



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Social Policy Scrutiny Committee

**Inquiry into the Criminal Code
Amendment (Intimate Images)
Bill 2017**

March 2018

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Chair's Preface

This report details the Committee's findings regarding its examination of the Criminal Code Amendment (Intimate Images) Bill 2017. The Bill amends the *Criminal Code Act* to address the growing community concern about the non-consensual sharing of intimate images. It introduces two new offences of distributing an intimate image without consent and threatening to distribute an intimate image without consent. The Bill also empowers a court to order rectification where a person is found guilty of one of the new offences.

The Committee has recommended that the Assembly pass this important piece of legislation with the proposed amendments as set out in the recommendations. To reduce the risk of inadvertently capturing conduct that the Bill does not intend to criminalise, the Committee has recommended that the definition of intimate image be tightened. The Committee has also proposed amendments that go to ensuring the protection, respect and minimisation of harm to victims.

Based on the evidence received, the Committee has recommended that prompt consideration be given to the introduction of an additional offence regarding the non-consensual recording of intimate images. Finally, the Committee has recommended that introduction of the proposed legislation is combined with a comprehensive public education and awareness campaign.

On behalf of the Committee, I would like to thank all those who made submissions or appeared before the Committee. Their input has been invaluable. The Committee also thanks the Department of the Attorney-General and Justice for their advice.

I would also like to thank the members of the Committee for their bipartisan commitment to the legislative review process.



Ms Ngaree Ah Kit MLA

Chair

Committee Members

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Acknowledgements

The Committee acknowledges the individuals and organisations that provided written submissions to the inquiry or oral evidence at public hearings.

Terms of Reference

Sessional Order 13

Establishment of Scrutiny Committees

- (1) Standing Order 178 is suspended.
- (2) The Assembly appoints the following scrutiny committees:
 - (a) The Social Policy Scrutiny Committee
 - (b) The Economic Policy Scrutiny Committee
- (3) The Membership of the scrutiny committees will be three Government Members and one Opposition Member nominated to the Speaker in writing by the respective Whip and one non-party aligned Member to be appointed by motion.
- (4) The functions of the scrutiny committees shall be to inquire and report on:
 - (a) any matter within its subject area referred to it:
 - (i) by the Assembly;
 - (ii) by a Minister; or
 - (iii) on its own motion.
 - (b) any bill referred to it by the Assembly;
 - (c) in relation to any bill referred by the Assembly:
 - (i) whether the Assembly should pass the bill;
 - (ii) whether the Assembly should amend the bill;
 - (iii) whether the bill has sufficient regard to the rights and liberties of individuals, including whether the bill:
 - (A) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
 - (B) is consistent with principles of natural justice; and
 - (C) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
 - (D) does not reverse the onus of proof in criminal proceedings without adequate justification; and
 - (E) confers powers to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
 - (F) provides appropriate protection against self-incrimination; and
 - (G) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

- (H) does not confer immunity from proceeding or prosecution without adequate justification; and
 - (I) provides for the compulsory acquisition of property only with fair compensation; and
 - (J) has sufficient regard to Aboriginal tradition; and
 - (K) is unambiguous and drafted in a sufficiently clear and precise way.
- (iv) whether the bill has sufficient regard to the institution of Parliament, including whether the bill:
- (A) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and
 - (B) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and
 - (C) authorises the amendment of an Act only by another Act.
- (5) The Committee will elect a Government Member as Chair.
- (6) Each Committee will provide an annual report on its activities to the Assembly.

Adopted 24 August 2017

Recommendations

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Criminal Code Amendment (Intimate Images) Bill 2017 with the proposed amendments set out in Recommendations 2, 3, 4 and 5.

Recommendation 2

The Committee recommends that paragraphs (a) and (b) of the proposed definition of 'intimate image' in proposed section 208AA be amended to read as follows:

- (a) a person engaged in a sexual act of a kind not reasonably expected to be done in public;
- (b) a person in a manner or context that is sexual and of a kind not reasonably expected to be displayed in public;

Recommendation 3

The Committee recommends that proposed section 208AB(2) be amended to include the following, generally applicable, defence provision:

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.

Recommendation 4

The Committee recommends that proposed section 208AE be amended to include provision for the Northern Territory Police, or the individual whose intimate image has been posted, to apply to the Local Court for an ex parte injunctive order to take-down, and not permit the republication of, any intimate images.

Recommendation 5

The Committee recommends that the Bill be amended to include provision for a court to order compensation in the following terms:

A court may order a person found guilty by the court of an offence under this Division to pay compensation to the aggrieved for any loss or harm sustained through, or by reason of, the offence.

Recommendation 6

The Committee recommends that the Government give prompt consideration to the introduction of an offence of 'recording of intimate image without consent'.

Recommendation 7

The Committee recommends that introduction of the proposed legislation is combined with a comprehensive public education and awareness campaign that takes into consideration available research and the comments of the Northern Territory Law Reform Committee.

1 Introduction

Introduction of the Bill

- 1.1 The Criminal Code Amendment (Intimate Images) Bill 2017 (the Bill) was introduced into the Legislative Assembly by the Attorney-General and Minister for Justice, the Hon Natasha Fyles MLA, on 23 November 2017. The Assembly subsequently referred the Bill to the Social Policy Scrutiny Committee for inquiry and report by 13 March 2018.¹

Conduct of the Inquiry

- 1.2 On 24 November 2017, the Committee called for submissions by 24 January 2018. The call for submissions was advertised via media release, the Legislative Assembly website, Facebook, Twitter feed and email subscription service. In addition, the Committee directly invited a number of individuals and organisations to provide a submission on the Bill.
- 1.3 As noted in Appendix A, the Committee received five submissions to its inquiry. The Committee held a public briefing with the Department of the Attorney-General and Justice on 31 January 2018 and a public hearing with eight witnesses in Darwin on 14 February 2018.

Outcome of Committee's Consideration

- 1.4 Sessional order 13(4)(c) requires that the Committee after examining the Bill determine:
- (i) whether the Assembly should pass the bill;
 - (ii) whether the Assembly should amend the bill;
 - (iii) whether the bill has sufficient regard to the rights and liberties of individuals; and
 - (iv) whether the bill has sufficient regard to the institution of Parliament.
- 1.5 Following examination of the Bill, and consideration of the evidence received, the Committee is of the view that the Legislative Assembly should pass the Bill with the proposed amendments set out in Recommendations 2, 3, 4 and 5.

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Criminal Code Amendment (Intimate Images) Bill 2017 with the proposed amendments set out in Recommendations 2, 3, 4 and 5.

¹ Parliamentary Record, (Hansard) and Minutes of Proceedings, 13th Assembly, Debates, 08/02/2018, https://parliament.nt.gov.au/_data/assets/pdf_file/0008/482309/DEBATES-DAY-3-8-FEBRUARY-2018.pdf, pp. 4-8

Report Structure

- 1.6 Chapter 2 provides an overview; of the policy objectives of the Bill and the purpose of the Bill as contained in the Explanatory Statement.
- 1.7 Chapter 3 considers the main issues raised in evidence received.

2 Provisions of the Bill

Background to the Bill

- 2.1 In presenting the Bill, the Attorney-General and Minister for Justice noted that the non-consensual sharing of intimate images, commonly referred to as ‘revenge porn’, is “an increasingly concerning and increasingly prevalent behaviour both in Australia and overseas” that has been facilitated by advances in technology and the rise in a range of social media platforms.²
- 2.2 In response to the growing concern regarding the capacity of the criminal law to address this issue, in November 2015 the Senate referred the matter to the Legal and Constitutional References Committee for inquiry and report. The Committee’s report, *Phenomenon colloquially referred to as ‘revenge porn’*, was published in February 2016 and recommended that the states and territories enact legislation with specific offences for:
- knowingly or recklessly recording an intimate image without consent;
 - knowingly or recklessly sharing intimate images without consent; and
 - threatening to take and/or share intimate images without consent, irrespective of whether or not those images exist.³
- 2.3 The previous Northern Territory Attorney-General and Minister for Justice, the Hon John Elferink MLA, subsequently commissioned the Northern Territory Law Reform Committee to:
- investigate, examine and report on law reform in relation to the practice of using intimate personal material to intimidate, hurt or extort others.⁴
- Following the change of Government, the Law Reform Committee’s *Report on the Non-Consensual Sharing of Intimate Images* (the NTLRC Report) was released in May 2017. The report made seven recommendations which, as noted by the Attorney-General and Minister for Justice, “the Territory Labor government broadly supports.”⁵
- 2.4 In May 2017, state and territory Attorneys-General, Justice and Police Ministers endorsed the *National Statement of Principles Relating to the Criminalisation of Non-Consensual Sharing of Intimate Images* (the *National Principles*). Developed by the cross-jurisdictional National Cybercrime Working Group and established under the former Law, Crime and Community Safety Council, the *National Principles* build on

