SOCIAL POLICY SCRUTINY COMMITTEE
Public Hearing 14 February 2018

Criminal Code Amendment (Intimate Images) Bill 2017

RESPONSES OF THE DEPARTMENT OF THE ATTORNEY-GENERAL AND JUSTICE TO WRITTEN QUESTIONS FROM THE COMMITTEE

1. **A number of submissions raised concerns regarding the breadth of the definition of 'intimate image'. The NT Legal Aid Commission suggested that the definitions of 'intimate image', 'engaged in a private act' and 'private parts' in the NSW legislation are preferable as they are more precise.**

   a) ***Can you clarify for the Committee how the definition of 'intimate image' in the Bill was determined and what consideration was given to definitions in equivalent legislation elsewhere?***

AGD RESPONSE

In determining the definition of 'intimate image', the Department of the Attorney-General and Justice (AGD) considered the definitions given to the equivalent term in the Australian jurisdictions that had already enacted specific offences regarding the non-consensual sharing of intimate images. Particular consideration was given to the definitions in NSW and the ACT, which were developed after those in Victoria and South Australia.

The Crimes (Intimate Image Abuse) Amendment Bill 2017 (ACT) was initially introduced as a private member's bill. It was modelled almost verbatim on the NSW Crimes Amendment (Intimate Images) Bill 2017. The ACT Government proposed a number of amendments to the Crimes (Intimate Image Abuse) Amendment Bill 2017 (ACT) as introduced and tabled a Supplementary Explanatory Statement[1] outlining and explaining the proposed amendments. The Bill was passed with those proposed amendments.

The relevant NSW definitions are found in section 91N of the *Crimes Act 1900* (NSW). They are:

> ***engaged in a private act*** means:
> (a) in a state of undress, or
> (b) using the toilet, showering or bathing, or
> (c) engaged in a sexual act of a kind not ordinarily done in public, or
> (d) engaged in any other like activity.
> image means a still or moving image, whether or not altered.

[1] Accessible at www.legislation.act.gov.au

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

private parts means:
(a) a person's genital area or anal area, whether bare or covered by underwear, or
(b) the breasts of a female person, or transgender or intersex person identifying as female.

The ACT government amendments removed the 'engaged in any other like activity' from the definition of 'engaged in a private act' on the ground that it was not sufficiently certain provide a clear definition of the proscribed behaviour.

The 'reasonable person' test as to the circumstances where a person would be 'expected to be afforded privacy' was also removed from the 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.

AGD was also influenced in determining the definition of 'intimate image' by recommendation 3 of the NT Law Reform Committee in its 2016 *Report on the Non-Consensual Sharing of Intimate Images* (the NTLRC Report), namely:

Recommendation 3
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

(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.

The NTLRC considered that the definition ought to be confined to sexual images (at p35 of the NTLRC Report). AGD considered this was a sensible constraint on the limits of criminalisation.

AGD notes the concerns about the breadth of the definition of 'intimate image' made in the submissions from the NT Legal Aid Commission, the Commissioner for Information and Public Interest Disclosures and Mr Michie. The Commissioner for

Information and Public Interest Disclosures also discussed her concerns with AGD (as noted in her submission).

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 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.

2. **Mr Michie suggested that subsection 208AB(2) be amended to include an exemption for the distribution of an 'intimate image' taken in public where members of the public are present – such as a photograph of a streaker at a cricket match.**

   a) Has any consideration been given to the inclusion of a provision similar to section 2(5) of the Abusive Behaviour and Sexual Harm Act 2016 (Scotland), which was introduced to cover these sorts of situations?

AGD RESPONSE

AGD did not specifically consider section 2(5) of the *Abusive Behaviour and Sexual Harm (Scotland) Act 2016* (the Scottish Act) during the development of the NT Bill. While the Policy Memorandum[2] 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 protesters 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 circumstance that the person did not consent to distribution of the image. Recklessness as to circumstance is defined in section 43AK(2) and (3) of the Criminal Code as:

> (2) A person is reckless in relation to a circumstance if:
> (a) the person is aware of a substantial risk that the circumstance exists or will exist; and
> (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.
> (3) The question whether taking a risk is unjustifiable is one of fact.

[2] www.parliament.scot/parliamentarybusiness/Bills/92672.aspx

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'.

It is noted that an equivalent of section 2(5) of the Scottish Act has not been adopted elsewhere in Australia.

3. **The NTLRC Report recommended that consideration be given to the inclusion of a public interest disclosure exemption "for 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".**

   a) Can you clarify for the Committee whether such an exemption was considered for inclusion in the Bill? If not, why?

