

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

Via email to: [lecouteur@parliament.act.gov.au](mailto:lecouteur@parliament.act.gov.au)

28<sup>th</sup> July 2017

**Re: ACT Crimes (Invasion of Privacy) Amendment bill 2017**

Dear Ms Le Couteur,

Electronic Frontiers Australia (EFA) appreciates the opportunity to provide this submission in relation to this consultation. EFA's submission is contained in the following pages. EFA is happy to provide further information, if required.

**About EFA**

Established in January 1994, EFA is a national, membership-based non-profit organisation representing Internet users concerned with digital freedoms and rights.

EFA is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting civil liberties in the digital context. EFA members and supporters come from all parts of Australia and from diverse backgrounds.

Our major objectives are to protect and promote the civil liberties of users of digital communications systems (such as the Internet) and of those affected by their use and to educate the community at large about the social, political and civil liberties issues involved in the use of digital communications systems.

Yours sincerely,



Jon Lawrence - Executive Officer, on behalf of EFA's Policy Team

## ACT Crimes (Invasion of Privacy) Amendment Bill 2017

### 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 (see Appendix 1)?**

EFA believes this proposed legislation incorporates all of the principles detailed in the National Statement of Principles relating to the Criminalisation of the Non-Consensual Sharing of Intimate Images.

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

Yes. In fact, it provides additional potential protection to victims of domestic violence and abusive relationships.

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

EFA does not see any infringements on human rights in the proposed legislation and believes that the exceptions in section 72F adequately address all human rights issues.

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

EFA believes that as long as the exceptions in section 72F and 66A are maintained, young people and marginalised groups would see an increase in their rights to privacy and self-determination.

### 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?**

EFA believes that young people require a higher level of protection than adults. As such, a higher threshold for consent would be appropriate.

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

Yes. Sharing of intimate images is now a widely-accepted courtship ritual and it is critical that issues involving under-16s acting consensually should not be criminalised.

**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?**

EFA believes that the legislation should distinguish between cases where both parties are minors and cases where one person is not a minor, subject to a maximum two year age difference in both contexts. Sharing of intimate images is now a widely-accepted courtship ritual and therefore must not be criminalised where it falls within long-established legal norms relating to consent in a sexual context, for example where one party is a minor and the other is not but the age difference between the parties is under two years.

While age is by no means an accurate determinant of either physical or psychological maturity it is the only objective metric that can be applied. As such, a situation in which both parties are minors but the age difference exceeds two years may be considered more serious than a situation involving a 19 year old and a 17 year old, though ideally judicial discretion should apply to ensure that the unique circumstances of each case are considered.

***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? (section 72I)***

EFA believes that requiring the explicit approval of the DPP for the prosecution of minors under these proposed offences is an appropriate and important safeguard. It is likely that the vast majority of cases where minors are the alleged offenders will be best dealt with outside the criminal justice system, however there may be isolated cases where a criminal prosecution is justified. As such, it is appropriate that any prosecution of minors must have the active and explicit approval of the DPP.

## **Consent**

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

***1) Is the definition of consent acceptable and effective?***

The definition of consent is appropriate insofar it refers to consent as being free and voluntary and having to be communicated by a positive act. It is also helpful in that it provides guidance in what circumstances consent is negated. It should be emphasised that this guidance is not comprehensive and that there may be other circumstances in which consent is negated.

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

EFA believes that the wording of sections 9(1A)(e) and 72B(2)(e) is too broad to conform to community standards. EFA believes that consent should be considered negated in circumstances where the individual's decision making may be impaired beyond the necessary level to engage in sexual activity. That however should not necessarily capture individuals who have consented to sexual activity but were affected by a small amount of alcohol, such as one standard drink.

***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. The conclusion of an intimate relationship involves an inherent removal of consent in relation to any matter involving intimacy. As such it is entirely appropriate that the end of such a relationship should be assumed to revoke any consent relating to intimate documents produced during the relationship.

