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SOCIAL POLICY SCRUTINY COMMITTEE

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Litchfield Room, Level 3, Parliament House, Darwin

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

Members: Ms Ngaree Ah Kit MLA, Chair, Member for Karama
Ms Sandra Nelson MLA, Member for Katherine
Mrs Lia Finocchiaro MLA, Member for Spillett

Witnesses:

- Russell Goldflam: Barrister and Solicitor, NT 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 Studies, Monash University
- Vanessa Lethlean: Managing Solicitor, Top End Women's Legal Service

  Caitlin Weatherby-Fell: Solicitor, Top End Women's Legal Service
- Rhys L. G. Michie: Private Citizen
- Jenni Daniel-Yee: Director Legal Policy Unit, Department of the Attorney-General and Justice

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

CRIMINAL CODE AMENDMENT (INTIMATE IMAGES) BILL 2017

Northern Territory Legal Aid Commission

Madam CHAIR: Hi, Russell, this is Ngaree Ah Kit, Member for Karama. I am the Chairperson of the Social Policy Scrutiny Committee. I thank you for being on the line as part of our public hearing today.

Mr GOLDFLAM: Thank you, Madam Chair.

Madam CHAIR: In the room with me I have my committee colleagues: Lia Finocchiaro the Member for Spillett, and Sandra Nelson, the Member for Katherine.

Mrs FINOCCHIARO: Good afternoon.

Mr GOLDFLAM: Good afternoon, members.

Ms NELSON: Good afternoon.

Madam CHAIR: Russell, this is a formal proceeding of the committee and the protection of parliamentary privilege and the obligation to not mislead the committee apply. This is a public hearing being webcast through the Assembly's website. A transcript will be made for the use of the committee and may be put on the committee's website.

If at any time during the hearing today you are concerned that what you will say should not be made public, you may ask that the committee go into a closed session and take your evidence in private.

I will ask you to state your name for the record and the capacity in which you appear. I will then invite you to make a brief opening statement before we proceed to the committee's questions. Please state your name and the capacity in which you are appearing.

Mr GOLDFLAM: Russell Goldflam, Barrister and Solicitor, Managing Solicitor of the Alice Springs Office of the Northern Territory Legal Aid Commission.

Madam CHAIR: Excellent. Thank you for that, Russell. I now invite you to make an opening statement. What we have been doing this morning is a bit of a recap of everybody's submissions for the committee.

Mr GOLDFLAM: Yes, I will summarise the submission which has been provided to the committee in writing by the Northern Territory Legal Aid Commission. I will also take the opportunity to make some comments on some other submissions that have been made to this inquiry and have been, very conveniently for the community, published by the Legislative Assembly on its website. I thank the Assembly for being of so much assistance in facilitating what, in a way, is a public discussion of these issues.

The submission made by the Legal Aid Commission contains a number of specific and some rather technical recommendations. Perhaps the most important thing is the Commission—and I will use the word 'Commission' as an abbreviation for the Northern Territory Legal Aid Commission—supports this bill and the principles behind it. It is very gratifying to see that all the other submissions that have been made to this inquiry have similarly been supportive of the bill in principle and, to a significant extent, in substance as well.

Nevertheless, we have some submissions which go to particular aspects of the bill. In taking the committee through the submission, I hope members have the submission in front of you as I am speaking.

Madam CHAIR: Yes, we do, Russell.

Mr GOLDFLAM: Thank you. First, we have made some suggestions about tightening up the definition of 'intimate images'. That submission is quite similar to the brief, but in our submission important comments made by Brenda Monaghan, the Commissioner for Information and the Public Interest Disclosure Commissioner. In her short submission, where she has also noted that potentially, the vagueness of the definition of 'intimate images' in section 208AA of the Bill—or the proposed *Criminal Code Act* if the Bill is passed—leave open the possibility that some sorts of innocuous and everyday imagery of things that happen on beaches, for example, where people do not wear very many clothes, could be criminalised.

For those reasons, the Commission recommends that we turn to the New South Wales legislation—when I say the New South Wales legislation, I refer to the legislation which was passed by way of the *Crimes Amendment (Intimate Images) Act 2017*, item No 29 by the New South Wales parliament last year. That statute introduced amendments to the New South Wales *Crimes Act* and, in particular there are definitions there of 'intimate image' and the associated concepts, which are set out in the Commission's submission, which set out on the second page the definitions we are talking about.

Although they are rather wordy compared to the Northern Territory provisions, in our view they are tighter and will be easier to apply and will not have the unintended consequence of criminalising photographs which, in themselves, are not ones which it intends to criminalise because they are innocuous.

The only matter which we draw to the attention of the committee which we think would justify a departure from the approach taken in the New South Wales legislation is set out in the last paragraph of our discussion under No 2 on page 2 in relation to this recommendation. I will read out the brief paragraph. It submitted that the provision in the Bill of 'intimate image' include 'an image that depicts or has been altered to appear to depict a person in a manner or context that is sexual' be retained so as to bring within the ambit of those provisions an image which in itself is innocuous but which has been republished with, for example, an offensively sexual caption.

That is, unfortunately, quite a common circumstance that occurs on the internet these days, where images of a person are taken and re-captioned, repurposed and de-contextualised and made disgusting and then published. We are not sure the New South Wales definition covers that and we think that should be covered. So, although we are supportive of amending the bill by including the New South Wales definitions instead of the current ones in our section 208AA, we would hope that that particular issue be addressed as well.

That is all consistent with what Brenda Monaghan has recommended, although she has not gone into that much detail about it. She very well captures the problem we also identify.

I turn now to the next submission we made under the heading 2.2. This is perhaps more important than what I have just been talking about and that is an issue we note is also addressed by several of the other bodies that have made submissions, including Monash University and RMIT. That is, that the Bill does not criminalise the recording of non-consensual intimate images; it only criminalises the distribution and threatened distribution of the images.

Our view is that is a significant gap in the breadth of this legislation. It can and should be remedied. In New South Wales it is also an offence, for example, to record intimate images without consent and we have set out the equivalent New South Wales provision in our submission.

I note that it is also a feature of this sort of legislation which was recommended by the Senate Legal and Constitutional Affairs Reference Committee's recommendations which are annexed to the Northern Territory Law Reform Committee's report on this matter which was published towards the end of 2016.

Those recommendations by the Senate Committee set out recommendation 2 and recommendation 3, essentially the Senate recommendations which I think might have been adopted as principles by COAG for all States and Territories when they are passing this sort of legislation. In effect, these recommendations recommend there be three different offences established.

1. to record an intimate image without consent
2. to share, or as it is sometimes called, distribute it
3. to threaten to share it.

We have the second two but not the first one of those three but we think all three should be made offences. We note that it is arguable and possible that section 12 of the *Surveillance Devices Act* of the Northern Territory already effectively covers that behaviour we are seeking to be criminalised. We have submitted that it should be included along with these other so-called revenge porn offences because it makes sense to group them all together in the same statute and form part of the same statutory scheme.

I read the transcript of the proceedings of this committee that were conducted on 31 January 2018 in which officers from the Department of the Attorney-General and Justice, specifically Fiona Hardy, had the opportunity to talk about the Bill and assist the committee to explain it.

I do not think there was any particular mention of this issue in the evidence given by the Department of the Attorney-General and Justice on that occasion. I am unable to assist the committee by way of explaining whether or not recording of non-consensual intimate images has been omitted because it is considered by the department that it is already covered by the *Surveillance Devices Act,* or for some other reason.