AGD RESPONSE

The NTLRC Report recommended:

> **Recommendation 4**
> Legislation should include specific public interest defences. It is recommended that conduct be defined as being of public benefit if it was necessary for or of assistance in:
>
> (a) enforcing a law of the Commonwealth, a State or a Territory; or
>
> (b) monitoring compliance with, or investigating a contravention of, a law of the Commonwealth, a State or a Territory; or
>
> (c) the administration of justice; or
>
> (d) conducting scientific, medical or educational research that has been approved by the Minister in writing for the purposes of this section.
>
> There should also be an exclusion for 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.

Proposed section 208A(2)(b), (c), (d) and (e) implements the first four points in recommendation 4. Similar exemptions are found in the NSW and ACT legislation. AGD did consider whether an exemption 'for 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' should be included and decided, on balance, that it should not. 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'. Given that level of uncertainty, AGD was of the view that such an exemption should not be included.

4. **Section 33(5) of the *Criminal Justice and Courts Act 2015* (UK) provides that 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.**

   a) Has any consideration been given to the inclusion of a similar provision in the Bill?

   AGD RESPONSE

   The approach taken in section 33 of the *Criminal Justice and Courts Act 2015* (UK) is not one that has been adopted in any of the Australian jurisdictions to legislate in this area, namely NSW, the ACT, Victoria and South Australia.

   Similar to the response to Question 2, AGD 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.

5. **It is noted that both the offence of distributing an intimate image without consent and the offence of threatening to distribute intimate images 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).**

   a) Is there any particular reason why these offences carry the same penalty?

   AGD RESPONSE

   The offence of threatening to distribute an intimate image (section 41DB *Summary Offences Act 1966* (Vic)) carries a lower penalty than the offence of distribution of an intimate image in section 41DA. The maximum penalty for the threat offence is 1 year imprisonment and for the distribution offence it is 2 years.

   The Victorian provisions were enacted in 2014. In 2017, NSW and the ACT enacted like offences. In both jurisdictions, the maximum penalty for the offences of distributing

and threatening to distribute an intimate image is the same, namely 3 years imprisonment. The NT Bill proposes the same penalties as NSW and the ACT.

The threat to distribute an intimate image can involve conduct at least as serious as the offence of distribution. Particularly in the domestic violence context, the threat to distribute an intimate image can be used as an instrument of coercion, manipulation or control.

Dr Nicola Henry, Dr Anastasia Powell and Dr Asher Flynn from RMIT University have recently completed a project on 'image-based abuse' (which they refer to in their submission to the Committee on the NT Bill) which involved a national online survey of 4274 participants. The findings of the survey, published in May 2017 as *Not Just 'Revenge Pornography': Australians' Experiences of Image-Based Abuse*, included 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' (at p5).

This compared with 75% of victims whose images were distributed without consent. In other words, 'threats of imaged-based abuse cause greater psychological distress for victims as compared with the taking or distribution of images' (at p9), which 'demonstrates the seriousness of such harms' (at p9).

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.

6. **The submission from RMIT and Monash Universities notes that the Bill incorporates the principles outlined in the *National Statement of Principles relating to the Criminalisation of the Non-Consensual Sharing of Intimate Images.* However, it suggested that subsection 208AC(1)(a) be amended to more fully reflect Principle 7.**

   a) Can you clarify for the Committee the reasons why this subsection does not specifically provide that the offence occurs irrespective of whether or not the intimate image exists?

AGD RESPONSE

Principle 7 of the *National Statement of Principles relating to the Criminalisation of the Non-Consensual Sharing of Intimate Images* (the National Principles) provides:

> Offences should address threats to distribute intimate images, irrespective of whether or not the intimate image exists.

Proposed section 208AC does reflect Principle 7 and does specifically provide that the offence occurs irrespective of whether or not the intimate image exists. It does so in subsection 208AC(2)(c), which provides:

"...

(c) a person may be found guilty even if carrying out the threat is impossible.

Examples for subsection (2)(c)

1. *The image does not exist.*
2. *Technical limitations prevent*

Subsection 208AC(2)(c) covers not only the situation where the intimate image does not exist, but also other situations where carrying out the threat is impossible. Subsection 208AC(2) is modelled on section 72E(2) of the *Crimes Act 1900* (ACT).

In the commentary for proposed section 208AC, the Explanatory Statement for the NT Bill states:

> 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.

That the ambit of the offence is detailed in subsection (2) rather than subsection (1) is a matter of drafting style not substance.

