



24 January 2018

Ms Julia Knight
Committee Secretary
GPO Box 3721
Darwin
NT 0801

Dear Ms Knight,

Re: Criminal Code Amendment (Intimate Images) Bill 2017

We welcome the opportunity to provide feedback on the Northern Territory's Criminal Code Amendment (Intimate Images) Bill 2017. Our submission expresses our views on the proposed legislation. Overall, we agree that the Assembly should pass the Bill with slight amendments, and that the Bill in its current form has sufficient regard to the rights and liberties of individuals and the institution of Parliament.

IBSA DEFINITION & RESEARCH

We are criminologists and socio-legal scholars who have recently completed a Criminology Research Council project (CRG08/15-16) on image-based sexual abuse (IBSA) – also known as “revenge pornography”. We are currently conducting a multi-country project on IBSA, funded by the Australian Research Council (ARC) (with Professors Clare McGlynn (Durham University, UK), Erika Rackley (University of Birmingham, UK & Nicola Gavey (University of Auckland, NZ) DP170101433). We define IBSA as encompassing three key behaviours: (1) the non-consensual taking of nude or sexual images; (2) the non-consensual sharing of nude or sexual images; and (3) the making of threats to share nude or sexual images.

Our research involves a mixed-methods approach to understanding the nature, prevalence and impacts of IBSA, as well as the legal and non-legal responses to this growing problem. Our 2016 national survey of Australians aged 16 to 40 years (n = 4,274), found that 1 in 5 respondents (22.7%) reported experiencing at least one form of IBSA. Most common were nude or sexual images being *taken* without the respondent's consent (20.2%), followed by nude or sexual images being sent onto others or *distributed* without consent (10.6%), and finally, experiencing *threats*

that a nude or sexual image would be sent onto others or distributed without consent (8.6%) (Henry, Powell & Flynn, 2017).

Significantly, victimisation was more common among marginalised groups, including young people, lesbian, gay and bisexual people, Aboriginal and Torres Strait Islander people and those disclosing a disability. Our findings included the following:

- 1 in 2 Indigenous Australians reported IBSA victimisation;
- 1 in 2 Australians with a disability reported IBSA victimisation;
- 1 in 3 lesbian, gay and bisexual Australians reported IBSA victimisation;
- 1 in 3 young people aged 16 to 19 years reported IBSA victimisation;
- 1 in 4 of those aged 20 to 29 years reported IBSA victimisation; and
- 1 in 2 respondents had experienced pressure/coercion to send sexual self-images (Henry, Powell & Flynn, 2017).

Our research thus demonstrates that IBSA is common amongst the Australian population, with wide-ranging and significant impacts. Although we are highly supportive of the introduction of new criminal laws, we also note the limitations of this one mechanism alone, and as such, more broadly support a range of different legal and non-legal options to address and prevent IBSA.

FEEDBACK

208AB: Distribution of intimate image without consent:

- Subsection (1) contains confusing wording. Currently the proposed new section states:

(1) A person commits an offence if the person: (a) intentionally distributes an image of another person; and (b) the image is an intimate image and the person is reckless in relation to that circumstance; and (c) the other person did not consent to the distribution and the person is reckless as to the lack of consent.

We suggest it be changed to:

(1) A person commits an offence if the person: (a) intentionally distributes an intimate image of another person; and (b) knows that the other person did not consent to the distribution or is reckless as to whether or not the person consented to the distribution.

- Subsection (3) contains confusing wording. Currently the proposed new subsection states:

(3) A person under the age of 16 years is taken to be incapable of consenting to the distribution of an intimate image of the person.

Below we propose that this subsection is removed from the bill, however if the decision is made to retain it, we suggest it be changed to:

(3) A person under the age of 16 years is taken to be incapable of consenting to the distribution of their own intimate image.

- Subsection (4). Currently the proposed new subsection states:

(4) A person who consents to the distribution of an intimate image on a particular occasion is not, by reason only of that fact, to be regarded as having consented to the distribution of that image or any other image on another occasion.

We suggest the word “further” be added so that it reads as follows:

(4) A person who consents to the distribution of an intimate image on a particular occasion is not, by reason only of that fact, to be regarded as having consented to the further distribution of that image or any other image on another occasion.

- Subsection (6) contains confusing wording. Currently the proposed new subsection states:

(6) A person who distributes an intimate image of the person is not, by reason only of that fact, to be regarded as having consented to any other distribution of the image.

We suggest it be changed to:

(6) A person who distributes an intimate image to another person is not, by reason only of that fact, to be regarded as having consented to any other distribution of the image.

208AC Threaten to distribute intimate images

- The proposed legislation has incorporated the principles outlined in the *National Statement of Principles*. We do propose, however, that subsection (1) be amended to specifically state that the offence occurs “irrespective of whether or not the intimate image exists”, to more fully reflect the *National Statement of Principles* (number 7). Currently the wording is as follows:

(1) A person commits an offence if the person: (a) intentionally threatens to distribute an intimate image of another person; and (b) intends the other person to fear that the threat would be carried out.

We suggest it be changed to:

(1) A person commits an offence if the person: (a) intentionally threatens to distribute an intimate image of another person, irrespective of whether or not the image exists; and (b) intends the other person to fear that the threat would be carried out.

Absence of any criminal offences on the non-consensual recording of intimate images

- We note the absence of any specific criminal offences relating to the non-consensual recording of intimate images (e.g. “upskirting” and “downblousing”) and/or surreptitious filming of intimate images in either public or private places in either the existing *Criminal Code Act* in Part VI or the proposed Criminal Code Amendment (Intimate Images) Bill 2017. We recommend that the proposed legislation include an additional “non-consensual recording” offence, similar to that introduced in New South Wales and the Australian Capital Territory in 2017. We suggest the following:

Recording intimate images without consent

(1) A person commits an offence if the person: (a) intentionally records an intimate image of another person; and (b) knows that the other person did not consent to the recording or is reckless as to whether or not the person consented to the recording.

Maximum penalty: Imprisonment for 3 years.

(2) Subsection (1) does not apply to the recording of an intimate image in the following circumstances: [insert circumstances]

Young people

- In relation to young people, we are of the view that the consensual taking and sharing of intimate images among young people under the age of 16 should not be considered criminal offences for either party, as long as there is a 2 year or less difference in age. We support wording to that effect. We also believe that where a minor distributes an intimate image of another minor that they should not be subjected to child abuse material charges, unless in exceptional circumstances (e.g. the nature of the image or circumstances would warrant that it be considered as child abuse material), but instead, such individuals should be

charged under the proposed new legislation. In general, we believe that careful consideration should be made in relation to criminalising children who take or share images without consent, and that criminal charges should only be used as a last resort. We also suggest removing the following subsection under 208AB:

(3) A person under the age of 16 years is taken to be incapable of consenting to the distribution of an intimate image of the person.

In conclusion, we strongly support changes to criminal laws in the Northern Territory and elsewhere in Australia to address the problem of image-based sexual abuse. Any reforms to laws, however, should be implemented in conjunction with a range of other legal (e.g. civil) and non-legal remedies, as well as support services and education.

Thank you for considering our submission. We are happy to respond to any further questions. We are also happy for this submission to be made public.

Yours sincerely,



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Reference

Henry, N, Powell, A & Flynn, A (2017) *Not Just 'Revenge Pornography': Australians' Experiences of Image-based Abuse: A Summary Report*. Melbourne: RMIT University.