Mrs FINOCCHIARO: Russell, I just had a question on that point if you do not mind. If the department was satisfied that the *Surveillance Devices Act* did cover it, would that satisfy the Commission or would you still like to see it?

Mr GOLDFLAM: No, we would still prefer that it be included in this part of the *Criminal Code* so that all of these similar offences which all involve the same sort of activity and would often be charged against a person are as a group. They should all be included in the same part of the law because it is easier for prosecutors, defence lawyers and the courts to administer the prosecution, trial and punishment of these sorts of offences if they are all included together with the same principles underlying them, physical and fault elements and a penalty scheme which is graduated according to the severity of the offending.

The *Surveillance Devices Act* kind of sticks out by itself a bit and is a very different piece of legislation with a very different structure to it. We think it would be worthwhile including this offence in this part of the *Criminal Code*, even if it is substantially covered by section 12 of the *Surveillance Devices Act.*

Mrs FINOCCHIARO: Thank you.

Mr GOLDFLAM: The next recommendation we make is about the defences to a charge. Under the Bill there is a partial defence in that it only applies when the person whose intimate image has been taken is a child, that it is a defence to a charge of distribution that the circumstances of the distribution were such that a reasonable person would regard as acceptable, and that is set out in proposed section 208AB(2)(g).

The Commission recommends that that be changed in two ways. Firstly, the phrase, "circumstances that a reasonable person would regard as acceptable", is a very general phrase, and it might be difficult for a court to decide exactly what circumstances a reasonable person would regard as acceptable are. The New South Wales legislation, to which I previously referred, uses that phrase("a reasonable person would consider the conduct acceptable") but it then spells out some of the circumstances that can be relevant to considering whether or not the behaviour involved was acceptable or not, and there are five circumstances that are listed by the New South Wales Act, and I will not read them out—they are set out on page three of our submission, they are part of section 91D of the New South Wales legislation—and we propose that those circumstances be added in to the provision in the Northern Territory just so that it is easier for tribunals of fact to apply that test and consider whether that defence is made out.

The second aspect of this defence, which is mentioned in our submission but probably not emphasised as much as it could have been, is in the last sentence of section 2.3, where we say, "it is submitted that the New South Wales provisions be inserted in to the bill, and that they be generally applicable". When we say, "and they be generally applicable", our submission is that that defence should be available to any charge of distribution of intimate images without consent, not merely charges involving images of children, and that is what they have done in New South Wales, and our submission is that if the conduct is conduct the reasonable person 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.

The next recommendation we make is about the prosecution of children. We agree with the principle behind proposed section 208D that there be limits on the prosecution of children, and that it can only be done by the authority of the Director of Public Prosecutions, but we seek to have that beefed up a little further by also explicitly providing that an offence under this part of the *Criminal Code* be one which is not a serious offence for the purpose of section 39 of the *Youth Justice Act*. What that means is that a child caught producing or distributing or threatening to distribute intimate images should be eligible to be given diversion as the first option rather than being prosecuted. Section 39 sets out which offences are so serious that cannot be the subject of diversion. We say that these offences clearly should be divertible.

I note the submission by Monash University and RMIT also addresses this issue. In their submission, if I understand it correctly, the recommendation on the fourth page under the heading Young People, they are, I think, suggesting that children should not be able to be prosecuted at all or at least only as a last resort. We do not go so far as that in our submission, but we do, I am sure that the committee will consider very seriously what RMIT and Monash University say, and I understand that you will be hearing from Dr Henry later today, who will be making some oral submissions to this committee as well.

The question of what we do with children who are exchanging sexual images with each other, of each other, is a very difficult and sensitive issue. Anyway, our view is set out in recommendation 3.

Our fourth recommendation is about take-down powers. We accept that the capacity of States and Territories to persuade international companies—like the people who run Facebook, Snapchat and so on—to do anything is very limited. Really, this is an area which is more likely to be effectively legislated for by the Commonwealth than the States and Territories. Nevertheless, the Bill provides power to a court to order offending images to be taken down, but only—this is section 208AE—after an offender has been found guilty. That is too late, in our submission.

We have referred the committee to the passage from the Northern Territory Law Reform Committee report—page 42 of the report, which is set out on the top of page 4 of our submission. The concluding words of that paragraph are, 'Every minute counts'. By the time you get to court and a person has been found guilty, it might be months after the offending images have been circulated. In that time, of course, they could have been circulated all over the world.

Our recommendation is that the remedy of getting a take-down order—even though we recognise that it may be of limited practical value in many cases—should be available not just after a person has been found guilty, but there should be a capacity to make an application for that order at any stage of the proceedings, and even possibly by ex–parte injunctive relief—which using ordinary language means that the police or some other government agency could make an application without even giving the person who put the image up in the first place an opportunity to respond—for the order that the image be taken down. That is consistent with recommendation No 7 that the Northern Territory Law Reform Committee has made.

In a similar vein, we made recommendation No 5 that the court has power to make compensation orders when it is sentencing a person who has been found guilty of an offence under this part of the *Criminal Code Act*. Our view is that there are currently, in the *Sentencing Act*, powers for courts to order compensation. usually called restitution. Our view is under those *Sentencing Act* powers, it is not clear that they would extend to paying compensation in an intimate images prosecution case. For that reason, our proposal is that the Bill specifically include such power for a court to order that the offender pay money by way of compensation to the victim.

We have made the observation that in these sorts of cases, it is quite often the case that there is a maliciousness about the offending—not always, sometimes the offending might be more in the nature of a very poorly executed offensive joke. But often, these offences carry with them a specific intent to hurt a former sexual partner. Because of that common aspect of this offending, they are peculiarly apt to be ones which include as part of the suite of powers judges have to punish people, the opportunity for the victim to be compensated by the offender. There is a restorative justice component to that sort of remedy. So, we are asking that consideration be given to including that sort of provision in the act.

Finally, we propose that there be specific measures included in the Bill which would protect the privacy of victims, similar to the provisions which currently protect the privacy of women and girls—or for that matter, men and boys—who are alleged victims of sexual offences and the provisions set out in the *Sexual Offences (Evidence and Procedure) Act* are reproduced on page 4 of our recommendation.

That completes the summary of the submission made by the Northern Territory Legal Aid Commission. I am happy to either take questions or speak a little further in response to the recommendations made by some of the other bodies that have made submissions to this inquiry.

Madam CHAIR: Thank you, Russell. I will just check with my committee members to see if they have any questions at this stage. We are happy for you to proceed, thank you.

Mr GOLDFLAM: Thank you. I will turn first to the RMIT and Monash University submission. Unfortunately the copy I have does not have page numbers and the sections are not numbered, apart from that it is a terrific submission. Nevertheless, on the second page under the heading 208A (b) Distribution of an Intimate Image without Consent, there is a recommendation there to make the wording less confusing.

With respect, we do not agree with that recommendation. I can see why the recommendation has been made and I note the authors of the submission are criminologists and socio-legal scholars rather than lawyers who appear in court. As I understand it, and perhaps the Department of the Attorney-General and Justice is better equipped to comment on this, the reason for the particular wording in subsection 208A (b) is that it conforms to the scheme of what is the so called, Part 2AA which establishes a particular formula for establishing offences with physical and fault elements.

Criminal lawyers are pretty familiar with the way in which it is worded, as are judges in courts. They are used to un-confusing themselves about this language which at first brush, does appear pretty complicated but it is quite standard. The proposed change by the authors of this submission might have unintended consequences of causing confusion in other areas and we do not support it.

The second recommendation we have no difficulty with. It sounds like a good idea and it simplifies the language. That is on the third page, the recommendation in relation to a person under the age of 16 years is taken to be incapable of consenting to the distribution of an intimate image of the person. It just suggested a minor improvement and we agree with that, as we do with the recommendation under that.