² Parliamentary Record, (Hansard) and Minutes of Proceedings, 13th Assembly, Debates, 23/11/2017, https://parliament.nt.gov.au/_data/assets/pdf_file/0017/463202/DEBATES-DAY-3-23-NOVEMBER-2017.pdf, p.4

³ Senate Legal and Constitutional Affairs References Committee, *Phenomenon colloquially referred to as ‘revenge porn’*, Commonwealth of Australia, Canberra ACT, February 2016, p.vii

⁴ Northern Territory Law Reform Committee, *Report on the Non-Consensual Sharing of Intimate Images*, Report No. 43, November 2016, <https://justice.nt.gov.au/attorney-general-and-justice/law/report-on-the-non-consensual-sharing-of-intimate-images>, p.6

⁵ Parliamentary Record, (Hansard) and Minutes of Proceedings, 13th Assembly, Debates, 23/11/2017, https://parliament.nt.gov.au/_data/assets/pdf_file/0017/463202/DEBATES-DAY-3-23-NOVEMBER-2017.pdf, p.4

the “progress by all jurisdictions to prevent technology-facilitated abuse”⁶ and identify non-binding, best practice principles for “nationally consistent criminal offences relating to non-consensual sharing of intimate images.”⁷

- 2.5 Drawing on the legislation enacted in other Australian jurisdictions, and taking into consideration the recommendations of the Northern Territory Law Reform Committee and the *National Principles*, the Criminal Code Amendment (Intimate Images) Bill seeks to address the:

growing community concern about the sharing of intimate images of a person without that person’s consent.⁸

Purpose and Overview of the Bill

- 2.6 As noted in the Explanatory Statement, the purpose of the Criminal Code Amendment (Intimate Images) Bill is to amend the *Criminal Code Act* to address the non-consensual sharing of intimate images. The Bill introduces two new offences of non-consensual sharing of an intimate image and threatening to share an intimate image, each with a maximum penalty of 3 years imprisonment.
- 2.7 The Bill also introduces an ancillary power for a court to order rectification when a person is found guilty of one of the new offences. Breach of the court order carries a maximum penalty of 2 years imprisonment.⁹

⁶ Law, Crime and Community Safety Council, *National Statement of Principles Relating to the Criminalisation of the Non-Consensual Sharing of Intimate Images*, <https://www.ag.gov.au/CrimeAndCorruption/Cybercrime/Documents/National-statement-of-principles-criminalisation-non-consensual-sharing-intimate-images.PDF>, p.1

⁷ Law, Crime and Community Safety Council, *National Statement of Principles Relating to the Criminalisation of the Non-Consensual Sharing of Intimate Images*, <https://www.ag.gov.au/CrimeAndCorruption/Cybercrime/Documents/National-statement-of-principles-criminalisation-non-consensual-sharing-intimate-images.PDF>, p.1

⁸ Explanatory Statement, *Criminal Code amendment (Intimate Images) Bill 2017 (Serial No. 38)*, <https://parliament.nt.gov.au/committees/spsc/CCA>, p.1

⁹ Explanatory Statement, *Criminal Code amendment (Intimate Images) Bill 2017 (Serial No. 38)*, <https://parliament.nt.gov.au/committees/spsc/CCA>, p.1

3 Examination of the Bill

Introduction

- 3.1 All of the submissions received noted their 'in principle' support for the Bill. In a number of instances clarification was sought on the anticipated operation of the Bill. Submitters also provided suggestions as to how the Bill might be improved. The following discussion considers the main issues raised in the evidence received and the responses to the Committee's written questions provided by the Department of the Attorney-General and Justice (the Department).

Definition of Intimate Image

- 3.2 Proposed section 208AA defines 'intimate image' as a moving or still image in any form that depicts or has been altered to depict:
- (a) a person engaged in a sexual act; or
 - (b) a person in a manner or context that is sexual; or
 - (c) the genital or anal region of a person, whether bare or covered by underwear; or
 - (d) a breast, whether bare or covered by underwear of a female person or a transgender or intersex person who identifies as female.
- 3.3 A number of witnesses were concerned that the definition is too broad and may inadvertently capture innocuous and everyday imagery that the Bill does not intend to criminalise.¹⁰ The NT Legal Aid Commission submitted that the definitions of 'intimate image', 'engaged in a private act' and 'private parts' in section 91N of the NSW legislation were preferable as they are:

more precise and more comprehensive than the proposed NT s 208AA definitions. In addition, the NSW 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."¹¹

- 3.4 The Department advised that consideration was given to the definitions in equivalent legislation in other Australian jurisdictions, in particular NSW and the ACT, as well as Recommendation 3 of the NTLRC Report which proposed that:

The term 'intimate image' should be defined to mean a moving or still image that depicts:

- (a) a person engaged in a sexual activity; or
- (b) a person in a manner or context that is sexual; or

¹⁰ NT Legal Aid Commission (the Commission), Submission No. 1; Commissioner for Information and Public Interest Disclosures, Submission No. 3 and Mr Rhys L.G. Michie, Submission No. 5

¹¹ NT Legal Aid Commission, Submission No. 1, pp.2-3; Northern Territory Law Reform Committee, *Report on the Non-Consensual Sharing of Intimate Images*, Report No. 43, November 2016, <https://justice.nt.gov.au/attorney-general-and-justice/law/report-on-the-non-consensual-sharing-of-intimate-images>, p.35

- (c) the genital or anal region of a person, or in the case of a female or a transgender or intersex person and who identifies as female, the breasts.¹²

3.5 While the proposed definition of 'intimate image' is very similar to that of the ACT, the Committee notes that the ACT legislation also refers to 'a person engaged in a private act'. Similar to NSW, 'engaged in a private act' is defined as 'in a state of undress; or using the toilet showering or bathing; or engaged in an act of a sexual nature of a kind not ordinarily done in public.'¹³ However, the Department advised that:

the NTLRC considered that the definition ought to be confined to sexual images ... AGD considered this was a sensible constraint on the limits of criminalisation.¹⁴

3.6 Noting that the ACT legislation was initially "modelled almost verbatim on the NSW Crimes Amendment (Intimate Images) Bill, 2017"¹⁵, the Department advised the Committee that:

the 'reasonable person' test as to the circumstances where a person would be 'expected to be afforded privacy' was ... removed from the [ACT] definition of 'intimate image' on the ground that the term 'privacy', not being used elsewhere in the *Crimes Act 1900* (ACT), meant that the definition lacked sufficient certainty. AGD found these arguments convincing. Privacy is, likewise not defined in the NT Criminal Code.¹⁶

3.7 Mr Rhys Michie (Private Citizen), was concerned that there is no connection to a sexual context in paragraphs (c) and (d) of the definition of 'intimate image':

Thus, a man wearing underpants at the beach may be captured by this provision. It does not appear that this behaviour necessarily will "hurt, intimidate or extort others." I think this construction of the definition extends beyond the purpose of this legislation. I recommend the Committee consider amending the definition to delete "covered by underwear". Alternatively, another option could be to make it a necessary condition that the covering of the genital or anal region, or a breast has a connection to a sexual context.¹⁷

3.8 Noting that 'covered by underwear' is consistent with equivalent definitions in other Australian jurisdictions, the Department advised that, as set out in the Explanatory Statement, it was of the view that while images of these parts of the body may not necessarily be sexual, "their non-consensual distribution, whether bare or covered by underwear, would constitute such a degree of invasion of privacy as justifying criminalisation."¹⁸

¹² Northern Territory Law Reform Committee, *Report on the Non-Consensual Sharing of Intimate Images*, Report No. 43, November 2016, <https://justice.nt.gov.au/attorney-general-and-justice/law/report-on-the-non-consensual-sharing-of-intimate-images>, pp.7 and 35-6

¹³ *Crimes (Intimate Image Abuse) Amendment Act 2017* (ACT), s72A

¹⁴ Department of the Attorney-General and Justice, *Answers to Written Questions*, 13 February 2018, <https://parliament.nt.gov.au/committees/spsc/CCA#TP>, p.2; Northern Territory Law Reform Committee, *Report on the Non-Consensual Sharing of Intimate Images*, Report No. 43, November 2016, <https://justice.nt.gov.au/attorney-general-and-justice/law/report-on-the-non-consensual-sharing-of-intimate-images>, p. 35

¹⁵ Department of the Attorney-General and Justice, *Answers to Written Questions*, 13 February 2018, <https://parliament.nt.gov.au/committees/spsc/CCA#TP>, p.2

¹⁶ Department of the Attorney-General and Justice, *Answers to Written Questions*, 13 February 2018, <https://parliament.nt.gov.au/committees/spsc/CCA#TP>, p.2

¹⁷ Mr Rhys L.G. Michie, Submission No. 5, p.2

¹⁸ Explanatory Statement, *Criminal Code amendment (Intimate Images) Bill 2017 (Serial No. 38)*, <https://parliament.nt.gov.au/committees/spsc/CCA>, pp.2-3

- 3.9 Ms Brenda Monaghan (Commissioner for Information and Public Interest Disclosures) also raised concerns as to the breadth of the proposed definition of 'intimate image' noting that:

these definitions could potentially capture images that would not normally be classified as 'revenge porn' and the like. For example, paragraph (a) of the definition could conceivably extend to two people embracing and kissing in the street. Such an image was clearly not intended to be captured by the Bill, although I concede that it would also be unlikely to be the subject of a criminal complaint.

