



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

13th Assembly

SOCIAL POLICY SCRUTINY COMMITTEE

Public Briefing Transcript

11.00 am, Wednesday 31 January 2018

Litchfield Room, Level 3, Parliament House, Darwin

INQUIRY INTO CRIMINAL CODE AMENDMENT (INTIMATE IMAGES) BILL 2017

Members:

Ms Ngaree Ah Kit MLA, Chair, Member for Karama

Mrs Robyn Lambley MLA, Deputy Chair, Member for Araluen

Ms Sandra Nelson MLA, Member for Katherine

Witnesses:

Greg Shanahan: Chief Executive Officer, Department of the Attorney-General and Justice

Jenni Daniel-Yee: Director Legal Policy, Department of the Attorney-General and Justice

Fiona Hardy: Senior Policy Lawyer, Department of the Attorney-General and Justice

CRIMINAL CODE AMENDMENT (INTIMATE IMAGES) BILL 2017

Madam CHAIR: On behalf of the committee, I welcome everyone to this public briefing on the Criminal Code Amendment (Intimate Images) Bill 2017.

I welcome to the table the following representatives from the Department of the Attorney-General and Justice, Mr Greg Shanahan, Chief Executive Officer; Ms Jenni Daniel-Yee, Director Legal Policy; and on the phone we have Fiona Hardy, the Senior Policy Lawyer. Thank you for appearing before the committee this morning; we appreciate you taking the time to speak to us and look forward to hearing from you today.

This is a formal proceeding of the committee and the protection of parliamentary privilege and the obligation not to mislead the committee apply. This is a public briefing and is being webcast through the Assembly's website. A transcript will be made for the use of the committee and may be put on the committee's website. If at any time during the briefing you are concerned that what you will say should not be made public, you may ask that the committee go into a closed session and take your evidence in private.

I will ask each witness to state their name for the record and the capacity in which they appear. I will then ask you to make a brief opening statement before proceeding to the committee's questions. Could you please each state your name and the capacity in which you are appearing?

Mr SHANAHAN: I am Greg Shanahan, Chief Executive Officer, Department of the Attorney-General and Justice.

Ms Daniel-Yee: Jenni Daniel-Yee, Director of Legal Policy, Department of the Attorney-General and Justice.

Madam CHAIR: Thank you, and Fiona?

Ms HARDY: Hello, I am Fiona Hardy. I am a Senior Policy Lawyer at the Department of the Attorney-General and Justice and I am the action officer for the development of this bill.

Madam CHAIR: Thank you very much. Mr Shanahan, do you have an opening statement?

Mr SHANAHAN: No.

Madam CHAIR: I open it to the committee for any questions on the Criminal Code Amendment (Intimate Images) Bill 2017.

Mrs LAMBLEY: Once again, if you could provide us with a general overview of what this legislation is and some of the more contentious aspects to what the legislation proposes please?

Mr SHANAHAN: I think the plan was Fiona to lead you through that.

Mrs LAMBLEY: Could you just provide an overview of this legislation and maybe highlight the more contentious issues for changes that it might mean please?

Ms HARDY: Okay. The Bill addresses what is perceived (inaudible) fairly worldwide area and the disturbing conduct which has become increasingly prevalent in Australia and internationally, in terms of distribution of intimate images of a person without that person's consent.

You might have heard of this kind of conduct being described as 'revenge porn' and it is a phrase that is not really in favour (inaudible) phrase. It is not just about revenge and it is not about pornography. There are many reasons why people distribute these kinds of images. Sometimes it is about revenge, sometimes it is about humiliation, financial gain, coercion, manipulation, a whole load of reasons.

In any event, what has been noted over the last few years is the limited capacity of the criminal law to address this kind of behaviour. It was not such a big issue before the exponential growth of social media and the internet, but it is becoming much more of an issue.

A number of jurisdictions in Australia have introduced criminal offences and we are doing the same. Our offences are—they are not so much copied but they are certainly drawn from the offences that have been introduced in other jurisdictions. There have been considerable (inaudible) history behind this bill and consultations—would you like me to go into that just briefly before talking about the bill?

Madam SPEAKER: Yes please.

Ms HARDY: There is a lot happening both at the Commonwealth level and at the Territory level. In February 2016, the Commonwealth Senate Legal Constitutional Affairs References Committee published a report on the phenomenon colloquially referred to as ‘revenge porn’. It recommended that the Commonwealth and the states and territories enact specific offences criminalising this kind of behaviour.

At that time Northern Territory Police and the Top End Women’s Legal Service made submissions to the senate committee. They were supportive of that criminalisation.

The Commonwealth did introduce a bill themselves before the parliament was prorogued in 2016 and that subsequently lapsed. Also, happening around about the same time COAG requested from the Law, Crime and Community Safety Council to provide a report addressing technology facilitated abuse towards women. And the Law, Crime and Community Safety Council tasked the National Cybercrime Working Group to provide this report.