The second last recommendation on the third page, we do not have a view one way or the other. We are not sure whether it is an improvement. The last recommendation on the third page we do not have a view about either.

The next recommendation on the fourth page under the heading, Absence of Any Criminal Offences on the Non-consensual Recording of Intimate Images we strongly agree with the Monash and RMIT submission that recording should be made an offence as well as distribution and threatened distribution. I have already made submissions about that. I have also already commented on the final part of the RMIT and Monash submission that is on the prosecution of young people.

The other submission that I have read which I can comment on is from TEWLS, the Top End Women's Legal Service. They strongly support the Bill as does everybody else, I think. They have not suggested any particular changes at all as far as I can tell from reading the brief submission. It may be, however, in the lengthy annexures to this which I have not read, comprising submissions they had made to previous related inquiries in other forums that there is other valuable material which would be of assistance to the commission. I have not perused that material.

That completes what I wanted to say in relation to the submissions that have been made by other parties.

Madam CHAIR: Thank you very much, Russell. I will now open it up to the committee for questions.

Russell, this is Ngaree. One of the things that I wanted to find out from you on behalf of the NT Legal Aid Commission, is I wanted to get a feeling for how matters in relation to intimate images or revenge porn, as it is widely known, does NT Legal Aid Commission come in to contact with? Is this a big issue in our community that you are facing?

Mr GOLDFLAM: I do not think we are facing it yet. Because it is not criminal activity at this point, although sometimes we have clients who are charged with criminal offences and there is buried in the brief there will be disgusting text messages or Facebook entries, which are sort of incidental evidence which has come out, it is not something which we have kept proper records of because it is not a category of offence. We do collect data about how many different people we get every month are charged with different sorts of offences but to some extent, but certainly not this because it is not an offence

It is not a problem that we are facing and from my personal experience, because I cannot speak for how many times other colleagues in the Commission have been confronted by this sort of material, I can only say that occasionally I see cases where there has been something which might constitute a revenge porn type offence or an intimate image type offence but not all that often. However, I am aware of the research that has been done by RMIT and Monash which is referred to at the beginning of their submission where they have surveyed the community and the statistics, if these are accurate, are extremely alarming—they are saying that something like one in five women and girls who have been surveyed report that they have been targeted by having non–consensual intimate images taken of them. That is an extraordinarily high number of people.

Certainly, when we have gone in to high schools, as we do, to deliver community legal education, anecdotally our impression is that when we start speaking about this sort of stuff the kids all seem to know exactly what we are talking about and our impression is that it is prevalent and widespread.

Madam CHAIR: Thank you very much for that. I will open it up to the committee. Does the committee have any questions of Russell?

Mrs FINOCCHIARO: It is not so much a question, Russell, I was just wondering if—and again I do not know how closely the Commission has been watching trends in other jurisdictions—but are there any, I guess, lessons learnt or anything more general, policy type comments around revenge porn laws and how they have worked or not worked in other jurisdictions?

Mr GOLDFLAM: I think it is fair to say that all over Australia parliaments are really struggling to get to grips with what is clearly a serious issue that is affecting very large numbers of people, particularly very young people, but we have not really anywhere got to the point where we can say that we have worked out how to tackle this effectively. One of the reasons for that is that criminalising certain behaviour can have an effect but the sort of behaviours that we are talking about to a significant extent are not going to be effectively touched by the criminal law, and one of the reasons for that is that this behaviour is being engaged in over the internet using social media which is kind of uncontrollable.

I already mentioned that States and Territories have only got limited powers to do anything about companies that are not even located within the Australian borders, and even the Commonwealth has got limited power. All the reports that I have read about this, and there have been quite a few now around Australia, including our own Law Reform Committee, have focussed strongly on the need for education and public education and working with young people in schools and that perhaps we are hoping that that will be more effective than just the criminal legislation, which can only—as said in one of the submissions, I think—affect the tip of the iceberg.

Mrs FINOCCHIARO: Fair point. Thank you.

Ms NELSON: This is Sandra Nelson, Member for Katherine. We were talking earlier in deliberation. I am wondering about the serious offences, section 208D. There was some discussion about what constitutes a serious offence and how that will be prosecuted, especially when it comes to youth being involved in sharing pictures and intimate images. Would there need to be some significant reform in the *Youth Justice Act* to address this intimate image sharing?

Mr GOLDFLAM: Member for Katherine, coincidentally, I am also a delegate of the Northern Territory Legal Aid Commission on a committee known as the Legislative Amendment Advisory Committee that was convened by Territory Families. We met yesterday and discussed at length a number of reforms to the *Youth Justice Act* that are in the pipeline—including section 39 of the *Youth Justice Act*—and which offences should and should not be included in that provision as serious offences. If they are on the list of serious offences then children cannot be diverted, they have to go through the courts.

This, of course, all comes out of the Royal Commission into the Protection and Detention of Children in the Northern Territory. Section 39 is currently being looked at very closely by government at senior levels and also at not-so-senior levels. There is a major reform process occurring and section 39 is part of that.

Ms NELSON: Okay.

Mrs FINOCCHIARO: Sorry. Russell, this bill is modelled off the work that the Law Reform Commission did. I wonder if there is any value—or if you see any value—now that it is drafted and in this format in them taking another look at it to see if it aligns strongly enough with their recommendations?

Mr GOLDFLAM: As it happens, I am a member of the Law Reform Committee, although I did not …

Mrs FINOCCHIARO: You are a member of a lot of things. You are a busy man.

Mr GOLDFLAM: I tend to go to a lot of meetings. I did not participate in this subcommittee which wrote this report, although I have read the report. We considered it in draft form as a full committee. I do not suggest it would be a good idea to send it back to the Law Reform Committee. That would only have the effect of delaying the whole process. The committee submitted their report in November 2016, so it is well over a year ago now. The committee is certainly aware that the intimate images legislation has got as far as it has. There has been, with respect, ample opportunity for members of the public and organisations such as Legal Aid, to put in submissions to address the fine-tuning of the legislation.

I do not think it would be a good idea to send it back to the committee again. That would just result in another six months delay. Also, the committee is struggling to do the work that has already been assigned to us by the Attorney-General at the moment.

Mrs FINOCCHIARO: Thank you.

Madam CHAIR: Thank you, Russell. It is Ngaree Ah Kit again. You mentioned that Legal Aid Commission goes into schools and helps educate students about legal processes.

Mr GOLDFLAM: Yes.

Madam CHAIR: If this legislation was to pass, would the Legal Aid Commission be currently adequately resourced to be able to talk about this information on top of everything else you do—with our kids in our schools specifically?

Mr GOLDFLAM: The Deputy Director of the Commission might be listening in to this or following the webcast. I am sure she would hope I would say no, we always need more resources when we get more work to do, so that is what I will say.

Madam CHAIR: Thank you. Just to elaborate on that, Russell, what does the Legal Aid Commission think would be the best avenue to help educate our young kids especially? If this Bill was to come into place as well, the threat of publishing or distributing an intimate image could get them in a lot of trouble.

Mr GOLDFLAM: I am not an expert in how best to get through to high school aged and young people about these sensitive topics. The reading I have done suggests—everyone agrees that going in to high schools and talking to young people, telling them not to break the law, is a good thing. The research shows that a lot of the time it is not very effective. I do not presume to have any advice I could give the committee as to how best to go about it.

Presumably you would want to use social media platforms to break through a social media related problem. Beyond that, I cannot really contribute. I am a very old person so I feel a bit out of touch with teenagers.