I query whether definition (a) and perhaps (b) could be more tightly drafted without risking the integrity of the Bill. A tighter definition for (a) might read an 'act of a sexual nature/sexual act not ordinarily done in public.' Such a definition to my mind more clearly categorises the type of sexual image that the legislation is targeting.¹⁹

- 3.10 Noting the concerns raised regarding the breadth of the proposed definition of 'intimate image', the Department advised that:

If the Committee proposes to make any recommendations that differ from the definition of 'intimate image' in the NT Bill as introduced, the definition could be tightened in the manner suggested by the Commissioner for Information and Public Interest Disclosures. By providing that a 'sexual act' should be confined to acts 'of a kind not ordinarily done in public', the risk for capturing behaviour that is not intended to be criminalised under the NT Bill will be better minimised.²⁰

Committee's Comments

- 3.11 Acknowledging the concerns of witnesses, the Committee is of the view that to minimise the inadvertent criminalisation of innocuous or everyday imagery, the proposed definition of 'intimate image' should be tightened. Taking into account the views of the Northern Territory Law Reform Committee and the advice of the Department, the Committee considers that, for clarification, the Bill should be amended in a manner similar to that proposed by the Commissioner for Information and Public Interest Disclosures.
- 3.12 While the Committee considers that the amendment proposed by the Commissioner is certainly an improvement on the definition as currently drafted, it is concerned that the phrase 'ordinarily done in public' may cause undue confusion and require more intricate explanation and interpretation by the courts. The Committee considers that a definition that incorporates application of a 'reasonableness' test would be more appropriate and less ambiguous.

Recommendation 2

The Committee recommends that paragraphs (a) and (b) of the proposed definition of 'intimate image' in proposed section 208AA be amended to read as follows:

¹⁹ Commissioner for Information and Public Interest Disclosures, Submission No. 3, p.2

²⁰ Department of the Attorney-General and Justice, *Answers to Written Questions*, 13 February 2018, <https://parliament.nt.gov.au/committees/spsc/CCA#TP>, pp.2-3

- (a) a person engaged in a sexual act of a kind not reasonably expected to be done in public;
- (b) a person in a manner or context that is sexual and of a kind not reasonably expected to be displayed in public;

Distribution of Intimate Image without Consent

3.13 Proposed section 208AB(1) creates the offence of intentionally distributing an intimate image of another person without consent. As defined in section 192(1) of the *Criminal Code Act* (NT), consent means 'free and voluntary agreement'. Subsection (2)(a) – (g) sets out a number of circumstances in which the offence does not apply, thereby ensuring that:

the offence applies only to conduct that so far transgresses societal norms that it justifies criminalisation and that it not interfere with the performance of legitimate functions.²¹

3.14 Subsections (3) to (6) provide a non-exhaustive list of circumstances in which consent to the distribution of an intimate image may be vitiated. As noted in the *Explanatory Statement*, these factors are designed to provide guidance as to circumstances where there is no consent. Furthermore, subsection (7) clarifies that "the circumstances in which consent may be vitiated are not limited by subsections (3) to (6)."²²

Exemptions

3.15 In support of Recommendation 4 of the NTLRC Report, Mr Michie proposed that subsection 208AB(2) be amended to include a public interest disclosure exemption to cover persons that:

collect, prepare or disseminate material having the character of news, current affairs, information or a documentary or material consisting of commentary or opinion of this material.²³

3.16 The Department advised that while consideration had been given to the inclusion of such an exemption, it was decided not to do so given that:

The NTLRC Report gave no commentary or analysis as to why that exemption should be included. AGD considered that the exemption was potentially too broad and too vague, in particular 'material consisting of *commentary or opinion* of this material' (emphasis added). Would there be any limits on how relevant such commentary or opinion had to be? Would there be any other limits? How could a court determine with any certainty what 'commentary or opinion' means? AGD considered that the answer to each of those questions would be, 'We don't know.'

²¹ Explanatory Statement, *Criminal Code amendment (Intimate Images) Bill 2017 (Serial No. 38)*, <https://parliament.nt.gov.au/committees/spsc/CCA>, pp.3-4

²² Explanatory Statement, *Criminal Code amendment (Intimate Images) Bill 2017 (Serial No. 38)*, <https://parliament.nt.gov.au/committees/spsc/CCA>, p.4

²³ Mr Rhys L.G. Michie, Submission No. 3, p.3; Northern Territory Law Reform Committee, *Report on the Non-Consensual Sharing of Intimate Images*, Report No. 43, November 2016, <https://justice.nt.gov.au/attorney-general-and-justice/law/report-on-the-non-consensual-sharing-of-intimate-images>, p.7

Given that level of uncertainty, AGD was of the view that such an exemption should not be included.²⁴

- 3.17 Mr Michie also suggested inclusion of an exemption for the distribution of an intimate image taken in public where members of the public are present, similar to that provided for in s 2(5) of the *Abusive Behaviour and Sexual Harm Act 2016* (Scotland).²⁵ Noting that an equivalent of s 2(5) of the Scottish Act has not been adopted elsewhere in Australia, the Department advised that:

While the Policy Memorandum to the Bill for the Scottish Act makes it clear (at paragraph 30) that the defence in section 2(5) is intended to ensure that the images of naked protestors or ‘streakers’ at sporting events are not ‘intimate images’ and therefore their distribution is not an offence, it would also appear to cover such situations, for example, as the distribution of an image of a pole dancer in a strip club or a person sunbathing naked at a nudist beach.

It is AGD’s view that the circumstances that section 2(5) of the Scottish Act intends to cover are better addressed through the requirement that the distribution is done without consent.

In relation to consent, under proposed section 208AB(1)(c), the onus is on the prosecution to prove lack of consent beyond reasonable doubt. Consent may be explicit or implicit. In addition, the fault element of recklessness applies to the circumstances that the person did not consent to distribution of the image ...

AGD is of the view that the ‘streaker’ example is adequately addressed by the requirement that the prosecution prove absence of consent. AGD considers that the defence in section 2(5) of the Scottish Act is too wide. The streaker may well be impliedly consenting to distribution of their image but it cannot be said that the person sunbathing at the nudist beach is. To argue otherwise is arguably to ‘victim blame’.²⁶

Committee’s Comments

- 3.18 The Committee is satisfied with the Department’s explanation regarding the potential issues that could arise should exemptions of this nature be included in the Bill.

