

Mr Rhys L. G. Michie

5 February 2018

Ms Julia Knight
Social Policy Scrutiny Committee Secretary
Northern Territory Legislative Assembly
GPO Box 3721
Darwin NT 0801

Submission in response to the *Criminal Code Amendment (Intimate Images) Bill 2017*

Dear Ms Knight,

I write you to provide my feedback on the *Criminal Code Amendment (Intimate Images) Bill 2017*, which the Northern Territory Legislative Assembly referred to the Social Policy Scrutiny Committee on 23 November 2017, for inquiry and report. The relevant Terms of Reference state that, according to Sessional Order 14 (4)(c) the function of this committee is to inquire and report, whether the Assembly should pass, or amend the *Criminal Code Amendment (Intimate Images) Bill 2017*, and whether there this Bill has sufficient regard to the rights and liberties of individuals. I have read the Bill, the Explanatory Statement, and Statement of Compatibility with Human Rights. I make the following recommendations:

1. I recommend the Committee report that the Assembly should pass the *Criminal Code Amendment (Intimate Images) Bill 2017*;
2. I recommend amendments to the proposed Bill.

Recommendations

I recommend that the Committee consider including ‘share’ as a conduct listed in s. 208AA **distribute** (a).

I recommend that the Committee consider reconceptualising the definition of an intimate image. The problem this reform appears to address is the law lagging technological change. Existing Information Communication Technologies (ICT) include audio and text. Furthermore, a 3D printed statue of a person’s genitalia is also excluded from the current construction of the definition of an intimate image in this Bill. These types of documents that can be used to communicate One’s sexuality in ways that may “*hurt, intimidate or extort others*”¹. I recommend the definition of image be reconceptualised to capture a broader range of ways of documenting One’s sexuality.

I recommend the Committee consider inserting ‘genuine’ into 208AB(2)(e) to strengthen purposiveness of the scientific, medical or educational use.

I recommend that the Committee consider reconstructing s. 208AB(4) to provide that the distribution of an intimate image for reward ought to delineate the operation of the criminal law. That is, in a situation where a person consents the distribution of an intimate image for

¹ Fyles, N. (2017) *New Laws on the Non-Consensual Sharing of Intimate Images*, NT Government Newsroom.

reward, then “*by reason only of that fact*”² they ought to “*be regarded as having consented to the distribution of that image*”³, by the legal title holder, in the future. I recommend the Committee consider the model contained in section 33(5) of the *Criminal Justice and Courts Act 2015 (UK)*.

I recommend the Committee consider restructuring the penalty regime between the offence of ‘Distribution of an intimate image without consent’ contained in s. 208AB(1) and the offence of ‘Threaten to distribute an intimate image’ contained in s. 208AC(1) to create a structural disincentive to act on the threat. Both these offences provide a maximum penalty of 3 years imprisonment. Thus, once a person makes the threat, there is no disincentive not to carry out the act of distribution. I recommend the Committee consider a maximum penalty for the threat offence that is less than the maximum penalty for the distribution offence, thus constructing a deterrent to carry out the threat. The model contained in sections 41DA and 41DB of the *Summary Offences Act (1966) (Vic)* could be a good model to emulate.

I recommend the Committee consider amending the definition of an ‘intimate image’. The definition contained in ss. 208AA **intimate image** (c) and (d) extends to the genital or anal region, or a breast... “*covered by underwear*”⁴. However, there is no requirement for a connection to sexual context. 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*”⁵. 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*”⁶. 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 sexual context.

I recommend the Committee consider two further exceptions. The list of circumstances where a person does not commit the offence of ‘Distribution of an intimate image without consent’ contained in s. 208AB does not cover situations where the intimate image is taken in public, nor certain circumstances where the disclosure is in the public interest.

The first exception is in situations where the intimate image is taken in public. These situations have the following common characteristics:

- Person A and Person B are both represented in the intimate image; and
- Person B was not recorded in that intimate image as a result of a deliberate act of another person to which person B did not freely agree; and
- Person B was in a place to which members of the public had access (whether or not on payment of a fee), and
- Members of the public were present.

This provision was introduced in Scotland to cover the situation where a stalker at a cricket match is photographed. I do not think this exception inconsistent with the purpose of criminalising intimate images that “*hurt, intimidate or extort others*”⁷. The model contained in s. 2 (5) *Abusive Behaviour and Sexual Harm (Scotland) Act 2016* may be a good model to follow. I recommend the Committee consider amending s. 208AB(2) to include this exception.

² Ibid.

³ Ibid.

⁴ *Criminal Code Amendment (Intimate Images) Bill 2017*, ss. 208AA **intimate image** (c) and (d).

⁵ Fyles, N. (2017) *New Laws on the Non-Consensual Sharing of Intimate Images*, NT Government Newsroom.

⁶ *Criminal Code Amendment (Intimate Images) Bill 2017*, ss. 208AA **intimate image** (c) and (d).

⁷ Fyles, N. (2017) *New Laws on the Non-Consensual Sharing of Intimate Images*, NT Government Newsroom.

The second exception is the public interest disclosure for journalists. I agree with the Northern Territory Law Reform Committee's recommendation that there be a public interest disclosure "*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*"⁸.

Sexting Provisions

The Victorian Parliament reformed the criminal law in Victoria in 2014 to make the non-consensual distribution (and threat) of an intimate image a criminal offence⁹. This reform was the result of the Victorian Parliament's Inquiry into Sexting. The complementary reforms the Victorian Parliament introduced were provisions that apply to young people who engage in consensual distribution of intimate images. The provisions ensure that child pornography laws are not being inappropriately applied to young people who lawfully engage in sexual activity, and consensually produce or distribute intimate images, where there are no aggravating factors present. These reforms have also been introduced in the ACT as part of the reform of this section of the law. I recommend the Legislative Assembly consider reforming the law to provide protections for young people who engage in age appropriate peer-to-peer sexting.

Conclusion

I recommend that the Social Policy Scrutiny Committee report should report to the Northern Territory Legislative Assembly that the *Criminal Code Amendment (Intimate Images) Bill 2017* should be passed. I recommend that the above mentioned amendments be considered. I hope that the Northern Territory Legislative Assembly legislates to criminalise the non-consensual distribution of intimate images. Please feel free to contact me if you think there is something that I can do that would be helpful.

Yours Sincerely,

Mr Rhys L. G. Michie

⁸ Northern Territory Law Reform Committee (2016) *Report on the Non-Consensual Sharing of Intimate Images*, p. 7.

⁹ *Summary Offences Act (1966) (Vic)* ss 41DA – DB.