7. **A number of submissions raised concerns that the Bill does not provide sufficient safeguards against the potential criminalisation of children who take or share images without consent.**

   a) Section 208AD provides that the prosecution of a child must not be commenced without the consent of the Director of Public Prosecutions. Can you clarify for the Committee under what circumstances it is expected that consent would be given?

AGD RESPONSE

In the Northern Territory, the Director of Public Prosecutions (DPP) is guided by the *Guidelines of the Director of Public Prosecutions* when determining whether to commence or continue a prosecution. The DPP should prosecute when there are reasonable prospects of conviction and it is in the public interest to prosecute. Guideline 2.5 sets out the matters to be considered when assessing public interest. Guideline 10 deals specifically with young offenders. Guidelines 10.4 and 10.6 are particularly relevant to the Committee's question.

10.4 Special considerations apply to the prosecution of young offenders and children. A prosecution of a young offender should always be regarded as a severe step, and generally speaking a much stronger case can be made for methods of disposal which fall short of prosecution unless the seriousness of the offence or the circumstances of the young offender concerned dictate otherwise. Ordinarily the public interest will not require the prosecution of a young offender who is a first offender in circumstances where the offence is not serious.

10.6 In deciding whether or not the public interest warrants the prosecution of a young offender, regard should be had to such of the factors set out in Guideline 2: The Decision to Prosecute and particularly:
(1) the seriousness of the offence;
(2) the age and apparent maturity and mental capacity of the young offender;
(3) the available alternatives to prosecution, such as a caution, and their efficacy;
(4) the sentencing options available to the Youth Justice Court if the matter were to be prosecuted;
(5) the young offender's family circumstances, particularly whether the parents of the young offender appear able and prepared to exercise effective discipline and control over the young offender;
(6) the young offender's antecedents, including the circumstances of any previous caution the young offender may have been given, and whether they are such as to indicate that a less formal disposal of the present matter would be inappropriate;
(7) whether a prosecution would be likely to be harmful to the young offender or be inappropriate, having regard to such matters as the personality of the young offender and his or her family circumstances; and
(8) the welfare and rehabilitation of the young offender.

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.

NSW has introduced a similar safeguard, in section 91P(2) and 91Q(2) of the *Crimes Act 1900* (NSW).

b) Can you comment on the NT Legal Aid Commission's proposal that the Bill expressly provide that the offence of distributing images without consent should not be prescribed as a 'serious offence' for the purposes of section 39 of the Youth Justice Act?

AGD RESPONSE

To be a 'serious offence' for the purposes of section 39 of the *Youth Justice Act*, an offence must be prescribed, in other words included in the Youth Justice Regulations, which would require such inclusion being on the advice of the Executive Council. An offence is not a 'serious offence' unless it is made so by regulation. The Government

has no intention of having the offences proposed in the NT Bill prescribed as 'serious offences'. The Attorney-General and Minister for Justice stated this clearly in her Explanatory Speech when introducing the NT Bill on 23 November 2017. She said:

> 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.[3]

There are no other criminal offences that are excluded from being prescribed in the manner suggested by the NT Legal Aid Commission.

Territory Families is currently reviewing the *Youth Justice Act* and the Youth Justice Regulations in response to the Report of the Royal Commission into the Protection and Detention of Children in the Northern Territory. It is understood that the offences currently prescribed under regulation 3 are being reviewed as is the general ambit of what should be prescribed as a 'serious offence' under section 39(7) *Youth Justice Act*. This could possibly involve amendment to that definition. The review is being led by Territory Families which has administrative responsibility for the *Youth Justice Act*.

8. **The Committee has heard that the fundamental issue for most people faced with the publication of intimate images is that there is both an ongoing affront to their dignity and ongoing invasion of their privacy. Section 208AE empowers a court to order offending images to be taken down, but only after an offender has been found guilty.**

   a) ***What consideration has been given to other measures that may be enacted to provide a more immediate remedy to victims to restrict the further distribution of non-consensual images, such as ex parte injunctive relief or other administrative measures?***

AGD RESPONSE

The criminal law has symbolic and educative functions, denouncing conduct that grossly offends community norms. However, criminalising the non-consensual sharing of intimate images is only one aspect of addressing the issue of technology-facilitated harm. For example, as the NTLRC Report recommended:

> **Recommendation 6**
> 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.

[3] NT Hansard 23.11.17 p7

Education and information not just about the ambit and operation of the proposed criminal law but also the harms that this conduct can cause is essential. To a considerable extent the provision of information, including advice and support for victims, is to be found on the online portal introduced by the Commonwealth eSafety Commissioner in October 2017.

Another aspect, pertinent to the Committee's Question 6, is the importance of providing non-criminal remedies for victims.