Defence Provisions

- 3.19 Subsection 208AB(2)(g), provides that it is a defence to the charge of distribution of an intimate image of a child, or other person incapable of giving consent, in circumstances that ‘a reasonable person would regard as acceptable’ (for example, sharing a photograph or a movie of a naked newborn relative). Mr Russell Goldflam (Barrister and Solicitor: NT Legal Aid Commission) expressed the view that this phrase is very general noting that “it might be difficult for a court to decide exactly what circumstances a reasonable person would regard as acceptable.”²⁷

²⁴ Department of the Attorney-General and Justice, *Answers to Written Questions*, 13 February 2018, <https://parliament.nt.gov.au/committees/spsc/CCA#TP>, pp.4-5

²⁵ Mr Rhys L.G. Michie, Submission No. 5, pp. 2-3; *Abusive Behaviour and Sexual Harm Act 2016* (Scotland), s2(5); see also Mr Rhys L.G. Michie, Committee Transcript, 14 February 2018, p.15

²⁶ Department of the Attorney-General and Justice, *Answers to Written Questions*, 13 February 2018, <https://parliament.nt.gov.au/committees/spsc/CCA#TP>, pp.3-4; see also Ms Fiona Hardy, Committee Transcript, pp.19-20

²⁷ Mr Russell Goldflam, Committee Transcript, 14 February 2018, p.3; NT Legal Aid Commission, Submission No. 1, p.3

3.20 While noting that section 91(T)(d) of the NSW legislation establishes a similar defence, the NT Legal Aid Commission submitted that:

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.²⁸

3.21 In recommending that the Bill be amended to incorporate these circumstances, Mr Goldflam further submitted that, as is the case in NSW, this defence should be generally applicable. That is, the defence should be available to any charge of distribution of an intimate image without consent:

if the conduct is conduct the reasonable press would regard as acceptable, whether or not it is an image of a child or an adult, it should not be criminal and there should be a defence that can be raised when a person is charged with distributing that image.²⁹

3.22 The Department advised that consideration was given to the inclusion of such a defence noting that:

A similar provision was included in the Crimes (Intimate Image Abuse) Bill 2017, the private member's bill introduced in the ACT Parliament. One of the amendments proposed by the ACT Government was to omit that exception on the grounds that it was too broad and unnecessarily complicated, and that the issues the exception sought to address were appropriately addressed through the definition of 'intimate image' and the requirement that distribution is done without consent. The Bill was passed with the omission of the exception.

AGD found these arguments convincing and instructed OPC not to include an exception modelled on section 91(T)(d) of the *Crimes Act 1900* (NSW) ... AGD is of the view that, rather than a proliferation of exceptions, most circumstances where the offence in proposed section 208AB(1) would not apply are better addressed through the requirement of lack of consent.³⁰

3.23 Mr Michie also proposed that consideration be given to the inclusion of a defence similar to that provided for under section 33(5) of the *Criminal Justice and Courts Act 2015* (UK) whereby it is a defence for a person charged with the offence of 'disclosing private sexual photographs and films with intent to cause distress' where it is reasonably believed that the image has previously been disclosed for reward.³¹

²⁸ NT Legal Aid Commission, Submission No. 1, p.3

²⁹ Mr Russell Goldflam, Committee Transcript, 14 February 2018, p.3

³⁰ Department of the Attorney-General and Justice, *Drafting Clarifications – Criminal Code Amendment (Intimate Images) Bill 2017*, (unpublished), 22 February 2018, p.3

³¹ Mr Rhys L.G. Michie, Submission No. 5, p.2

- 3.24 Noting that the approach taken in the UK legislation is not one that has been adopted in equivalent legislation in any other Australian jurisdiction, the Department pointed out that it is of the view that:

the element of lack of consent adequately addresses this point. It does so in two ways. First, the prosecution must prove that the defendant was reckless as to the lack of consent. If an intimate image of a person has previously been disclosed for reward, such as pictures of a lingerie model, it may be that recklessness as to lack of consent cannot be proven. Secondly, the defence of mistake of fact, under section 43AW of the *Criminal Code* is available. The defendant might be mistaken in certain circumstances as to consent.³²

³² Department of the Attorney-General and Justice, *Answers to Written Questions*, 13 February 2018, <https://parliament.nt.gov.au/committees/spsc/CCA#TP>, p.5

Committee's Comments

3.25 While acknowledging the Department's comment that the Bill "follows very closely on the ACT bill in particular."³³, the Committee is not convinced that section 91(T)(d) of the *Crimes Act 1900* (NSW) is necessarily overly complex or too broad. Rather, the Committee is of the view that, as submitted by Mr Goldflam, the inclusion of a generally applicable defence provision which sets out the circumstances that must be considered when determining whether the impugned conduct was acceptable would assist "tribunals of fact to apply that test and consider whether that defence is made out."³⁴

Recommendation 3

The Committee recommends that proposed section 208AB(2) be amended to include the following, generally applicable, defence provision:

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.**

Offence Penalties

3.26 It is noted that both the offence of distributing an intimate image without consent (s 208AB) and the offence of threatening to distribute intimate images (s 208AC) carry the same maximum penalty of 3 years imprisonment. Mr Michie suggested that in order to create a disincentive to act on a threat, consideration be given to a maximum penalty for the threat offence that is less than that for the distribution offence as is the case in sections 41DA and 41DB of the *Summary Offences Act 1966* (VIC).³⁵

3.27 The Committee understands that the Victorian provisions were enacted in 2014 at which time there was very little research evidence available regarding the impact of image-based abuse. The Department noted that the Bill proposes the same offence penalties as NSW and the ACT which were enacted in 2017 and reflect the findings of the 2016 national survey of image-based abuse conducted by Dr Nicola Henry,

³³ Ms Fiona Hardy, Committee Transcript, 31 January 2018, p.3

³⁴ Mr Russell Goldflam, Committee Transcript, 14 February 2018, p.3

³⁵ Mr Rhys L.G. Michie, Submission No. 5, p.2

Dr Anastasia Powell and Dr Asher Flynn on behalf of the Office of the eSafety Commissioner.³⁶

In our survey, we found that 80% of victims who had experienced threats to distribute an image reported high levels of psychological distress, consistent with a diagnosis of moderate to severe depression and/or anxiety disorder. Levels of psychological distress were also high for other victims of image-based abuse, with 67% of those whose images were taken without their consent, and 75% of those whose images were distributed, also reporting symptoms of moderate to severe depression and/or anxiety.³⁷

Some of the most damaging examples of image-based abuse we have heard of from victims and from service providers, is where the threat of releasing an image is used to harass a victim, or to coerce them in some way ... Our finding that threats of image-based abuse cause greater psychological distress for victims compared with the taking or distribution of images demonstrates the seriousness of these harms.³⁸

3.28 Ms Vanessa Lethlean (Managing Solicitor: Top End Women's Legal Service) advised the Committee that:

As evidence suggests, domestic and family violence offenders currently use private sexual material as a tool to intimidate, harass and/or control current and former partners. That is reflected within our legal practice. I acknowledge that the threat of using such material can cause similar harm as the actual distribution.³⁹

3.29 Dr Nicola Henry (Associate Professor and Vice-Chancellor's Principal Research Fellow: Centre for Global Studies, RMIT University) suggested that to more fully reflect principle 7 of the *National Principles*, proposed section 208AC(1) should be amended to specifically state that the offence occurs 'irrespective of whether or not the image exists'.⁴⁰ The Department advised that proposed section 208AC does, in fact, reflect the *National Principles*, but does so in 208AC(2)(c).

3.30 Modelled on section 72E(2) of the *Crimes Act 1900* (ACT), proposed subsection 208AC(2)(c) provides that 'a person may be found guilty even if carrying out the threat is impossible.' By way of clarification, the Bill also includes the examples that 'the image does not exist', and 'technical limitations prevent'.⁴¹

³⁶ Department of the Attorney-General and Justice, *Answers to Written Questions*, 13 February 2018, <https://parliament.nt.gov.au/committees/spsc/CCA#TP>, pp.5-6; Dr Nicola Henry, Dr Anastasia Powell and Dr Asher Flynn, *Not Just 'Revenge Pornography': Australian's Experience of Image-Based Abuse*, A Summary Report, May 2017, https://www.rmit.edu.au/content/dam/rmit/documents/college-of-design-and-social-context/schools/global-urban-and-social-studies/revenge_porn_report_2017.pdf, Office of the eSafety Commissioner, *Image Based Abuse, National Survey: Summary Report*, February 2018, <https://www.esafety.gov.au/image-based-abuse/about/research>

³⁷ Dr Nicola Henry, Dr Anastasia Powell and Dr Asher Flynn, *Not Just 'Revenge Pornography': Australian's Experience of Image-Based Abuse*, A Summary Report, May 2017, https://www.rmit.edu.au/content/dam/rmit/documents/college-of-design-and-social-context/schools/global-urban-and-social-studies/revenge_porn_report_2017.pdf, p.5

³⁸ Dr Nicola Henry, Dr Anastasia Powell and Dr Asher Flynn, *Not Just 'Revenge Pornography': Australian's Experience of Image-Based Abuse*, A Summary Report, May 2017, https://www.rmit.edu.au/content/dam/rmit/documents/college-of-design-and-social-context/schools/global-urban-and-social-studies/revenge_porn_report_2017.pdf, p.9

³⁹ Ms Vanessa Lethlean, Committee Transcript, 14 February 2018, p.10; Top End Women's Legal Service, Submission No. 4

⁴⁰ RMIT University and Monash University, Submission No. 2; Dr Nicola Henry, Committee Transcript, 14 February 2018, p.8

⁴¹ Department of the Attorney-General and Justice, *Answers to Written Questions*, 13 February 2018, <https://parliament.nt.gov.au/committees/spsc/CCA#TP>, pp.6-7

- 3.31 Noting that this subsection not only covers instances where the image does not exist, but other situations where implementing the threat is not necessarily possible, the Department also drew the Committee's attention to the associated commentary in the Explanatory Statement:

Section 208AC(2) provides guidance as to the ambit of the offence. A threat may be explicit, implicit, conditional or unconditional. It can be made by any conduct, not just words. As the offence is targeted at the perpetrator's behaviour and state of mind, while the prosecution must prove an intention to cause the other person to fear that the threat would be carried out, it is not necessary to prove actual fear or that it was possible for the threat to be carried out. For example, a person (A) wants to leave her abusive partner (B). B threatens that he will send an intimate photograph of A to her employer unless she stays with him. As long as B intends A to fear that he will carry out the threat, it does not matter that there is no photograph. Nor does it matter that the threat does not, in fact, instil fear in A.

