy handed criminal sanctions

3) Should this legislation distinguish between cases where both parties are minors and cases where the offender is over 18 years and the other person is not?

Yes. It is important that courts be alerted that 'minor' is a broad category; in practice there will sometimes be substantive differences in capacity and vulnerability between people who are in the same cohort.

4) Do you think it appropriate that the Director of Public Prosecution's explicit approval is required for the prosecution of young people under the proposed offences?

Yes. This serves to offset concerns regarding past incidents in other jurisdictions where zealous law enforcement or other personnel have acted in ways that potentially traumatise young people or older people with a cognitive deficit or other vulnerability. The overall object of the Bill should be the proportionate reduction of harm, which is not necessarily identical with investigation, prosecution and conviction.

Consent

In relation to the proposed sections 67(1) and 72B in the Bill:

1) Is the definition of consent acceptable and effective?

See above.

Consent assumes that the person is effectively informed, but we know that many 'privacy statements' are unreadable and unread, and have little real effect in bringing potential harms to full frontal awareness of young people.

Much more work, using assessments of actual effectiveness to cut through and change perceptions and intentions, needs to be done before any reliance on consent is justifiable.

2) Do you foresee any unintended complications arising from the proposed definition?

See above.

3) Should consent to having intimate documents shared during the course of a relationship be assumed to be revoked upon the conclusion of that relationship?

Yes. This is a salient point. The subjects of stored digital documents should be able to prevent unauthorised sharing of those documents (eg uploading of hitherto-unpublished images to a website from a mobile phone) during and at the end of a relationship. Revocation should not need to be express

In relation to proposed section 72A in the Bill:

1) Are there other behaviours that constitute technology-facilitated abuse that we have failed to consider or need to be more clearly defined?

These should be explored as part of a broader consideration of privacy in relation to digital technologies, building on the work of the Australian Law Reform Commission in particular.

Your attention is drawn to comments above regarding jurisdictions and the privacy tort.

2) Does our definition of "device" and "distribute" sufficiently future-proof these offences?

Language should be consistent across the Australian jurisdictions. The definition is adequate in the immediate future and can be amended in future.

3) Does our definition of “distribute” include all methods of sharing? If not, how?

The emphasis should be on principle rather than specifics.

4) Do you agree that the definition of “intimate” should include images which are not sexual?

Yes. This is salient.

5) Do you consider the wider definition of “intimate” could be abused? If so, how?

The Foundation would be happy to discuss this matter.

6) Do you think the term “intimate document” adequately encompasses all variations of the behaviours these offences seek to address?

The Foundation would be happy to discuss this matter.

New Offences

In relation to proposed sections 72C, 72D, 72E and 72G in the Bill:

1) Do you consider the following proposed offences effectively combat the behaviours that amount to technology-facilitated abuse?

a) non-consensual intimate observations etc-generally (section 72C);

b) non-consensual intimate observations etc- intimate body areas (section 72D);

c) non-consensual distribution of intimate documents (section 72E); and,

d) threat to distribute intimate document (section 72G);

As noted above, the offences should be complemented by establishment of a statutory cause of action for serious invasions of privacy and by an effective community awareness program. It is important to recognise that some behaviour is shaped by perceptions that it is ‘normal’, ‘acceptable’ or without legal sanction.

2) Should “threats” be defined? If so, should they include both explicit and implicit threats made by any conduct?

The coverage could extend to implicit threats.

Exceptions

In relation to proposed section 72F in the Bill:

1) Are the current exceptions clear and effective?

The exceptions appear to be sensible.

2) Are there other exceptions that need to be considered?

The Foundation would be happy to discuss this matter.

Penalties & Remedies

In relation to proposed section 72H in the Bill and generally:

1) Do you consider the proposed penalties to be appropriate?

Yes. Your attention is drawn to the significance of the statutory cause of action.

2) What other diversionary or alternative sentencing could be appropriate for these penalties?

The Foundation notes disagreement within the criminological and legal communities about the appropriateness and effectiveness of diversionary and other sentencing mechanisms. The matter deserves further consideration in the context of the overall ACT sentencing regime regarding offenders in general and particular cohorts such as young offenders.

3) Should the Court be able to order an individual convicted of an offence to take-down/remove the images in question?

Yes. This is salient. It should be noted however that dissemination beyond the author/initial communicator of a document may be beyond the power of that individual, particularly where an image or other document is being communicated on a 'viral' basis across mobile networks or via a service outside Australia.

4) Would any additional powers need to be granted to the ACT Government in order to provide fast relief to victims of these offences?

The Foundation would be happy to discuss this matter. It is unclear what relief is envisaged.

Other Considerations

1) Are there other civil reforms or common law considerations in relation to this legislation?

See comments above regarding the overall ACT privacy regime and the privacy tort.

2) Should a conviction under the proposed legislation be considered relevant for obtaining a Working with Vulnerable People Check?

Yes.

3) How best should these new offences and changes be communicated to the public?

See comment above regarding community education.

4) Are there further reforms relevant to the aims of this legislation that we should include in the final Bill.

See above.

Yours sincerely

David Vaile
Chair
For the Australian Privacy Foundation 27 July 2018