I was the NT representative on that working group and we developed a set of national principles which were then presented to the LCCSC meeting in May 2017, endorsed by ministers and subsequently released in May 2017. In the Territory, at the same time, the previous Attorney-General commissioned a report on non-consensual sharing of intimate images from the Northern Territory Law Reform Committee and that was subsequently provided to the current Attorney-General after the change of government, and she released that report in May 2017. These are the sort of things that were going on in the background.

South Australia introduced specific offences in 2013, Victoria in 2014 and then just last year, after the national principles had been endorsed by ministers, New South Wales and the ACT introduced legislation. The bill we have developed follows very closely on the ACT bill in particular. There was quite a lot of liaison about captions with the action officer who worked in the department in the ACT, looking at what issues had arisen in the development of their bill. We worked from that.

Basically, the bill introduces three new offences to the *Criminal Code*—one of non-consensual sharing of intimate images, one of threatening to share an intimate image and one of failing to comply with a court order if a court orders some action be taken in relation to taking down or removing an intimate image from a website, for example. That, in a nutshell, is what the bill does.

It is acknowledged that criminalising this kind of conduct is really the tip of the iceberg. That has been acknowledged in all the reports that have been written. A lot of this issue or phenomenon needs to be addressed in other ways – for example, education and awareness of the harm this type of behaviour can cause – and providing more of a civil or administrative remedy, as states and territories have very limited capacity to order an Internet provider of something like Facebook to take down an image.

Very recently, on 6 December, the Commonwealth introduced a bill into the Senate—which hopefully will progress further when Commonwealth parliament commences sittings this year—which will provide investigative powers to the eSafety Commissioner and a civil regime with civil penalties and take-down powers. At a Commonwealth level, that kind of power will be far more effective than anything the states and territories can do.

Madam CHAIR: Thank you for that, Fiona. Are there any further questions from the committee?

Ms NELSON: I have a couple. This is Sandra Nelson, Member for Katherine. I have a question in regard to the prosecution of a child, section 208D.

Ms HARDY: Yes.

Ms NELSON: There is that section and a comment made in one of the submission from Monash University about a person under the age of 16 years is taken to be incapable of consenting to the distribution of their own intimate image.

Ms HARDY: Yes.

Ms NELSON: Then we have prosecution of a child section. I am a bit confused. If they are under the age of 16 and are incapable of consenting to their image being distributed, could that logic or thought be applied to the person who has posted it that is under the age of 16? I want to get some clarity on that.

Ms HARDY: I am sorry. I missed a little of that because the connection is not very good. There are two separate issues there. The main offence is about the non-consensual sharing of intimate images ...

Ms NELSON: Yes.

Ms HARDY: Amongst adults, people might want to share intimate images. Who knows? They might just not want to share amongst themselves, they might want to share them on a wider basis. As long as that is consensual, that is fine.

We have, though, put a safeguard into the bill in relation to children, which is that children under the age of 16 cannot give that consent. So, if a child is under the age of 16 says, 'I do not care, you can show this image to anyone', we are saying, 'No, you cannot. That child needs to be protected'. That is the same protection that is offered in other parts of the Criminal Code in relation to sexual offences that a child under the age of 16 cannot give free and voluntary consent, and that protects the child.

The issue of prosecuting a child—the prosecution is in relation to distribution. For example, you have a 16-year-old girl—we will put someone over the age of 16—a 16 year old girl sends an intimate picture to her 17-year-old boyfriend. The 17-year-old boyfriend gets his phone out at school and shows his mates, and goes, 'look guys, look at this, look at this, look how hot she is'. He has no permission to do that. He is technically committing an offence. We have put in section 208AD to offer some kind of protection, I suppose, to perpetrators as well if the perpetrators are children, so that we do not over criminalise what might just be stupid or naïve behaviour, that is better addressed through education and through awareness of the harm that that kind of behaviour caused.

The demographic that this legislation is aimed at, is not children. It is not aimed at prosecuting children. However, there may be instances where a person under the age of 18 is engaging in such serious behaviour that they ought to be prosecuted. That is why we have put that safeguard in 208AD, to say that it is up to the Director of Public Prosecutions, it is not just up to the police to say we think we will lay a charge here, it is up to the Director of Public Prosecutions for that (inaudible) safeguard.

One of the reasons for that is that is has been noted in Victoria that, I think the (inaudible) is that their legislation was introduced in 2014. Between 2014 and 2017, 30% of prosecutions were children, and this is not what the legislation really is aimed at. The fact that that was happening suggests that there is some kind of problem somewhere. Whether it is educating the police about whether they should be prosecuting, I do not know.

I do not know whether anything has been done to rectify that, because those figures only go up to 2017. We do not want that happening in the Northern Territory.

Ms NELSON: I agree with you, but the number of young adults under the age of 18 engaging in this sort of behaviour has been increasing—it has been a steady increase over the last five years.

Ms HARDY: Yes, definitely.

Ms NELSON: Along with the legislation obviously we need to be providing a lot more education in the schools, community organisations and all of that. I was just a little confused because if we have put the legislation up and it says that kids under the age of 16 are incapable of providing that consent, are kids under the age of 16 incapable of understanding the seriousness of putting an intimate image up or sharing it—does what I am saying make sense to you?