Committee's Comments

- 3.32 In light of the research evidence and the experience of legal practitioners, the Committee agrees with the Department's view that:

The seriousness of the harm that can be caused by threatening to distribute an intimate image justifies this offence carrying the same penalty as the offence of distribution.⁴²

- 3.33 Similarly, the Committee is satisfied that proposed section 208AC(2) adequately reflects the intent of principle 7 of the *National Principles* and acknowledges the Department's comment "that the ambit of the offence is detailed in subsection (2) rather than subsection (1) is a matter of drafting style not substance."⁴³

Criminalisation of Children

- 3.34 Proposed section 208AD provides that the prosecution of a child must not be commenced without the consent of the Director of Public Prosecutions. Noting that a similar provision is included in the NSW legislation, the Department advised that:

the decision to prosecute a child is not one taken lightly. The NT Bill intends, by requiring the DPP's consent to commence a prosecution to emphasise the seriousness of that decision.⁴⁴

- 3.35 While agreeing with the principle behind this section, the NT Legal Aid Commission recommended 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.⁴⁵

⁴² Department of the Attorney-General and Justice, *Answers to Written Questions*, 13 February 2018, <https://parliament.nt.gov.au/committees/spsc/CCA#TP>, pp.5-6

⁴³ Department of the Attorney-General and Justice, *Answers to Written Questions*, 13 February 2018, <https://parliament.nt.gov.au/committees/spsc/CCA#TP>, p.7

⁴⁴ Department of the Attorney-General and Justice, *Answers to Written Questions*, 13 February 2018, <https://parliament.nt.gov.au/committees/spsc/CCA#TP>, p.8

⁴⁵ NT Legal Aid Commission, Submission No. 1, p.3; Mr Russell Goldflam, Committee Transcript, 14 February 2018, pp. 3 & 5; see also, Northern Territory Law Reform Committee, *Report on the Non-Consensual*

- 3.36 For an offence to be considered ‘serious’ for the purposes of s 39 of the *Youth Justice Act*, the Committee heard that it must be prescribed. That is, it must be included in the Youth Justice Regulations which would be subject to the advice of the Executive Council.⁴⁶ However, as stated by the Attorney-General and Minister for Justice, when introducing the Bill:

The offences in new sections 208AB and 208AC will not be prescribed as serious offences for the purpose of section 39 of the *Youth Justice Act*. This means that the first recourse for police dealing with a complaint against a young person will be a warning or diversion, not prosecution.⁴⁷

The Department further advised that the *Guidelines of the Director of Public Prosecutions* incorporate specific considerations that would need to be taken into account when determining whether to prosecute a child.⁴⁸

Committee’s Comments

- 3.37 Given the Attorney-General and Minister for Justice’s assurance that it is not intended that the offences under this part be prescribed as ‘serious’, the fact that no other legislation in the Northern Territory incorporates a provision that explicitly states that an offence is not serious for the purpose of s 39 of the *Youth Justice Act*, and the Department’s advice regarding matters that must be taken into consideration when determining whether to prosecute a child, the Committee does not consider that proposed section 208AD warrants amendment.

Rectification Orders

- 3.38 Proposed section 208AE empowers a court to order a person found guilty of an offence under this Division to ‘take reasonable action to remove, retract, recover, delete or destroy any intimate images related to the offence within a stated period.’ Subsection 208AE(2) introduces an offence whereby breaches of an order attract a maximum penalty of 2 years imprisonment.
- 3.39 The Committee heard that, given the impact distributing or threatening to distribute intimate images without consent has on victims, waiting until the offender has been found guilty is too late. As the Top End Women’s Legal Service noted:

the first issue for a client approaching our service is, I need it taken down and I need it taken down now ... for a number of our clients it is actually that vortex of domestic family violence, which is often around coercion and control. The fact that police have been involved but the image has continued to remain up there means that dynamic is still in place. The earlier there can be an appropriate order

Sharing of Intimate Images, Report No. 43, November 2016, <https://justice.nt.gov.au/attorney-general-and-justice/law/report-on-the-non-consensual-sharing-of-intimate-images>, p.34

⁴⁶ Department of the Attorney-General and Justice, *Answers to Written Questions*, 13 February 2018, <https://parliament.nt.gov.au/committees/spsc/CCA#TP>, pp.8-9

⁴⁷ Parliamentary Record, (Hansard) and Minutes of Proceedings, 13th Assembly, Debates, 23/11/2017, https://parliament.nt.gov.au/_data/assets/pdf_file/0017/463202/DEBATES-DAY-3-23-NOVEMBER-2017.pdf, p.7

⁴⁸ Department of the Attorney-General and Justice, *Answers to Written Questions*, 13 February 2018, <https://parliament.nt.gov.au/committees/spsc/CCA#TP>, p.8

made, that is more positive for a client in trying to reduce the harm and trauma, and to get on a better path where there is some healing.⁴⁹

3.40 Similarly, the NTLRC Report pointed out that:

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.⁵⁰

3.41 The NT Legal Aid Commission submitted that, as drafted, the Bill “fails to adequately address this important issue”⁵¹ and proposed that it should be amended to give effect to Recommendation 7 of the NTLRC Report:

The Northern Territory Parliament should enact appropriate legislation to establish a statutory based administrative scheme that provides for the rapid issue of take-down and non-publication notices in relation to intimate images that have been posted without consent. Alternatively, should the Northern Territory Parliament be of the view that such an administrative scheme is not appropriate, it should enact appropriate legislation to empower the Northern Territory Police, or the individual whose intimate image has been posted, to apply to the Local Court for an ex parte injunctive order to take-down, and not permit the republication of, the intimate image.⁵²

3.42 The Committee heard that the proposed take-down powers in section 208AE of the Bill are based on equivalent provisions in the NSW and ACT legislation. The Department advised that while the NTLRC Recommendation was taken into account, the scope of the take-down powers in the Bill was also informed by the inherent limitations of local courts to make orders against internet providers and content hosts, many of which are located outside of Australia, and the introduction of the Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2017 into the Australian Senate on 6 December 2017.⁵³

3.43 The purpose of the Bill, which is now before the House of Representatives, is to amend the *Enhancing Online Safety Act 2015* to establish a civil penalty regime for the non-consensual sharing of intimate images. According to the Explanatory Memorandum, the Bill will:

- Prohibit the posting, or threatening to post, of an intimate image without consent on a social media service, relevant electronic service, or a designated internet service.

⁴⁹ Ms Caitlin Weatherby-Fell and Ms Vanessa Lethlean, Committee Transcript, 14 February 2018, p.12

⁵⁰ Northern Territory Law Reform Committee, *Report on the Non-Consensual Sharing of Intimate Images*, Report No. 43, November 2016, <https://justice.nt.gov.au/attorney-general-and-justice/law/report-on-the-non-consensual-sharing-of-intimate-images>, p.42

⁵¹ NT Legal Aid Commission, Submission No. 1, p.5

⁵² Northern Territory Law Reform Committee, *Report on the Non-Consensual Sharing of Intimate Images*, Report No. 43, November 2016, <https://justice.nt.gov.au/attorney-general-and-justice/law/report-on-the-non-consensual-sharing-of-intimate-images>, p.43

⁵³ Department of the Attorney-General and Justice, *Answers to Written Questions*, 13 February 2018, <https://parliament.nt.gov.au/committees/spsc/CCA#TP>, p.11

- Establish a complaints and objections system in relation to the non-consensual sharing of intimate images to be administered by the eSafety Commissioner (the Commissioner).
- Provide the Commissioner with powers to issue a removal notice requiring end-users, hosting service providers, or providers of a social media service, relevant electronic service or designated internet service, to remove an intimate image from a service.
- Provide the Commissioner with the power to give a person a remedial direction, directed towards ensuring the person does not contravene the prohibition on the non-consensual sharing of intimate images.
- Establish a civil penalty regime giving the Commissioner the discretion to take enforcement action under various Parts of the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act) if there has been a contravention of the prohibition on the non-consensual sharing of an intimate image or a remedial direction, or a failure to comply with a removal notice.
- Allow the Commissioner to seek a civil penalty order, issue an infringement notice, obtain an injunction or enforce an undertaking under the Regulatory Powers Act, or issue a formal warning under the Online Safety Act for contraventions of the civil penalty provisions.⁵⁴

3.44 In light of the above, and not wishing to establish a competing regime, the Department advised that “a take-down power wider than that in proposed section 208AE was not seen as feasible or desirable.”⁵⁵ The Department also noted that neither the Victorian nor South Australian legislation incorporates a take-down provision.⁵⁶

Committee’s Comments

3.45 As highlighted by a number of witnesses, the Committee acknowledges that there is a limit as to what the states and territories can do in this area. However, the Committee also considers that there is merit in empowering the Northern Territory Police, or the individual whose intimate image has been posted, to apply to the Local Court for an ex parte injunctive order to take-down, and not permit the republication of, the intimate image.