## **Definitions**

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?***

While there are other behaviours that constitute technology-facilitated abuse, EFA believes these other behaviours fall outside the scope of this proposed legislation.

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

EFA believes that these definitions are sufficiently broad and technologically neutral to address the current issue of non-consensual sharing of intimate material. However, EFA strongly disagrees that all internet content hosts should be protected from liability, since “revenge porn” is often shared on websites dedicated to the sharing of non-consensual intimate images.

The operators of content hosts that are at least partly dedicated to the sharing of non-consensual intimate images should be liable for criminal prosecution. The criteria for defining such hosts must be carefully-worded to ensure that legitimate expression is not unintentionally suppressed, particularly in the context of public interest journalistic reporting.

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

EFA believes the term ‘distribute’ is sufficiently flexible to encompass all current and future methods of sharing.

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

EFA is concerned that the inclusion of non-sexual images within the definition of intimate may broaden the scope of the proposed criminal sanctions beyond what is appropriate. Of course, the nature of what is intimate will vary widely based on a variety of factors including age, cultural background, religious affiliation and location. Significant judicial discretion in this regard should ensure that the particular circumstances of each case are considered in the appropriate context.

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

EFA believes there may be some scope for the wider definition of ‘intimate’ to lead to inappropriate prosecutions. As noted above, judicial discretion in considering the context of each case should mitigate this risk.

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

EFA believes that the definition for intimate document may be overly broad and therefore liable to misinterpretation. EFA recommends that the definition be further defined.

## **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);**

Yes. EFA believes the proposed offences should provide meaningful deterrents to the specified behaviours.

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

EFA believes that explicit threats should come within the scope of this legislation. However, when it comes to implicit threats, EFA believes that a higher bar should be met as to the content and circumstances of the threat to avoid unfair consequences.

## Exceptions

In relation to proposed section 72F in the Bill:

### ***1) Are the current exceptions clear and effective?***

Yes.

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

EFA believes that the public interest exception needs to be as wide as possible to avoid unnecessary suppression of free expression, particularly in relation to public interest journalism.

## Penalties & Remedies

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

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

Although the proposed penalties seem reasonably appropriate, EFA has no criminological expertise and therefore defers to others with such expertise on this question.

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

Per above, EFA has no criminological expertise and therefore defers to others with such expertise on this question.

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

While it is appropriate for the Court to be able to order an individual convicted of an offence to take-down/remove the images in question, the reality is that in some cases they may not be able to do so. More concerning is the significant amount of time that is likely to elapse between any original posting/sharing/distributing of the image and any conviction being recorded.

Regardless of any suppression orders that may be issued, the fact of a criminal trial will inevitably draw additional attention to any case and if the image(s) in question are still available, will almost certainly lead to additional potential harm to the alleged victim.

EFA therefore proposes that the sentencing guidelines for the proposed offences should include a strong and explicit incentive for the defendant to take-down/remove the image(s) in question at the earliest opportunity, without that being considered to be in any way an admission of guilt.

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

Given the reality that the vast majority of potential offences under this proposed legislation will involve services hosted outside Australia, let alone the ACT, there is likely to be little point in providing the ACT Government with powers that will in almost all circumstances be unenforceable.



As noted above, EFA suggests that creating strong positive incentives for potential defendants to remove content at the earliest opportunity, ideally without that action involving any admission of guilt, is likely to be the most effective approach to minimising harm to victims.

## **Other Considerations**

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

EFA supports the introduction of a statutory cause of action for serious invasions of privacy. Such a cause of action would create a significant additional disincentive to acts of sharing intimate images without consent and would also provide an opportunity for victims to achieve redress.

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

Yes, absolutely.

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

Targeted social media advertising (based on location), outdoor advertising (bus stops etc), TV & Radio advertising, dedicated website as part of a wider 'respect' agenda (eg [respect.act.gov.au](http://respect.act.gov.au)), print advertising (Canberra Times etc).

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

As noted above, a statutory a statutory cause of action for serious invasions of privacy should be created to provide a means for victims to realise compensation for serious invasions of their privacy.