The NTLRC Report recommended:

> **Recommendation 7**
> 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

AGD considered this recommendation. It is an issue that was not considered in the National Principles, which are confined to the 'criminalisation' of the non-consensual sharing of intimate images. There is no 'take down' power at all in Victoria and South Australia.

The take down power included in proposed section 208AE is modelled on equivalent provisions in NSW (section 91S *Crimes Act* 1900) and the ACT (section 72H *Crimes Act 1900*). The issue of the scope of the take down power was thoroughly ventilated during the debate in the NSW Parliament of the Crimes Amendment (Intimate Images Bill 2017 (NSW). A number of members of the Opposition were critical of the narrowness of what has been enacted as section 91S *Crimes Act 1900* (NSW).

In reply, the NSW Attorney-General, the Hon Mark Speakman, SC MP stated:

> The concerns expressed by those opposite about the need for swift rectification action are entirely legitimate, but they overlook the place of New South Wales in a federation and what is happening at the Commonwealth level.[4]

He went on to explain the limitations of courts in NSW making orders against internet providers and content hosts, many of which are located outside Australia. He expressed the view that a civil or administrative regime was best dealt with by the Commonwealth. He noted the public consultation being undertaken by Australian

[4] NSW Hansard 31.5.17, p28

Government Department of Communications and the Arts into a proposed civil penalties regime[5] targeting both perpetrators and sites and noted:

> We do not need two competing regimes, to the extent that any New South Wales government regime could be at all effective. ...the States are dealing with criminal matters and the Commonwealth is looking at a broader range of civil penalties.[6]

With the background of the debate in the NSW Parliament and the action being taken at Commonwealth level, a take down power wider than that in proposed section 208AE was not seen as feasible or desirable.

On 6 December 2017, the Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2017 (the Commonwealth Bill) was introduced in the Australian Senate.

According to the Explanatory Statement tabled at the same time, the Commonwealth 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.
- 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* 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.[7]

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[5] Australian Government Department of the Communications and the Arts Discussion Paper 'Civil penalties regime for non-consensual sharing of intimate images' released May 2017.
[6] Supra note 2, at p28.
[7] Explanatory Statement for Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2017 (Cth) at p5.

9. **As implied by the term 'revenge porn', in many cases a prominent aspect of the offending is a malicious intent to harm the victim. The NT Legal Aid Commission proposed that, when dealing with offenders under this division, the court be conferred the power to make a compensation order in addition to sentence pursuant to Part 5 of the *Sentencing Act.***

    a) In its current form, section 88 of the Sentencing Act (orders for restitution and compensation) does not appear to be applicable to the offences in the Bill. Has any consideration been given to either amending the Sentencing Act or including provisions in the Bill similar to section 97(1) of the NSW Victims Rights and Support Act?

    AGD RESPONSE

    It is unclear why the NT Legal Aid Commission considers that section 88 of the *Sentencing Act* would have no application to the offences in the NT Bill. 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 has suffered an 'injury' in the course of or in connection with the commission of an offence.[8]

    Section 97(1) of the *Victims Rights and Support Act 2013* (NSW) empowers a court which convicts a person of an offence to direct the offender to pay compensation to any 'aggrieved person' for any 'loss' sustained through, or by reason of, the offence. 'Loss' most likely means economic loss, as it is under the NT *Sentencing Act*.

    It is not clear from the submission whether the NT Legal Aid Commission is proposing an amendment to section 88 of the *Sentencing Act* to widen the scope of when a court may make an order for compensation for economic loss to victims of crime (for example, not requiring that the victim suffered an 'injury') or some wider form of compensation, more akin to civil compensation for pain and suffering.

    If the Committee was of a 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.

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[8] See for example *The Queen v Williams* [2010] NTSC 74; *Hutchinson v Anderson* [2015] NTSC 68

10. **It has been suggested that the Bill should incorporate provisions to protect the privacy of victims similar to that provided to victims of sexual offences.**

    a) ***Can you clarify for the Committee why the Bill does not include provisions such as section 6 of the Sexual Offences (Evidence and Procedure) Act (NT) which prohibits publication of the complainant's identity?***

AGD RESPONSE

'Open justice' is a fundamental principle of the common law. The general rule is that justice must be administered in public. This means that, unless precluded by statute or absolutely necessary to the administration of justice, proceedings must be held in public and the media must be allowed to report fairly, accurately and contemporaneously on those proceedings.

In all Australian jurisdictions, 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. In the Northern Territory, this power is found in section 57 of the *Evidence Act*.