3.46 Given that it may be some months before cases of this nature are settled, such a mechanism may well limit the extent to which the offending image is distributed. Moreover, the extent to which the proposed Commonwealth complaints and objections system will be able to effect a rapid and essentially immediate response is, as yet, unknown. The Committee is also mindful that, as stated in Principle 2 of the *National Principles*:

⁵⁴ Explanatory Memorandum, *Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2017* (Cwlth),

https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=s1113, p.5

⁵⁵ Department of the Attorney-General and Justice, *Answers to Written Questions*, 13 February 2018, <https://parliament.nt.gov.au/committees/spsc/CCA#TP>, p.11

⁵⁶ Department of the Attorney-General and Justice, *Answers to Written Questions*, 13 February 2018, <https://parliament.nt.gov.au/committees/spsc/CCA#TP>, p.10

The protection and respect of victims and minimisation of harm to victims is essential in responding to the non-consensual sharing of intimate images.⁵⁷

Recommendation 4

The Committee recommends that proposed section 208AE be amended to include provision for the Northern Territory Police, or the individual whose intimate image has been posted, to apply to the Local Court for an ex parte injunctive order to take-down, and not permit the republication of, any intimate images.

Compensation Orders

3.47 The NT Legal Aid Commission queried the applicability of existing provisions, pursuant to Part 5 of the *Sentencing Act*, for courts to make a compensation order in addition to a sentence to the offences introduced under the Bill 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.⁵⁸

3.48 Section 88(1)(a) of the *Sentencing Act* provides that a court may order an offender to pay compensation ‘for injury suffered by a person in the course of or in connection with the commission of an offence’. However, as Mr Goldflam pointed out to the Committee, it is unclear whether this provision would extend to paying compensation in an image-based abuse case.⁵⁹ While noting that civil remedies may be available to affected victims, as highlighted in the NTLRC Report, “such a process will inevitably be time-consuming and expensive.”⁶⁰

3.49 The NT Legal Aid Commission further noted that “the NTLRC Report [refers] to the power of courts in NSW to make compensation orders pursuant to s 97(1) of the *Victims Rights and Support Act 2013* (NSW).”⁶¹ In contrast to the NT legislation, compensation is payable to any ‘aggrieved person’ for any ‘loss sustained through, or by reason of the offence’ without the requirement that the victim suffered an ‘injury’.⁶² The Committee also notes that the jurisdictional comparison of criminal sanctions applicable to image-based abuse in the NTLRC Report makes no

⁵⁷ Law, Crime and Community Safety Council, *National Statement of Principles Relating to the Criminalisation of the Non-Consensual Sharing of Intimate Images*, <https://www.ag.gov.au/CrimeAndCorruption/Cybercrime/Documents/National-statement-of-principles-criminalisation-non-consensual-sharing-intimate-images.PDF>, p. 2

⁵⁸ NT Legal Aid Commission, Submission No.1, p.4

⁵⁹ Mr Russell Goldflam, Committee Transcript, 14 February 2018, p. 4

⁶⁰ Northern Territory Law Reform Committee, *Report on the Non-Consensual Sharing of Intimate Images*, Report No. 43, November 2016, <https://justice.nt.gov.au/attorney-general-and-justice/law/report-on-the-non-consensual-sharing-of-intimate-images>, p.19

⁶¹ NT Legal Aid Commission, Submission No. 1, p.4

⁶² *Victims Rights and Support Act 2013* (NSW), s97(1)

reference to the restitution and compensation provisions under s88 of the *Sentencing Act* (NT).⁶³

- 3.50 Given the above, the NT Legal Aid Commission proposed that “the Bill specifically include such power for a court to order that the offender pay money by way of compensation to the victim.”⁶⁴ The Department expressed the view that it was unclear why the NT Legal Aid Commission considered that s 88 of the *Sentencing Act* (NT) would not be applicable to the offences in the Bill, noting that:

There would seem to be scope under section 88(1)(a) for a court to order compensation for economic loss, such as loss of income or the costs of counselling, providing the victim had suffered an ‘injury’ in the course of or in connection with the commission of an offence.⁶⁵

However, it is also unclear whether ‘injury’ would extend to emotional or psychological conditions. The Committee notes that the two cases cited as examples by the Department both involved compensation orders where the victim had suffered a physical injury.⁶⁶

- 3.51 The Department further advised that:

If the Committee was of mind to make a recommendation relating to compensation, AGD emphasises that any amendment to section 88 of the *Sentencing Act* would require stakeholder consultation, including consideration of risks and benefits. Any amendment would have an impact not only in relation to the offences proposed in the NT Bill but would have general application. It is beyond the scope of the NT Bill to include such an amendment. Any recommendation should be premised as being for longer term consideration by the Government.

Finally, AGD notes that it would not be appropriate to include a provision such as section 97(1) of the *Victims Rights and Support Act 2013* (NSW) in the NT Bill. The *Victims Rights and Support Act 2013* (NSW) is an Act of general application, not specific to a particular offence.

The Department also noted that, as in the case under the *Sentencing Act* (NT), the term ‘loss’ in the NSW legislation would most likely refer to economic loss.⁶⁷

Committee’s Comments

- 3.52 Given the nature of image-based abuse offences, the Committee agrees with the NT Legal Aid Commission’s view that it is particularly apt to empower courts to impose compensation orders in appropriate cases. However, the Committee is not convinced that section 88(1) of the *Sentencing Act* (NT) is an appropriate mechanism for this since victims will not necessarily have suffered a ‘loss’ or ‘injury’. The Committee is also mindful of the Department’s advice regarding any amendments to section 88.

⁶³ Northern Territory Law Reform Committee, *Report on the Non-Consensual Sharing of Intimate Images*, Report No. 43, November 2016, <https://justice.nt.gov.au/attorney-general-and-justice/law/report-on-the-non-consensual-sharing-of-intimate-images>, pp.20-1

⁶⁴ Mr Russell Goldflam, Committee Transcript, 14 February 2018, p.4

⁶⁵ Department of the Attorney-General and Justice, *Answers to Written Questions*, 13 February 2018, <https://parliament.nt.gov.au/committees/spsc/CCA#TP>, p.12

⁶⁶ Department of the Attorney-General and Justice, *Answers to Written Questions*, 13 February 2018, <https://parliament.nt.gov.au/committees/spsc/CCA#TP>, p.12

⁶⁷ Department of the Attorney-General and Justice, *Answers to Written Questions*, 13 February 2018, <https://parliament.nt.gov.au/committees/spsc/CCA#TP>, p.12

Similarly, the Committee acknowledges that inclusion of a provision such as section 97(1) of the *Victims Rights and Support Act 2013* (NSW) would not be appropriate.

- 3.53 As proposed by the NT Legal Aid Commission, the Committee considers that the Bill should include provision for a court to order compensation that is specific to the offences under Division 7A and covers both any 'loss' or 'harm' sustained by the victim. The Committee notes that reference to 'harm' rather than 'injury' is more pertinent as it takes into consideration psychological harm. Pursuant to section 1A(3) of the *Criminal Code Act* (NT) harm to a person's mental health includes significant psychological harm, but does not include mere ordinary emotional reactions such as those of distress, grief, fear or anger.

Recommendation 5

The Committee recommends that the Bill be amended to include provision for a court to order compensation in the following terms:

A court may order a person found guilty by the court of an offence under this Division to pay compensation to the aggrieved for any loss or harm sustained through, or by reason of, the offence.