Madam CHAIR: Thank you for that. I think the point I was getting across was that it will need a wide and varied suite of communication tools to get through to not only our young Territorians, but some of the older ones in the community about the impact this can have on them and things they might deem as funny or entertaining on social media platforms can also be a breach of this Bill. It is an interesting one to watch.

Mr GOLDFLAM: Certainly. Even though it is an international problem, one good thing about that is that the work done in other places can be used quite readily here. We do not have to go back and reinvent the wheel or spend millions of dollars making video clips to show young people when there is already quite a lot of material. Through National Legal Aid some of the other legal aid commissions have been producing material on this very issue aimed at young people from other parts of Australia, so we can piggyback off that work that has already been done.

There is a lot of work that can be done and the research shows that when you create a new type of criminal offence which criminalises behaviour that was previously lawful, it deters people. It does not necessarily deter people when you increase penalties or impose mandatory sentencing, but making something that used to be lawful unlawful does have an effect on dissuading people from engaging in that behaviour. There is an opportunity when this Bill is passed, if it is done in conjunction with serious resources put into public education, to change people's behaviour and the culture of sexting, revenge porn and so on.

Madam CHAIR: Fantastic, that is great to hear.

Ms NELSON: I know that the eSafety Commissioner and their program has some things they are rolling out to schools and youth organisations to educate youth and parents about internet safety. Going back to what you were saying in regards to legislation in other parts of the world, in the UK I think they introduced legislation in 2015 in regards to intimate images. They did not actually amend their criminal code, I think it was new, specific legislation for this.

The United States has also gone through some changes as well, they started rolling out legislation in each state and now they have made it national. They also did not amend their criminal code act, they made specific legislation for this itself with, I think, its own sentencing requirements. Is that something we have talked about in Australia or the NT?

Mr GOLDFLAM: I do not know about that off the top of my head but I do know there is a discussion of how this problem has been addressed in the Law Reform Committee report starting on page 27 which talks about what measures have been taken internationally. That might be a bit out of date because as I mentioned before, it was written a little over a year ago. As you say, the report records that legislation was introduced in 2015.

There is just one comment I can make in response to what you are saying. That is, no, they have not amended their criminal code but that is because there is not a criminal code in England, Wales or Scotland. They have a different way of regulating criminal behaviour there and indeed the criminal code is not something you find all over Australia. There is a criminal code here and there is a criminal code in Queensland, Tasmania and Western Australia, but the other States and Territories—I am not sure about the ACT—have other sorts of criminal laws usually in legislation such as a crimes act. Not amending the criminal code in itself does not mean much if it is not a jurisdiction where there is a criminal code.

Ms NELSON: That brings up another question, what happens if it is carried over the border?

Mr GOLDFLAM: With respect, that is an excellent challenge or issue to raise, and that is why I and many others have said that legislation at the State and Territory level in this area is of limited effect because distribution is going to be just about always using a medium that does not recognise State borders at all. That is a big problem which we cannot really do much about with this Bill or with any Bill that the Northern Territory can pass. That is why COAG is interested in it because at a national level there need to be measures taken.

Madam CHAIR: Does the committee have any final questions? That concludes our line of questioning for you Russell. I just want to say thank you again for joining us this afternoon. It has been quite insightful.

Mr GOLDFLAM: Thank you, Madam Chair. The Commission greatly appreciates the opportunity to contribute to and participate in the development of this important legislation.

The committee suspended.

RMIT University and Monash University

Madam CHAIR: Good afternoon. My name is Ngaree Ah Kit, I am the Member for Karama and the Chairperson of the Social Policy Scrutiny Committee for the Northern Territory Legislative Assembly. I would like to introduce my fellow committee colleagues in the room with me in Darwin today. We have Lia Finocchiaro, Member for Spillett and we have Sandra Nelson, Member for Katherine.

On behalf of the committee I welcome you to the public hearing in to the Criminal Code Amendment Intimate Images Bill 2017, and thank you for your submission. This is a formal proceeding of the committee and the protection of parliamentary privilege and the obligation not to mislead the committee apply. This is a public hearing and is being webcast through the Assembly's website. A transcript will be made for use of the committee and may be put on the committee's website. If at any time during the hearing you are concerned that what you will say should not be made public you may ask that the committee go in to a closed session and take your evidence in private.

I will ask each witness to state their name for the record and the capacity in which they appear. I will then invite you to make an opening statement on your submission prior to asking the committee for their questions. Starting with you, Nicola, could I ask you to introduce yourself, your name and the capacity in which you are appearing today.

Dr HENRY: I am Dr Nicola Henry, Associate Professor and Vice Chancellor's Principal Research Fellow in Social and Global Studies Research Centre at RMIT University, Melbourne.

Madam CHAIR: Thank you. Asher?

Dr FLYNN: Yes, I am Dr Asher Flynn. I am a Senior Lecturer in Criminology in the School of Social Sciences at Monash University in Melbourne.

Madam CHAIR: Thank you very much. I now invite you both, if you would like to make a statement in regard to—we have been doing a bit of a summary of the submissions we have received in regard to this bill.

Dr HENRY: Thank you so much for inviting us to appear as witnesses today. Dr Flynn and I are speaking on behalf of our research teams. That also includes Associate Professor Anastasia Powell, also from RMIT University.

The three of us have been undertaking extensive research over the past eight or so years on technology facilitated abuse. Over the last few years we have been specifically focusing on the phenomenon colloquially known as revenge pornography or what we call image-based sexual abuse. We define that to include three key behaviours. One is the non-consensual taking of nude or sexual images. The second is the non-consensual sharing of intimate images. The third is making threats to share those images.

In 2016, as part of a criminology research council grant, we conducted a national survey of over 4000 Australian adults aged between 16 and 49 and found that one in five of our respondents reported at least one form of image-based abuse.

In 2017, last year, we also partnered with the social research centre and conducted some commissioned research for the Australian Office of eSafety Commissioner and found in another population-based national survey that one in 10 respondents said that someone had shared a nude or sexual images of them without consent.

Currently, we are undertaking further research on image-based abuse which involves a mixed methods approach to understanding the nature, prevalence and impacts of image-based abuse, as well as the legal and non-legal responses to the problem. We are conducting a multi-country project through the national surveys in Australia, the UK and New Zealand, as well as victim and stakeholder interviews. We are doing that project with Professors Clare McGlynn, Erika Rackley and Nicola Gavey who are international experts on image-based abuse and other forms of sexual abuse.

In today's hearing, Dr Flynn and I are happy to respond to any questions about the key findings of our research, anything I have mentioned in our submission and any other matters. Thank you.

Madam CHAIR: Thank you very much for that. I will open it up to the committee if they have any questions.

Ms NELSON: This is Sandra Nelson, Member for Katherine. I have one quick questions. It is regarding, in your submission, section 208AC, T*hreaten to Distribute Intimate Images* you said:

> *We do propose, however, that subsection (1) be amended to specifically state that the offence occurs "irrespective of whether or not the intimate image exists", to more fully reflect the* National Statement of Principles *…*

Can you talk me through that because the way I am reading that is that we will punish someone because they are threatening you. Anyway, can you talk me through that part there? Why would you suggest that?

Dr HENRY: Yes, sure. It is Nicola here. The reason we made that suggestion is because someone who makes a threat to distribute or share nude or sexual images—the effect of the victim on that threat, regardless of whether the image exists or not, can be quite significant.

