



Northern Territory
Legal Aid Commission

SUBMISSION
BY NORTHERN TERRITORY LEGAL AID COMMISSION TO
LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY SOCIAL
POLICY SCRUTINY COMMITTEE

CRIMINAL CODE AMENDMENT (INTIMATE IMAGES) BILL 2017

1. The Northern Territory Legal Aid Commission (the Commission) supports the *Criminal Code Amendment (Intimate Images) Bill 2017* (the Bill) in principle, and commends the Attorney-General's initiative in substantially implementing the recommendations of the Northern Territory Law Reform Committee's Report No. 43 (the NTLRC Report), and in introducing legislation similar to that which has recently been enacted in New South Wales, Victoria and South Australia.
2. The Commission notes the amendments to the *Crimes Act 1900* (NSW) (the NSW Act) enacted by the *Crimes Amendment (Intimate Images) Act 2017* (NSW), which commenced on 25 August 2017, and proposes that the following provisions of the NSW Act be incorporated into the Bill:

2.1. Section 91N definitions of "intimate image", "engaged in a private act" and "private parts"

It is submitted that the NSW definitions are preferable because they are more precise and more comprehensive than the proposed NT s208AA definitions. In addition, the NSW Act definition of "intimate image" includes images recorded in "circumstances in which a reasonable person would reasonably expect to be afforded privacy". It is noted that the NTLRC Report also proposes that the definition of "intimate image" should make reference to an image that depicts a person "in a way that suggests the image is of an intimate or private nature" (p.35). The Commission supports this approach,

which, it is submitted, expresses a principle that underlies the categorical concept of “intimate images”.

The relevant NSW definitions are:

engaged in a private act means:

- (a) in a state of undress, or
- (b) using the toilet, showering or bathing, or
- (c) engaged in a sexual act of a kind not ordinarily done in public, or
- (d) engaged in any other like activity.

image means a still or moving image, whether or not altered.

intimate image means:

- (a) an image of a person’s private parts, or of a person engaged in a private act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy, or
- (b) an image that has been altered to appear to show a person’s private parts, or a person engaged in a private act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy.

private parts means:

- (a) a person’s genital area or anal area, whether bare or covered by underwear, or
- (b) the breasts of a female person, or transgender or intersex person identifying as female.

However, it is submitted that the provision in the Bill that “intimate image” include “an image that depicts or has been altered to appear to depict... a person in a manner or context that is sexual” be retained, so as to bring within the ambit of these provisions an image which in itself is innocuous, but which has been republished with, for example, an offensively sexual caption.

2.2. Section 91P: Record intimate image without consent

In accordance with Recommendations 2 and 3 of the Senate Legal and Constitutional Affairs References Committee Report on ‘Phenomenon colloquially referred to as “revenge porn”’ (appended to the NTLRC Report), the NSW Act criminalises both recording and distribution without consent (as well as threatening to engage in that conduct). The Bill, however, does not criminalise non-consensual recording of intimate images. Recording, as a pre-cursor to distribution, should be made an offence. It is noted that the existing section 12(1) of the *Surveillance Devices Act* (NT) captures much the same conduct as s91P of the NSW Act, but it is preferable that the offences, which have several common elements, be part of the same Division of the same statute. The NSW provision relevantly provides:

91P Record intimate image without consent

(1) A person who intentionally records an intimate image of another person:

(a) without the consent of the person, and

(b) knowing the person did not consent to the recording or being reckless as to whether the person consented to the recording,

is guilty of an offence.

2.3. Section 91T(d): “acceptable to a reasonable person”

Both the Bill (in relation to an image of a child or other person incapable of giving consent) and the NSW Act (generally) establish this defence, but the NSW Act is easier for tribunals of fact to apply because it sets out the matters that must be considered in determining whether the impugned conduct was acceptable, as follows:

a reasonable person would consider the conduct of the accused person acceptable, having regard to each of the following (to the extent relevant):

(i) the nature and content of the image,

(ii) the circumstances in which the image was recorded or distributed,

(iii) the age, intellectual capacity, vulnerability or other relevant circumstances of the person depicted in the image,

(iv) the degree to which the accused person’s actions affect the privacy of the person depicted in the image,

(v) the relationship between the accused person and the person depicted in the image.

It is submitted that the NSW provisions be inserted into the Bill, and that they be generally applicable.

3. Section 208D: Prosecution of child to be approved

This provision reflects the view expressed in the NTLRC Report (p. 34) that the prosecution of children for these offences should be limited. It is submitted that the Bill should also expressly provide that Part VI Division 7A offences are not “serious offences” for the purpose of section 39 of the *Youth Justice Act*. This would give effect to the view of the NTLRC that youth diversion should be offered in the first instance, and the laying of these charges against children should only be a last resort.

4. Take-down powers

Proposed section 208AE empowers a court to order offending images to be taken down, but only after an offender has been found guilty. The NTLRC Report makes the following salient observation (p. 42):

The fundamental issue for most individuals faced with publication of intimate images is that there is both an ongoing affront to their dignity and an ongoing invasion of their privacy. The continuing nature of the affront (open to a large portion of the family, friends and work colleagues of the victim and, often, to the world at large) is of particular importance in establishing appropriate remedies. Further, we live in a digitally-connected world where publication is instant, as is the ability to share the image. The remedies for victims must match this environment. *In such cases, every minute counts* [emphasis added].

It is submitted that the Bill fails to adequately address this important issue, and that it should be revised to give effect to Recommendation 7 of the NTLRC Report, which proposes that either through an administrative scheme or by way of ex parte injunctive relief, measures be enacted to provide a rapid remedy to victims to restrict the further distribution of non-consensual intimate images.

5. Compensation orders

It is submitted that when dealing with offenders under Part VI Division 7A, the court be conferred power to make a compensation order in addition to sentence, pursuant to Part 5 of the *Sentencing Act 1995* (NT). In its current form, s 88 of the *Sentencing Act* does not appear to be applicable to these offenders.

As the NTLRC Report explains, civil remedies may be available to affected victims, but “such a process will inevitably be time-consuming and expensive” (p. 19). The NTLRC Report adverts to the power of courts in NSW to make compensation orders pursuant to s97(1) of the *Victims Rights and Support Act 2013* (NSW) (p. 24).

Given that in many cases, a prominent aspect of the offending is a malicious intent to harm the victim (as is implied by the colloquial expression “revenge porn”), these offences are ones for which it is particularly apt to confer on courts the power to impose compensation orders in appropriate cases. This restorative justice approach punishes the offender while benefitting the victim.

6. Privacy of victims

It is submitted that victims of Part VI Division 7A offences should be afforded protection similar to that provided to victims of sexual offences by the *Sexual Offences (Evidence and Procedure) Act* (NT), s6 of which relevantly provides:

[A] report made or published concerning an examination of witnesses or a trial shall not reveal the name, address, school or place of employment of a complainant or any other particular likely to lead to the identification of a complainant, unless the court makes an order to the contrary.

Thank you for the opportunity to contribute to the process of enacting this significant item of legislation.