Privacy of Victims

- 3.54 The NT Legal Aid Commission raised concerns regarding the privacy of victims and suggested that there should be specific provisions in the Bill similar to that afforded to victims of sexual offences pursuant to section 6 of the *Sexual Offences (Evidence and Procedure) Act* (NT), which provides that:

[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.⁶⁸

Ms Caitlin Weatherby-Fell noted that the Top End Women's Legal Service endorsed the NT Legal Aid Commission's submission in this respect.⁶⁹ As noted previously, Principle 2 of the *National Principles* states that:

The protection and respect of victims and minimisation of harm to victims is essential in responding to the non-consensual sharing of intimate images.⁷⁰

- 3.55 While 'open justice' is a fundamental principle of the common law, as is the case elsewhere in Australian, pursuant to section 57 of the *Evidence Act* (NT) "courts are empowered to prohibit the publication of evidence or the names of parties to proceedings where it is in the interests of justice to do so."⁷¹ The Top End Women's

⁶⁸ NT Legal Aid Commission, Submission No. 1, p.4

⁶⁹ Ms Caitlin Weatherby-Fell, Committee Transcript, 14 February 2018, p.11

⁷⁰ Law, Crime and Community Safety Council, *National Statement of Principles Relating to the Criminalisation of the Non-Consensual Sharing of Intimate Images*,

<https://www.ag.gov.au/CrimeAndCorruption/Cybercrime/Documents/National-statement-of-principles-criminalisation-non-consensual-sharing-intimate-images.PDF>, p. 2

⁷¹ Department of the Attorney-General and Justice, *Answers to Written Questions*, 13 February 2018, <https://parliament.nt.gov.au/committees/spsc/CCA#TP>, p.13

Legal Service pointed out that this does not necessarily prevent people from being identified:

As a service, we have had circumstances in a very different context, but where those anonymity provisions take place but there is still a connector there. Whilst a person is referred to as XY, perhaps they are referred to as mother of name, and she is the mother of XY. Or course, you have just made that direct link.⁷²

However, it was further noted that where issues have arisen regarding the inappropriate identification of parties to proceedings, the tribunals and courts are “extremely responsive to services flagging those issues and removing them properly.”⁷³

- 3.56 Noting that non-publication provisions do not apply in other jurisdictions that have enacted offences regarding the non-consensual sharing of intimate images, the Department advised the Committee that:

Including the offences proposed in the NT Bill to the definition of ‘sexual offences’ for the purposes of the *Sexual Offences (Evidence and Procedure) Act* or including a provision similar to section 6 of that Act in the NT Bill is not a course that would be taken, particularly in the absence of any precedent in other jurisdiction, without extensive consultation.

The power in section 57 of the *Evidence Act* for a court to make a suppression order is, in the view of the AGD, sufficient to ensure that the interests of justice, including balancing the principle of open justice with any harms that could ensue from publication of identifying material, are met.⁷⁴

Committee’s Comments

- 3.57 While acknowledging the concerns raised by witnesses, the Committee is satisfied with the Department’s explanation.

Non-Consensual Recording of Images

- 3.58 Concern was raised that the Bill does not criminalise the recording of non-consensual intimate images such as ‘up skirting’, ‘down blousing’ or the surreptitious filming of intimate images in public or private places.⁷⁵ In February 2016, the Senate Legal and Constitutional Affairs References Committee recommended that, in addition to offences for sharing or threatening to share intimate images without consent, the states and territories also enact legislation that criminalises the non-consensual recording of intimate images.⁷⁶
- 3.59 The importance of enacting laws to criminalise all aspects of non-consensual sharing of intimate images was highlighted in the Senate inquiry with service providers noting that it would “send a clear message to the community that conduct of this type is

⁷² Ms Caitlin Weatherby-Fell, Committee Transcript, 14 February 2018, p.12

⁷³ Ms Caitlin Weatherby-Fell, Committee Transcript, 14 February 2018, p.12

⁷⁴ Department of the Attorney-General and Justice, *Answers to Written Questions*, 13 February 2018, <https://parliament.nt.gov.au/committees/spsc/CCA#TP>, p.13

⁷⁵ NT Legal Aid Commission, Submission No. 1, p.2; RMIT University and Monash University, Submission No. 2, p.4

⁷⁶ Senate Legal and Constitutional Affairs References Committee, *Phenomenon colloquially referred to as ‘revenge porn’*, Commonwealth of Australia, Canberra ACT, February 2016, p.viii

unacceptable and serve to deter potential perpetrators from offending.”⁷⁷ The Top End Women’s Legal Service noted that, as a form of technology facilitated sexual or intimate violence, the non-consensual recording of intimate images is known to take place in a number of situations including:

- partners recording intimate partner sexual assaults;
- women ‘agreeing’ to intimate images being taken in the context of an already violent relationship, where refusing may not be a safe option; and
- situations where a partner threatens to distribute private sexual material (whether originally taken with consent or not) to third parties such as, the children of the relationship, extended family, or employers as a means of punishment and control.⁷⁸

3.60 As Mr Goldflam pointed out to the Committee, the absence of such an offence in the Bill is a “significant gap in the breadth of this legislation. It can and should be remedied.”⁷⁹ The submissions from the NT Legal Aid Commission and the RMIT and Monash Universities recommended that the Bill incorporate a provision similarly worded to section 91(P) of the *Crimes Act 1900* (NSW)⁸⁰ such that:

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.

Maximum penalty: Imprisonment for 3 years.

3.61 While noting that the non-consensual recording of intimate images is certainly an issue, the Department advised that the Bill was developed primarily in response to the NTLRC Report and the *National Principles* which only address the non-consensual distribution of, and threatening to distribute intimate images. As such, the non-consensual recording of intimate images was “beyond the scope of the NT Bill.”⁸¹

3.62 The Committee understands that charges for offences such as ‘up skirting’ that come before the NT Local Court are “most commonly laid under section 47(a) of the *Summary Offences Act* (NT) and section 12(1) of the *Surveillance Devices Act* (NT).”⁸² Section 47(a) of the *Summary Offences Act*, ‘Offensive, &c., conduct’, is very general in nature and carries a penalty of \$2000 or imprisonment for 6 months or

⁷⁷ Senate Legal and Constitutional Affairs References Committee, *Phenomenon colloquially referred to as ‘revenge porn’*, Commonwealth of Australia, Canberra ACT, February 2016, p.27

⁷⁸ Top End Women’s Legal Service, Submission No. 4 – Appendix B, p.3

⁷⁹ Mr Russell Goldflam, Committee Transcript, 14 February 2018, p.2

⁸⁰ NT Legal Aid Commission, Submission No. 1, pp.2-3, RMIT University and Monash University, Submission No. 2, p.4

⁸¹ Department of the Attorney-General and Justice, *Answers to Written Questions*, 13 February 2018, <https://parliament.nt.gov.au/committees/spsc/CCA#TP>, p.15; Ms Fiona Hardy, Committee Transcript, 14 February 2018, p.23

⁸² Northern Territory Law Reform Committee, *Report on the Non-Consensual Sharing of Intimate Images*, Report No. 43, November 2016, <https://justice.nt.gov.au/attorney-general-and-justice/law/report-on-the-non-consensual-sharing-of-intimate-images>, p.20

both; significantly less than that proposed for the ‘distribute’ or ‘threaten to distribute’ offences in the Bill.

- 3.63 While section 12(1) of the *Surveillance Devices Act* is more specific and carries a maximum of 250 penalty units or 2 years imprisonment, it is not applicable to the surreptitious recording of a person in a public place. Furthermore, it is limited to the recording of activities to which the defendant is not a party, thereby precluding situations where the person doing the recording is also involved in the activity.⁸³
- 3.64 The Department advised that should the Committee be of a mind to recommend the introduction of an offence relating to the non-consensual recording of intimate images:

AGD emphasises that further stakeholder consultation, as to the scope of such an offence and consideration of whether any further related legislative amendment (for example regarding application of section 125B of the Criminal Code on the practice of ‘sexting’) is desirable, is required. It is beyond the scope of the NT Bill to make such an amendment. Any recommendation should be premised as being for longer term consideration by the Government.⁸⁴

Committee’s Comments

- 3.65 The Committee considers the lack of adequate legislation regarding the non-consensual recording of intimate images should be addressed. With regards to the NTLRC’s inquiry, the Committee acknowledges that its terms of reference were limited to the investigation and examination of the need for law reform in relation to “the practice of using intimate personal material to intimidate, hurt or extort others.”⁸⁵ Nevertheless, the Committee notes that Recommendation 2 of the NTLRC Report would appear to acknowledge the breadth of the issue:

The Northern Territory Parliament should enact appropriate legislation to protect all persons resident or present in the Northern Territory from lasting harm or distress caused to any person by what is colloquially known as ‘revenge porn’, but more accurately described as the non-consensual sharing of intimate images.’