I recall one stakeholder interview we did in Victoria where there was mention of a victim who had experienced someone making threats to share sexual videos of her—these videos actually did not exist but they caused this woman a huge amount of harm. She ended up changing her job, leaving the area where she lived. In our conversation with the stakeholder in this she suspected that the videos did not exist and that the perpetrator had not secretly recorded her, but the impact of that threat was the same on that woman as if those images had in fact existed.

That is why we are suggesting that it should not matter whether or not the images exist.

Madam CHAIR: Thank you for clarifying that. I had a similar question, I was wondering if we could go back to some of the evidence you found through your research. It is fantastic you have been working on this for quite a while. We all have your submission in front of us and I am looking through some of the research that says one in two Indigenous Australians reported IBSA victimisation.

Through this bill, reading the submissions and talking to others in the community, a lot of it comes back to education levels or targeting young people who are using social media platforms. Because you are so well across this issue for a number of years, I want to know what you think would be the way forward to help education our community members, not just young people, in regards to the safe sharing of images, obtaining consent or the ramifications of a threat they may not think will cause harm because the image does not actually exist. That can have a detrimental and lasting impact on a victim.

Dr FLYNN: I completely agree 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 information campaign that alerted people to what the new laws 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.

The other element we might mention is that we are quite supportive of strengthening privacy protections under the civil law and are keen for social media and website providers to have more responsibility in this area as well.

Dr HENRY: Can I just add to that as well? In our national survey we conducted in 2016 we found that four out of five participants agreed that image based abuse should be a crime, however 70% agreed with the statement that people should know better than to take nude selfies even if they never send them to anyone. 62% of our respondents also agreed with the statement that if a person shares a sexual selfie with another person then they are at least partly responsible if the image gets shared online.

These findings support the need for educational programs as Asher mentioned and that we need to move away from the victim-blaming mentality we have unfortunately seen in relation to image based abuse behaviours.

Mrs FINOCCHIARO: Your research started at age 16 years, so your comments are around that age being the starting point. Have you done any research on people younger than 16 and the prevalence of revenge porn in that younger age group? Is there a reason you started your research at that age group?

Dr HENRY: There has been a lot of research conducted to date on sexting among young people but less attention and research on non–consensual sexting or revenge porn or we call image-based abuse. We decided to focus on the adult population, and we did include 16 years plus, just to capture the younger end of that population, but there have been some studies, again, more broadly, looking at sexting but they have found that, for instance, one in 10 school students have sent a sexual explicit nude or nearly nude photo or video of someone else.

There is another study that was conducted by Thomas Crofts and colleagues back in 2015, again on sexting among young people that found that 20% of young people had showed another person an image without that person's consent and that six per cent had reported sending an image to another person without their consent. There has been some studies that have been looking at the non–consensual sharing of nude or sexual images among children and young adults and those findings are relatively consistent with our findings and other international studies around non–consensual sharing amongst the adult population.

Madam CHAIR: Thank you very much. Are there any further questions from the committee?

That concludes the questions from our part. Are there any final comments that you wanted to leave us with? We are still going through all of the submissions that are in front of us looking through our notes and things like that, but I just wanted to check if there was anything that you wanted to leave with us this afternoon?

Dr FLYNN: Yes, to reiterate what we have said in our submission is that we do strongly support changes to the criminal laws in the Northern Territory to address this problem, and it is fantastic to see that you are looking in to making these important changes, but again just to stress what I said earlier, which is that we do feel that any reforms to law should be incremented in conjunction with a range of other legal—so, civil and non–legal remedies, particularly around support services and education.

Madam CHAIR: On behalf of the committee, thank you for joining us this afternoon, and for putting in a submission from Monash University and RMIT. Enjoy the rest of your day, ladies.

The committee will take a short break until 2.30 pm where we will recommence our public hearing with the Top End Women's Legal Service.

The committee suspended.

Top End Women's Legal Service

Madam CHAIR: Welcome, ladies, and thank you for joining us at today's public hearing on the Criminal Code Amendment (Intimate Images) Bill 2017. I welcome to the table to give evidence to the committee from the Top End Women's Legal Service Vanessa Lethlean, Managing Solicitor and Caitlin Weatherby-Fell, Solicitor.
Thank you for appearing before the committee this afternoon. We really appreciate you taking the time out of your busy schedules.

This is a formal proceeding of the committee and the protection of parliamentary privilege and the obligation not to mislead the committee apply. This is a public hearing being webcast through the Assembly's website. A transcript will be made for the use of the committee and may be put on the committee's website as well.

If at any time during the hearing this afternoon you are concerned that what you will say should not be made public, you may ask that the committee go into a closed session so we can take your evidence in private.

I will ask each witness to state their name for the record and the capacity in which they appear this afternoon. I will then invite you both to make a brief opening statement—which is a snapshot or overview of the submission you have provided as part of the bill's inquiry. Could you each please state your name and the capacity in which you are appearing this afternoon?

Ms LETHLEAN: Vanessa Lethlean, Top End Women's Legal Service, Managing Solicitor.

Ms WEATHERBY-FELL: Caitlin Weatherby-Fell, Top End Women's Legal Services and Solicitor.

Madam CHAIR: Thank you very much. Would you like to make an opening statement in regard to the submission you provided into the inquiry.

Ms LETHLEAN: Our statement is very brief. Initially, I thank the committee for the opportunity to talk to the submissions we have lodged, acknowledge from a services perspective it is very important to have both criminal and civil legal provisions and in the service's experience, to acknowledge that the non-consensual sharing of intimate images is a highly gendered activity. It is primarily conducted by males and disproportionately targets women.

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. That can be emotional as well as physical and can have impacts in relation to employment.

We welcome the bill. That is evident from the submission we have made. Part of the background to that is we think it is important there are criminal offences which appropriately capture the legal wrong. We see the legislation as part of a continuum that increase prevention and education as well.

Madam CHAIR: Thank you very much. That has been a clear message that has come across through our inquiry thus far. I will now open it up to committee members if they have any questions in regards to your submission.

Mrs FINOCCHIARO: Thank you, Madam Chair. In one of the other submissions we received in relation to perceived threat, the comment was made that the legislation should or could extend to—it did not matter if the image existed or not, it was just the threat of an image irrespective of whether it does or does not exist. Do you have any comments about that idea?

Ms LETHLEAN: The initial comment I would make is it is not unusual for women to be unaware of whether there are images. Not all images are taken consensually. The threat in the absence of an image still can have exactly the same impact.

Ms NELSON: Would you support amending the wording in the legislation to reflect that?

Ms WEATHERBY-FELL: I understand that an example was given in the proposed section 208AC(2)(c) in the draft bill. The example was that the image does not exist. For our purposes, I think that drafting has captured the scenario however we would welcome more technical drafting, should that be required.

Mrs FINOCCHIARO: I did wonder that.

Ms WEATHERBY-FELL: The example provided seems to guide that scenario. We mentioned in our submission that we support the examples provided in the bill as providing really clear circumstances and steps, not only for victims of these particular crimes, but for advocates and the judiciary who are interpreting them.

Mrs FINOCCHIARO: The language itself intends the other person to fear the threat would be carried out. So you think it would capture it?

Ms WEATHERBY-FELL: That is right.

Madam CHAIR: You mentioned the importance of the bill to be supported by educational tools and resources. Would TEWLS be in a position to be supported to give that education directly to the clients who visit your service or would it be best placed for another entity to educate potential clients about the provisions of this bill?

Ms LETHLEAN: Certainly from our service's point of view, we have a very strong and effective connectivity with our client group. For example, we go to the prison once every three weeks, the Royal Darwin Hospital once a week and are in Palmerston on a weekly basis. We do a range of community legal education.

