Revenge Porn
Explanatory Paper
Summary Offences (Filming and Sexting Offences) Amendment Bill 2015
Explanatory Note

Summary Offences (Filming and Sexting Offences) Amendment Bill 2015

The Government is seeking comments on the draft Summary Offences (Filming and Sexting Offences) Amendment Bill 2015.

The Bill will refine and update the offences in Part 5A of the Summary Offences Act 1953 (filming offences) in response to the emerging phenomena of sexting among young people and revenge porn, where sexting-type images of adults and minors are used (whether by adults or minors) as a tool of bullying, vilification or harassment or as a form of domestic violence.

There are already various existing offences in South Australia dealing with explicit images. The Criminal Law Consolidation Act 1935 provides for the offences of producing, disseminating or possessing child exploitation material knowing of its pornographic nature; or intending to obtain access to child exploitation material and obtaining or taking a step towards accessing child exploitation material. Child exploitation material is defined as material that is of a pornographic nature that describes or depicts a child under, or apparently under, the age of 17 years engaging in sexual activity; or consists of, or contains, the image of (or what appears to be the image of) a child under, or apparently under, the age of 17 years. Material of a pornographic nature is defined as material intended or apparently intended to excite or gratify sexual interest; or to excite or gratify a sadistic or other perverted interest in violence or cruelty.

In 2013, the Summary Offences Act was amended to insert new provisions (Part 5A) including the offences of engaging in humiliating and degrading filming (for assaults and other acts of violence) and the distribution of invasive images (for images of persons engaging in private acts and in a state of undress). The Summary Offences Act already included an offence of indecent filming including the distribution of such an image, which covered images of children aged under 16 years. However, unlike with the existing indecent filming offence, the new invasive image offence excluded images of a person who is under the age of 16 years. The rationale for this was so as not to intrude on the child exploitation offences under the Criminal Law Consolidation Act.

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1 In this paper, sexting is referred to as the sending of sexually explicit photographs or messages, typically via mobile phone.

2 In this paper, revenge porn is referred to as the publication of explicit material portraying someone who has not consented for the material to be shared, often with the purpose of causing humiliation, embarrassment or distress.
The Bill

The Summary Offences (Filming and Sexting Offences) Amendment Bill 2015 proposes to amend Part 5A of the Summary Offences Act to apply the current offence of distribution of an invasive image to the distribution of images depicting a minor, being a child under the age of 17 years, to create a new offence of threatening to distribute an invasive image or an image obtained from indecent filming, which would apply to both minors and adults, and to make other consequential and related amendments to the existing provisions.

The Bill will amend section 26C of the Summary Offences Act so the offence in section 26C of distributing an invasive image will apply to images where the party depicted is under 17 years. Under the Bill, the distribution of an invasive image of a minor will be a criminal offence attracting a fine of up to $20 000 or imprisonment for four years. The existing penalty for the offence of distributing an invasive image of an adult is unchanged, namely a fine of up to $10 000 or imprisonment for two years.

In order to prevent the criminalisation of the distribution of innocent images of minors, the definition of invasive image excludes an image of a person that falls within the standards of morality, decency and propriety generally accepted by reasonable adults in the community. This test is a familiar concept in the criminal law. This definition protects the innocent uses of images of minors but ensures that the distribution of explicit images of children that offend reasonable adults in the community applying the stated standards are captured. The distribution of such inappropriate images may also be captured under the child exploitation material offences in the Criminal Law Consolidation Act.

A new offence has been created, which will apply to invasive images or images obtained by indecent filming of adults or minors, to target persons who threaten to distribute such an image of another person, intending to arouse a fear that the threat will be carried out or being recklessly indifferent as to whether such a fear is aroused; a practice colloquially referred to as revenge porn. In many cases of revenge porn, the images are acquired in the context of a relationship or by way of consensual sexting. Such an offence will attract a penalty of up to a $10 000 fine or two years imprisonment if the image is of a minor and up to a $5000 fine or imprisonment for one year in any other case.
The Bill also makes related and consequential changes such as making the relevant age 17 years rather than the current 16 years for the section 26C and section 26D offences (consistent with the child exploitation material and other sexual offences in the Criminal Law Consolidation Act), updating the preferred terminology and definition of a cognitive impairment to invalidate any consent to the distribution of such images and incorporating female breasts in the definition of an invasive image and private region.

The Bill reflects changing social and technological trends and reaffirms standards of appropriate conduct, especially involving the use of invasive images depicting minors. It is important to avoid an assumption that young offenders who deal with explicit material depicting a child aged under 17 are simply naïve or misguided individuals. There are some young offenders who use such images as a form of unacceptable bullying (including as revenge porn). There will of course continue to be serious cases where a young person should be properly charged with an offence under the Criminal Law Consolidation Act.

The Bill will provide prosecuting authorities with greater flexibility and a wider range of offences to better reflect the nature of the offending conduct in a particular case as presently, offences involving invasive images depicting children aged under 17 can usually only be charged under the child exploitation material offences in the Criminal Law Consolidation Act.
How to make a comment

Comments on the draft Bill can be sent to:
Attorney-General’s Department
G.P.O. Box 464
ADELAIDE S.A. 5001

Email: LLPsubmissions@agd.sa.gov.au
Fax: (08) 8204 1337

This consultation will remain open until Friday 5 February 2016.

Please be aware that information contained in any submission may be referred to publicly or published. It may also be disclosed to applicants under the Freedom of Information Act. Readers should not assume that any of the proposed changes will necessarily be made. The Government will decide on any changes to the draft Bill only after considering all submissions.