Ms HARDY: I think I understand what you are saying, and I think two different issues are being conflated. I think people say that a person under the age of 16 can understand that you cannot share somebody else's image. That is what it is about. It is about sharing somebody else's image. It is not about sharing your own image, it is somebody else's image. It is not your property it is their property, so to speak. That is the difference. I do not know if that is entirely clear.

Our department will be working with Department of Education, Territory Families, the Children's Commissioner and NT police in getting the message out there and helping them to get the message out there. In addition—just very briefly, last year, the Commonwealth eSafety Commissioner launched an online portal that has lots of useful information for people and that is another thing we will be communicating in the Northern Territory, that this is available to people as well.

Ms NELSON: Yes, we definitely need to be promoting that eSafety portal a lot more.

The Member for Araluen has a question so we will swap the phone over.

Mrs LAMBLEY: How do you determine consent between adults?

Ms NELSON: That is a good question.

Ms HARDY: Consent is defined as a free and voluntary agreement. We have consent in many aspects of the criminal law and it has to be determined on a case by case basis.

Mrs LAMBLEY: I guess I am not overly familiar with this topic. There must be cases in which images are sent to people who do not particularly want to receive them. What is the law around that, is this related? I can think of one case most of us are aware of in which it seems the woman did not want to receive the images of the man's genitals.

Ms HARDY: That is absolutely true. These offences do not address that kind of behaviour. That is another issue entirely.

Mrs LAMBLEY: Fair enough. Thank you, Fiona.

Ms HARDY: There is also another side to the issue. I think it has a name, 'sending dick pics', or something, that is its technical name.

Ms NELSON: Did she say that is a technical name?

Ms HARDY: I could take that question on notice and look into it further but all I can say is these offences do not cover that behaviour.

Mrs LAMBLEY: Thanks, Fiona. That is okay, if it is not relevant then that is okay.

Ms HARDY: In a way it is the use of technology to facilitate some kind of abuse.

Madam CHAIR: Thank you. I have a few questions in regards to this bill. I am wondering whether this legislation will apply to—I have heard a few instances where somebody has posted somebody else's image on either a dating site or porn site. Would this be covered under this legislation or a different part of a different legislation? It might not be an intimate picture but I think the intent behind it is pretty much the same as the intent of this legislation.

Ms HARDY: Yes, unless it falls within the definition of an intimate image then it would not fall within this legislation. This is something we considered in how wide the definition of an intimate image should be. The Northern Territory Law Reform Committee made a recommendation, I think it is recommendation three, that the definition be confined to having some kind of sexual nature to it; we have gone with that definition. It either has to involve some kind of sexual nature or nudity.

Madam CHAIR: Thank you for that.

The second question I have, Fiona, in regards to, let us say modelling in a public place of children under the age of 16. We know how prevalent Facebook, Twitter, Instagram and a whole raft of other social

media platforms are. What lies behind the consent if there is a 15-year-old swimsuit model in a bikini which could be deemed as an intimate image which has been posted on Facebook? There is a very easy mechanism to share other people's images or posts. Just because they post it does not necessarily mean they give permission for everyone else to post it, especially if they are under age and cannot have that consent. I guess there would be a raft of education tools around this should the legislation get passed to educate people about the non-consensual sharing of information from a minor?

Ms HARDY: That is exactly right. Education will be a major aspect of this, both about this legislation and how it will operate and the harm that can be caused by sharing these kinds of images. I do not know that a person posing in a swimsuit will fall within this, as far as I can see.

Madam CHAIR: If they were in a bikini and there is a very close up, could that be deemed, perhaps?

Ms NELSON: They've posted that image ...

Ms HARDY: (inaudible) on this.

Madam CHAIR: Sorry, what was ...

Ms HARDY: The thing is with any definition you have in criminal legislation—we try to do the best we can. I know there has been a submission made by the Information Commissioner and we will be looking at what she has said. You may have some questions about that subsequently, I am not sure, as to the breadth of the definitions we have. However, whatever definition that is finally determined, either in this legislation or any other legislation, there will always have to be some kind of prosecutorial discretion and common sense. You cannot legislate for every single scenario, I do not think.

Madam CHAIR: Thank you, Fiona. I do not think the committee members have any more questions in regard to this bill. Are there any final comments the department would like to leave the committee with today? No? Thank you very much for taking the time out of your schedule today, Fiona. We appreciate you being available on the line to answer our questions for today's briefing.

Ms HARDY: Okay. Certainly. It was a pleasure.

Madam CHAIR: Thank you very much.

And thank you, Jenni and Greg, for your time as well. Thank you, Fiona. Bye.

Ms HARDY: Thank you.

Madam CHAIR: Thank you very much. The committee will now take a five-minute break. Our next briefing will occur at 11.30 on the Adoption of Children Legislation Amendment (Equality) Bill 2017.

The committee suspended.