We would certainly welcome that in addition to the range of work already occurring and we are particularly well placed…

Madam CHAIR: …Because you already have that existing rapport and connectivity with clients.

Ms LETHLEAN: It is also about the expertise and ensuring if we need to be collaborative in terms of preventing a CLE with other service providers, it occurs. The expertise is harnessed.

Ms NELSON: Community legal services generally do CLEs, community legal education sessions. There is also a lot of outreach being done but I think it would have to be a collaborative effort to be able to reach as many as possible.

Ms WEATHERBY-FELL: Of course, and the legal services are very aware of and in tune to collaboratively servicing particular areas and client groups, not only to avoid any repetition, but to ensure we are really harnessing the service we have. Everyone is pressed would be a very nice way of putting that. To be collaborative is in everyone's best interests, particularly for clients.

Ms NELSON: This intimate images legislation, I would see that it definitely ties in with domestic and family violence legislation and all of that. Would you support that or think that it all ties in to domestic violence situations, domestic violence orders and restraining orders? Would it be really hard to enforce this on a restraining order, for example, or a domestic violence order?

Ms LETHLEAN: The position we would submit is that the legislation is all helpful but from different perspectives. An application for a domestic violence order is predominantly aimed at the domestic violence. From a client's experience intimate images can be part of that. The proposed bill specifically addresses intimate images and we welcome that because it appears to be an effective and appropriate proportionate response, and it may still be that, for example, that we would have clients where there would be an application for a domestic violence order appropriately but equally that there would be consideration in relation to charges.

Part of the issue in this space, which has been very difficult is the removal of the material. The fact that the bill has that take down order is extremely helpful, and it is also about the eSafety Commission is in that space very effectively, but I think for clients to have a tool kit to have matters addressed is important, and it might be that the issues can be dealt with through one application it may well be that there is unfortunately going to be something within the civil and the criminal jurisdiction.

Ms NELSON: Yes, it has come up a couple of times—the take down powers—and also it crosses all borders, it crosses oceans.

Madam CHAIR: We were talking about the limits that are in place at the moment and the importance of education around posting or sharing material that people might find to be entertaining or humorous and the detrimental impacts that can have.

As a committee we are also talking about the potential for a person who wants to take action should the bill be passed in parliament—if it is a deterrence for their business to be made public by bringing somebody to justice for sharing an intimate image of them—and we were talking about whether or not that would potentially keep people away from wanting to report because all of a sudden it is out in the public arena and everybody might know their business when they do not want to.

Do you think that could cause some issues for your clients at this stage?

Ms WEATHERBY-FELL: I think, importantly it is not something that we have specifically flagged in our submission but have had the benefit of having a look at the other four submissions to the committee, and note that Legal Aid made a similar submission around having that privacy for victims similar to the sexual violence legislation. To our mind that does makes sense. As a protection for those victims that assurance that, no, this will not be made public would be inherent in any form of legislation—we do not want to be saying to victims, you have experienced this these are the processes, but this is going to be causing shame. That is exactly what we do not want to be doing. Not something that we have addressed particularly but we definitely endorse Legal Aid's submission in that respect.

Ms LETHLEAN: We would certainly facilitate the intention of the bill, which is to actually effectively address those concerns, and it is hard to perceive the public interest argument where the anonymity is not appropriately afforded.

Mrs FINOCCHIARO: That is what we were wondering whether or not it needs to be reversed—currently court could determine that it needs to be all kept private, but should that not be the starting point and work back the other way?

Ms WEATHERBY-FELL: Similar to the current sexual violence legislation—it would make sense.

Mrs FINOCCHIARO: Yes, because we would have for people to think, okay, this is happening and then that be a deterrent in itself.

Ms LETHLEAN: In generic terms, it would be the Crown and the defendant would be named, but that often will be the connector to identify, yes.

Ms WEATHERBY-FELL: 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 then she is the mother of XY. Of course, you have just made that direct link—very similar to what Vanessa has just flagged around—yes, that could happen, but that direct link can still lead people back.

Ms LETHLEAN: It is in the precedent cases where it would be relevant because the tribunals and the courts generally are excellent at identifying—and they have their own protocols and procedures.

Ms WEATHERBY-FELL: And where the issue has arisen they are extremely responsive to services flagging those issues and removing them properly.

Ms LETHLEAN: But it would still be helpful to have a presumption (inaudible)—and to be able to advise a client of that, would be helpful.

Mrs FINOCCHIARO: Legal Aid also submitted an opportunity for the bill to have ex parte injunctive relief where the police are another agency, entity could seek that order that the material be removed immediately because obviously waiting until some is found guilty is a long way down the track—is that something that you would generally be support of?

Ms WEATHERBY-FELL: Yes, it could be. It could be by way of injunctive relief. Perhaps it could be by way of an interim order …

Mrs FINOCCHIARO: Something more immediate, yes.

Ms WEATHERBY-FELL: Exactly. An immediate process whereby, again, you are able to advise the client should this commence there will be the opportunity immediately to have that removed. Often, whatever harm has been done has been caused, but the next harm is the image being retained and still being made publicly available. The first issue for a client approaching our service is, 'I need it taken down and I need it taken down now'.

Ms LETHLEAN: The other comment I make is 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 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.

Mrs FINOCCHIARO: It also would potentially, possibly, stop it spreading borders. Of course, we are talking about the lack of borders of social media and our ability to legislate for this jurisdictions. The quicker you respond—I suppose unless it is viral—hopefully you can contain it to some extent.

Ms WEATHERBY-FELL: You would be acknowledging that here in the Territory we can only do so much. Having those immediate provisions would be ideal. But they will have to work hand-in-hand with the civil provisions. I noted in the public hearing the other day about the discussion of the Commonwealth's bill for extended powers for the eSafety Commissioner.

We referred in our submission to the current powers of the eSafety Commissioner and our view that these are not enough to capture the current civil provisions that could exist. Perhaps with extended powers in the Northern Territory, working together with Commonwealth provisions we could stop that extension of the harm and get around this borderless issue.

Ms NELSON: That is the thing also. If an image goes viral—the original image has been posted and it has been ordered to be taken down. It has been taken down but someone's screen shot it and obviously now they are sharing. Does that person who has screen shot it, edited it and shared it get charged as well? If that same image keeps going and going for years, is that factored into the charges or the sentencing for that original poster?

Madam CHAIR: That would be very hard to track and hold people to account, especially if it has gone international, when someone is sharing that overseas. I guess that is something we will be addressing with the department in the hearing later today.

One of the important topics that was raised—I think it might have been with the public hearing section with Monash University and RMIT—was about the victim mentality and the community believing that if someone has taken an intimate image of themselves and willingly shared that, then there is some sort of onus that they have given permission for that to perhaps end up in the wrong hands or something. I completely do not agree with that.

What could we, as a community, do better to try to educate people that these are victims and that is the way they need to be considered, especially under legislation like this?

Ms LETHLEAN: One of my comments would be—certainly within the areas of domestic family violence—there is a focus on accountability and responsibility. Those components are equally appropriately used here because it is the

behaviour of the sharing that causes the harm and trauma. We understand—irrespective of what people's individual views might be—that the image sharing is quite regularised now and is occurring. It is about providing an effective response.

Ms WEATHERBY-FELL: We noted, however, that the drafting of this bill by the Northern Territory has been expressed in such a way that it is quite neutral, which we support. There have been examples of other jurisdictions where the basis for that jurisdiction would be, 'the victim has done X, this is their fault, but we will put these remedies in place'. Whereas, for the Northern Territory bill it seems to be on a neutral starting point, then being able to move forward through a process of having those images withdrawn, having the perpetrator being taken into account.