Over recent years, specific statutory non-publication rules have been introduced regarding evidence in sexual offence proceedings, including information that could identify the complainant and, in many cases, the accused. In the Northern Territory, these rules are found in sections 6, 7 and 11(2) of the *Sexual Offences (Evidence and Procedure) Act*. Similar provisions have been enacted in the other Australian jurisdictions.

Victoria, South Australia, NSW and the ACT have enacted specific offences regarding the non-consensual distribution and threat to distribute intimate images. In none of these jurisdictions have these offences been added to the list of 'sexual offences' to which the special non-publication provisions apply.

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 jurisdictions, 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 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.

11. **Concern was raised in submissions that the Bill does not include any specific criminal offences relating to the non-consensual recording of intimate images such as 'up skirting', 'down blousing' or the surreptitious filming of intimate images in public or private places.**

a) To what extent is non-consensual recording of intimate images prohibited in the Northern Territory?

AGD RESPONSE

The Northern Territory offences most likely to be applicable to the non-consensual recording of intimate images are section 47(a) or (f) of the *Summary Offences Act* and section 12(1) of the *Surveillance Devices Act*.

Section 47(a) and (f) of the *Summary Offences Act* provides:

> **47 Offensive, &c., conduct**
> Every person who is guilty:
> (a) of any riotous, offensive, disorderly or indecent behaviour, or of fighting, or using obscene language, in or within the hearing or view of any person in any road, street, thoroughfare or public place;
> ...
> (f) of unreasonably disrupting the privacy of another person,
> shall be guilty of an offence.
> Penalty: $2,000 or imprisonment for 6 months, or both.

Section 12(1) of the *Surveillance Devices Act* provides:

> **12 Installation, use and maintenance of optical surveillance devices**
> (1) A person is guilty of an offence if the person:
> (a) installs, uses or maintains an optical surveillance device to monitor, record visually or observe a private activity to which the person is not a party; and
> (b) knows the device is installed, used or maintained without the express or implied consent of each party to the activity.
> Maximum penalty: 250 penalty units or imprisonment for 2 years.

Section 4 of the *Surveillance Devices Act* defines 'optical surveillance device' and 'private activity' as:

> ***optical surveillance device*** means a device capable of being used to monitor, record visually or observe an activity, but does not include spectacles, contact lenses or a similar device used by a person with impaired sight to overcome the impairment and permit the person to see only sights ordinarily visible to the human eye.
>
> ***private activity*** means an activity carried on in circumstances that may reasonably be taken to indicate the parties to the activity desire it to be observed only by themselves, but does not include an activity carried on in circumstances in which the parties to the activity ought reasonably to expect the activity may be observed by someone else.

The NTLRC Report noted (at p20) that, anecdotally, it was understood that 'upskirting' was charged in the NT Local Court most commonly under section 47(a) of the *Summary Offences Act* or section 12(1) of the *Surveillance Devices Act*.

However, neither section 47(f) of the *Summary Offences Act* nor section 12(1) of the *Surveillance Devices Act* seem a good fit for surreptitious recording of a person in a public place. Section 47(a) of the *Summary Offences* Act, being so general in nature, is less problematic. In addition, section 12(1) of the *Surveillance Devices Act* is limited to the recording etc of activities to which the defendant is not a party. This would preclude the surreptitious recording of sexual activity where the person doing the recording is also involved in the sexual activity.

b) Has the Department given any consideration to introducing an offence related to the non-consensual recording of intimate images such as those introduced in NSW and the ACT in 2017?

AGD RESPONSE

The NTLRC Report and the National Principles address the non-consensual distribution of and threatening to distribute intimate images. The NT Bill was developed primarily in response to those documents.

There are other issues which were beyond the scope of the NT Bill, including the non-consensual recording of intimate images.

The Crimes Amendment (Intimate Images) Bill 2017 (NSW) included an offence of recording an intimate image without consent and threatening to record an intimate image, which have been enacted as section 91P(1) and 91R(1) of the *Crimes Act 1900* (NSW) respectively.

The 'threats' offence in the Crimes (Intimate Image Abuse) Amendment Bill 2017 (ACT) included threatening to 'capture' or 'distribute' an intimate image, now enacted as section 72E of the *Crimes Act 1900* (ACT). The *Crimes Legislation Amendment Act 2015* (ACT) inserted section 61B 'Intimate observations or capturing visual data etc' into the *Crimes Act 1900* (ACT). The scope of section 61B is arguably wider than section 91P(1) of the *Crimes Act 1900* (NSW).

If the Committee was minded to make a recommendation relating to the introduction of an offence of non-consensual recording of an intimate image, 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 the 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.