- 3.66 While the Committee also accepts that the *National Principles* do not specifically consider offences relating to the non-consensual recording of intimate images, the evidence indicates that it is generally accepted that the term ‘non-consensual sharing of intimate images’ encompasses recording, distributing and threatening to distribute intimate images without consent. Indeed, in many instances, non-consensual recording is a pre-cursor to the offence of distributing or threatening to distribute intimate images without consent.
- 3.67 Given the significant harm that can ensue from the non-consensual recording of intimate images, the Committee is of the view that this conduct should be

⁸³ Department of the Attorney-General and Justice, *Answers to Written Questions*, 13 February 2018, <https://parliament.nt.gov.au/committees/spsc/CCA#TP>, p.15

⁸⁴ Department of the Attorney-General and Justice, *Answers to Written Questions*, 13 February 2018, <https://parliament.nt.gov.au/committees/spsc/CCA#TP>, p.15

⁸⁵ Northern Territory Law Reform Committee, *Report on the Non-Consensual Sharing of Intimate Images*, Report No. 43, November 2016, <https://justice.nt.gov.au/attorney-general-and-justice/law/report-on-the-non-consensual-sharing-of-intimate-images>, p.6

criminalised. While the Committee agrees that stakeholders should be consulted as to the scope of such an offence and that consideration ought to be given to whether any further related legislative amendment is required, it considers that this should be addressed promptly.

- 3.68 The Committee is concerned that the absence of an offence regarding the recording of intimate images without consent, sends a mixed message to the community as to the types of conduct that are considered unacceptable and may diminish the Bill's capacity to deter potential perpetrators. Similarly, the Committee is concerned that reliance on what are clearly inadequate provisions in the *Summary Offences Act* and the *Surveillance Devices Act*, further trivialises the seriousness of the non-consensual recording of intimate images.
- 3.69 Taking into consideration the recommendations of the Senate inquiry regarding the criminalisation of non-consensual recording of intimate images, and the precedents set by NSW and the ACT, the Committee is of the view that introduction of such an offence in the Northern Territory would more accurately reflect the aim of the *National Principles* to establish "nationally consistent criminal offences relating to non-consensual sharing of intimate images."⁸⁶

Recommendation 6

The Committee recommends that the Government give prompt consideration to the introduction of an offence of 'recording of intimate image without consent'.

Public Education and Awareness

- 3.70 All of the witnesses that appeared before the Committee highlighted the importance of public education in this area. While research indicates that criminalising behaviour that was previously lawful does deter people, it is generally acknowledged that criminalising the non-consensual sharing of intimate images is only the tip of the iceberg.
- 3.71 As Dr Asher Flynn (Senior Lecturer Criminology, Monash University) pointed out to the Committee:

There is a significant level of education needed in the community around what image-based sexual abuse is and the harms associated with it. From our research findings, we have felt there needs to be a multifaceted approach to this so we are highly supportive of introducing specific criminal offences that will target this type of behaviour.

We also feel it is really important that there are educational resources that come along with that. We feel it is important to have educational programs in schools, universities and communities more broadly. One of the ways we saw this play out in England and Wales when they introduced their legislation was they combined it with a very active public campaign that alerted people to what the new laws

⁸⁶ Law, Crime and Community Safety Council, *National Statement of Principles Relating to the Criminalisation of the Non-Consensual Sharing of Intimate Images*, <https://www.ag.gov.au/CrimeAndCorruption/Cybercrime/Documents/National-statement-of-principles-criminalisation-non-consensual-sharing-intimate-images.PDF>, p.1

were, the impacts of image based sexual abuse and what victims and perpetrators can expect might happen as a result of the new laws being introduced.

We think it is really important there are information and support services for victims and that this type of information support is actually accessible for the diversity of victims of image based sexual abuse, as you have mentioned, Indigenous people, younger people, people with a disability and those from the LGBTIQ community in particular. We need to make sure police and victim support services are well resourced to be able to respond adequately both in terms of prosecuting and policing this type of behaviour, but also in responding to victims who come forward.⁸⁷

- 3.72 The Committee notes that Dr Flynn's comments reflect those made by the NTLRC which recommended that:

Public education and awareness campaigns about non-consensual sharing of intimate images should be developed and implemented by appropriate offices such as the Children's Commissioner and the Northern Territory Police to prepare and support adults, young people and children in relation to cyber-safety and the misuse of digital technology.⁸⁸

- 3.73 In recommending an education campaign, the NTLRC also sounded a particularly salient note of caution:

There is a risk that an excessive focus on educating individuals about the consequences of allowing sexual images to be taken could be harmful. Messages that focus on the risks that arise from consenting to the production of private sexual images are easily translated to the message that people who take such risks are personally responsible for the harm that may befall them. This obscures the gendered inequities of such offending and harmfully amplifies existing and out-dated cultural norms that blame women who experience gendered violence. Such an approach overlooks the fact that digital and online technology has been integrated into modern sexual life and implies that victims are responsible for the decisions of perpetrators committing this kind of offence. The position that it is a woman's responsibility to manage such risk fails to take into account the spontaneous nature of sexual interaction and that such acts do not lend themselves to calculative rationality. The emphasis of an 'education drive' should thus be on the need to not distribute the images that a partner has implicitly been trusted with.⁸⁹

- 3.74 The Committee understands that the Department of the Attorney-General and Justice will be developing fact sheets explaining the new law and how it works, the civil and criminal procedural options that are available, and the resources that people can access, such as the eSafety Commissioner portal and the options. These fact sheets will then be provided to relevant departments and a range of non-government organisations.⁹⁰

⁸⁷ Dr Asher Flynn, Committee Transcript, 14 February 2018, pp. 8-9

⁸⁸ Northern Territory Law Reform Committee, *Report on the Non-Consensual Sharing of Intimate Images*, Report No. 43, November 2016, <https://justice.nt.gov.au/attorney-general-and-justice/law/report-on-the-non-consensual-sharing-of-intimate-images>, p.41

⁸⁹ Northern Territory Law Reform Committee, *Report on the Non-Consensual Sharing of Intimate Images*, Report No. 43, November 2016, <https://justice.nt.gov.au/attorney-general-and-justice/law/report-on-the-non-consensual-sharing-of-intimate-images>, pp.40-1

⁹⁰ Ms Fiona Hardy, Committee Transcript, 14 February 2018, p.18

Committee's Comments

3.75 As highlighted by the evidence received, the capacity of the proposed legislation to deter the non-consensual sharing of intimate images will be significantly enhanced if it is supported by an appropriate public education and awareness campaign.

Recommendation 7

The Committee recommends that introduction of the proposed legislation is combined with a comprehensive public education and awareness campaign that takes into consideration available research and the comments of the Northern Territory Law Reform Committee.

Appendix A: Submissions Received, Public Briefing and Public Hearings

Submissions Received

1. Northern Territory Legal Aid Commission
2. RMIT University and Monash University
3. Commissioner for Information and Public Interest Disclosures
4. Top End Women's Legal Service
5. Mr Rhys L. G. Michie

Public Briefing – Wednesday, 31 January 2018

Department of the Attorney-General and Justice

- Mr Greg Shanahan: Chief Executive Officer
- Ms Jenni Daniel-Yee: Director Legal Policy Unit
- Ms Fiona Hardy: Senior Policy Lawyer

Public Hearing – Wednesday, 14 February 2018

- Mr Russell Goldflam: Barrister and Solicitor, Northern Territory Legal Aid Commission
- Dr Nicola Henry: Associate Professor and Vice Chancellor's Principal Research Fellow, Social and Global Studies Research Centre, RMIT University
Dr Asher Flynn: Senior Lecturer Criminology, School of Social Sciences, Monash University
- Ms Vanessa Lethlean: Managing Solicitor, Top End Women's Legal Service
Ms Caitlin Weatherby-Fell: Solicitor, Top End Women's Legal Service
- Mr Rhys L.G. Michie: Private Citizen
- Ms Jenni Daniel-Yee: Director Legal Policy Unit, Department of the Attorney-General and Justice
Ms Fiona Hardy: Senior Policy Lawyer, Department of the Attorney-General and Justice

Note: Copies of submissions, hearing transcripts and tabled papers are available at: <https://parliament.nt.gov.au/committees/spsc/CCA>

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