For our service, that was quite a positive step forward in recognising this is not an issue for the victim, but the perpetrator.

Ms LETHLEAN: It is also an issue of consent. In essence, the way it is structured within the bill consent to an act is not consent for other distribution or provision. That is helpful because there is very clear guidance about how the offence is constituted and what is required in relation to consent.

Madam CHAIR: This morning we had an earlier hearing in regards to a different bill that is before parliament. That was in regards to domestic and family violence information sharing. One of the good points raised there was the need for education, not only for the victims but for the perpetrators as well. That seems to be something we have not quite touched on here.

Is that something you as the Top End Women's Legal Service would support, that education is provided to those who are threatening to or are sharing non-consensual images?

Ms LETHLEAN: Absolutely, the issue around education is that it should lead into preventative behaviour and greater capacity within the community to try to address some of these issues. We would be supportive of education across all age groups and genders.

Mrs FINOCCHIARO: In NT Legal Aid's submission they said for young people the first step should be diversion. I imagine you would be supportive of a diversionary course of action in the first instance.

Ms WEATHERBY-FELL: Of course.

Ms LETHLEAN: In general terms it is a starting point but there are some circumstances where it may be highly inappropriate. Our position is it should not be prescriptive.

Ms WEATHERBY-FELL: We have made previous submissions to similar inquiries around a Romeo and Juliet type clause for those younger offenders. Our submission remains that for younger offenders or victims there of course needs to be appropriate mechanisms in place and appropriate discussions as well. It appears to already exist in the bill in terms of the DPP needing to sign off on any prosecutions.

Ms LETHLEAN: I should clarify that my earlier comments were not about Romeo and Juliet scenarios, it is more about where there has been multiple offenders and there has been video taken and insinuation has been provided very publicly that it would not be appropriate. Close attention would need to be paid to that.

Ms NELSON: New South Wales has Romeo and Juliet legislation, do they not? They also have a timeframe…

Ms WEATHERBY-FELL: …An age bracket.

Ms NELSON: Yes.

Ms WEATHERBY-FELL: My understanding is that the two minors need to be within two years of each other. We were discussing this on the way over, I am not sure if anyone has had the benefit of seeing a Victorian film a couple of years ago where this issue was part of the film. It was called *52 Tuesdays*. A group of children who are 16 and 17 years old made a documentary style clip and included images where the females were wearing underwear and they were charged by Victorian police.

My understanding of the film is that was a demonstration of a need for changes to the legislation. After a Victorian inquiry those legislative changes were made. For that discretion to exist in the Territory just makes sense.

Madam CHAIR: I note there is still ten minutes left on your time. I am wondering if on behalf of TEWLS you would like to leave us with a closing statement or a reiteration of the main points of your submission before we close.

Ms LETHLEAN: I am quite comfortable. I think the submission was quite precise and members have read it.

Ms WEATHERBY-FELL: …Which is much appreciated.

Madam CHAIR: Thank you again for appearing before our public hearing this afternoon and providing your submission into this bill inquiry.

The committee suspended.

Mr Rhys L.G. Michie – Private Citizen

Madam CHAIR: Hi, Rhys, my name is Ngaree Ah Kit. I am the Member for Karama and the Chairperson of the Social Policy Scrutiny Committee. Can you hear me clearly right now?

Mr MICHIE: Yes, I can, Ngaree. Thanks for taking my call.

Madam CHAIR: Excellent. Thank you very much for partaking in our public hearing today and providing a submission into the Criminal Code Amendment (Intimate Images) Bill 2017. I also let you know that my fellow committee members are joining me in the room in Darwin this afternoon. We have Lia Finocchiaro, who is the Member for Spillett and Sandra Nelson, who is the Member for Katherine.

Mrs FINOCCHIARO: Good afternoon.

Ms NELSON: Good afternoon.

Mr MICHIE: Good afternoon.

Madam CHAIR: Rhys, thank you again for appearing before the committee this afternoon. We appreciate you talking the time out of your schedule to speak with us about your submission.

This is a formal proceeding of the committee and the protection of parliamentary privilege and the obligation not to mislead the committee apply. This is a public hearing being webcast through the Assembly's website. A transcript will be made for the use of the committee and may be put on the committee's website.

If at any time during the hearing you are concerned that what you will say should not be made public, you may ask that the committee go into a closed session and take your evidence in private.

I will start by asking you to state your name for the record and the capacity in which you appear. I will then invite you make an opening statement about the submission you provided as a part of the bill inquiry. Could you each please state your name and the capacity in which you are appearing this afternoon.

Mr MICHIE: I understand your instructions. My name is Rhys Michie and I am appearing as a private citizen.

Madam CHAIR: Thank you, Rhys. Would you like to commence with an opening statement, which basically recaptures the submission you put forward as a part of this bill inquiry?

Mr MICHIE: Sure. I have read the bill and I recommend that the committee report to the Legislative Assembly that the bill be passed with amendment. I have read through and made a number of recommendations, mostly to do with things that are missing from your bill when you compare it to previous considerations of this sort of legislation.

The first one should include 'share' as one of the conducts listed. I think you have a problem in defining this thing we are talking about. Labelling it as intimate is not as accurate as it could be. I would suggest reconceptualising how you define this thing.

I think there is a minor change to do with some of the exceptions, there should be genuine (inaudible) scientific, medical and educational use. I think there should be a clear delineation of when this law stops operating. I think that should be when the image is exchanged for a reward.

There is a technical structural suggestion I would make so people have a disincentive to carry out threats. There are definition issues and a number of exceptions from other jurisdictions that I think you should consider. Following on from that, I am ready to take your questions.

Madam CHAIR: Thank you, Rhys. I will now open it up to the committee for any questions on Rhys's submission.

Mrs FINOCCHIARO: I was interested if you could speak to your comments around needing to strengthen where this lot ends and that you think it should end where images are obtained for reward. Could you flesh that out for us?

Mr MICHIE: Sure. This idea has come from the first change that was made in Great Britain and I wanted to just point out that people had previously thought that Great Britain is just one thing. There are three separate revenge porn laws

in three separate jurisdictions. The first one is in England and Wales, the second is in Scotland and the third is in Northern Ireland.

The English model contains a provision so that if you sold a sexual image or video of yourself and then someone took that image from, say, a magazine or website and showed it to someone else, that you cannot then say this is a crime against me. By selling your picture you stop your claim by transferring legal title. This was then incorporated in the models in Scotland and then Northern Ireland.

Mrs FINOCCHIARO: Do you think our bill is silent on that?

Mr MICHIE: I can see problems that could emerge if you did not tie this up. I would suggest you focus on deciding when a person stops being able to say this law applies to them.

Mrs FINOCCHIARO: Thank you.

Madam CHAIR: We have spoken with a number of people who have appeared before the public hearing today about some common concerns. One of the things that keeps being reiterated is about the need for education in our community. I wanted to see what your thoughts were in regards to how it is best to let everybody know that if this bill passes through parliament it could significantly impact on the way people consider sharing images they find on social media platforms for the sake of entertainment or whether they find it humorous.

What do you think as an individual and a private citizen would be the best way for us to help educate private citizens all through the Northern Territory about the potential implications this bill can have on them and their behaviour?

Mr MICHIE: My view is that you need to consider this as a top down control mechanism or a grass roots community building opportunity. If you say we are passing a law which means if you do this we will lock you up, we are educating you on the law so that you behave yourselves according to how we determine, you will probably not be successful and have people voluntarily comply.

I would say that in the community at present there are different sets of norms. One of the norms that is already in existence is that you do not share sexual images and videos. These norms are being codified through this consultative processes that different states and territories in Australia are going through, and when we pass the law, what we are really doing is saying that we as Territorians got together and had a discussion about what kind of laws we want to have regulating it and the law that we have decided is this one.

What we are communicating to you is how we, the people of the Northern Territory already think that we should behave and you can then draw on the existing free sources, particularly the Respectful Relationships program or the resources produced by the eServices commissioner, and you might have opportunities to make them localised by using local people and involving them in the process of creating the resources. But I do not think a control process or a control mechanism is going to be as effective as educating people as it will be empowering and engaging them to be involved in the design and implementation of the education and awareness resources.

Mrs FINOCCHIARO: Rhys, you mentioned that it would be beneficial to carve out any exemptions and you listed two, do you mind speaking to those?

Mr MICHIE: Yes, sure. The first one comes in when Scotland reformed their law and they wanted to avoid situations where somebody might be protesting naked or they might be at a public events, say sporting match and they were also naked and somebody took a photograph, because technically that would be captured by the provision that you have in place at the moment.

They also created (inaudible) offence so that you could not abuse this provision so that defence does not operate where the person is in an intimate situation against their will. We are just trying to make sure that if somebody took a photograph of a person and you could see the persons genitalia but they were covered by underwear that they would not be committing the kind of crime that this is directed towards they are doing something which is categorically different and this is how we disambiguate these two behaviours.

Mrs FINOCCHIARO: In the example being if you are at the beach wearing bathers or ...

Mr MICHIE: Or if you were streaking at a cricket match or if people were protesting against government policy and they were bare chested and they were Indigenous women. We would not want that to be considered as a kind of sexual violence. That is something different.

The second provision was one to do with, I guess what you could call bad journalist privileging, and my understanding is that you do not have journalist shield law in the Northern Territory uniform evidence act, but that is probably a larger question about how do journalists protect their sources and how much privilege do you give to this group of people in society in the Northern Territory. This provision was not an issue in public jurisdictions because they already have a privilege for journalist laws.

Madam CHAIR: Rhys, in your submission I found it quite interesting and I am glad that you raised it in regards to provision for the bill to cater to 3D printed statues, and I thought that was quite insightful because it is technology of the future that people are using today, and currently the bill does not cover that. Do you think that it would be a good idea to include that explicitly in the bill itself or could that be left up to our judicial officers to decide the intent of the bill in going forward?

Mr MICHIE: I would not recommend including this specifically. What I would recommend is (inaudible) this non–exhaustive list and abstract it, and you find the thing that is common amongst all those actions and make that the offence. In previous jurisdictions, particularly in New South Wales and the ACT, I talked about my concept call the sexual document. A sexual document is recording something that is documented under the *Evidence Act*. It is sexual and it is either an image or recording of the genitals, the anus, the breasts of the person identified as a woman, or it is something sexual from the context. The offence is when you make this sexual document observable.

It is a different way of thinking about the offending. This makes it resilient to changes in technology because you are not saying, 'show then share, publish', you are saying if this records something which is sexual and then the person's actions, their activity, is to make that thing observable to someone else, then you have committed the offence. The advantage of this is that the actual sexual document need not exist for the threat to occur. It is more able to respond to change in technology because it is the act of making the thing observable, not the nature of the things itself which is a critical factor.

Madam CHAIR: Thank you for clarifying that, Rhys. That is very helpful.

Mr MICHIE: You are welcome.

Madam CHAIR: Does the committee have any further questions for Rhys in regards to his submission?

Mrs FINOCCHIARO: No, I think that covers it.

Madam CHAIR: Thank you, Rhys. I was checking with my fellow committee members to see if there are any final questions.

That concludes the committee's line of questioning. Do you have any final points you would like to leave us with in relation to our bill inquiry?

Mr MICHIE: Yes, I do. It goes to the definition. You have labelled this bill 'intimate image abuse'. I judge this to act as a bill in which criminalises a form of sexual image abuse. I can go to the difference between sexual private image and intimate and harmful images you find in different jurisdictions around the world, if you would like.

Madam CHAIR: Yes, thank you.

Mr MICHIE: Okay. The largest category of things is harmful images. You find this anywhere (inaudible). Within harmful images there is a smaller category of things we call intimate images. This first appeared in the Canadian legislation. Most of the discussion in Australia occurred in New South Wales and the ACT. A smaller subcategory of images are private images. Then a smaller again subcategory is sexual.

The connection between sexual and privacy that exists in Victoria runs through New South Wales and the ACT, but it is strongest in England and Wales, Scotland, Northern Ireland and Ireland. The broader category of things are harmful and those are the kind of image that causes a person—to get the precise wording, 'serious emotional distress'.

This is what you find in New Zealand and is something similar to the invasive image (inaudible) which South Australia based its legislation the first time around. The difficulty with this is it is very broad and South Australia had to come back and reform their (inaudible).

Intimate image is something which is private, but something you would not want people outside your intimate relatives or people you have intimate relations with to see. Typically in Australia, we use two examples that (inaudible). The cultural example we use is a Muslim woman who is not wearing a hijab might find that a picture of her in this state of undress would be harmful. The alternative is the way that you discipline your children. If someone took a film of you disciplining your children—perhaps smacking them—you might think this is something you do not want your neighbours or strangers to see. But this is not sexual, this is about the intimate relationship within your family.

That is distinct from the quality you find listed within your definition in your bill. Those qualities tend to be about sexual organs or context.

In the discussion in your discussion paper, explanatory statement and in other submissions no one has talked about cultural or family situations. I think you could narrow your definition to look at sexual images and you would have a much tighter and easier to understand law because there is less ambiguity about what is and is not a sexual image. That is all of my remarks.

Madam CHAIR: Thank you very much for that, Rhys. On behalf of the committee I would like to again thank you for taking the time out to be a part of our public hearing today into the Criminal Code Amendment (Intimate Images) Bill. Thank you and enjoy the rest of your afternoon.

Mr MICHIE: You are welcome. Goodbye.

The committee suspended.

Department of the Attorney-General and Justice

Madam CHAIR: My name is Ngaree Ah Kit. I am the Member for Karama and the Chairperson of the Social Policy Scrutiny Committee. I just wanted to let you know I am joined by my fellow committee members, Lia Finocchiaro, the Member for Spillett and Sandra Nelson, the Member for Katherine. We have Jenni Daniel-Yee in the room with us as well. On behalf of the committee I welcome both Jenni and Fiona who are appearing before us as part of the public hearing into the Criminal Code Amendment (Intimate Images) Bill 2017.

I thank you for appearing before the committee this afternoon and for taking time out of your schedule. Fiona, we really appreciate you being available via telephone for these proceedings. This is a formal proceeding of the committee and the protection of parliamentary privilege and the obligation not to mislead the committee apply. This is a public hearing and is being webcast through the Assembly's website. A transcript will be made for use of the committee and may be put on the committee's website.

If at any time during the hearing you are concerned that what you will say should not be made public, you may ask that the committee go into a closed session and take your evidence in private. I will ask each witness to state their name for the record and the capacity in which they appear. I will then invite you to make an opening statement before proceeding to the committee's questions. Could you please each state your name and the capacity in which you are appearing?

Ms DANIEL-YEE: I am Jenni Daniel-Yee, Director of Legal Policy from the Department of the Attorney-General and Justice.

Ms HARDY: Fiona Hardy, Senior Policy Lawyer at the Department of the Attorney-General and Justice.

Madam CHAIR: Thank you very much. I will now invite you both to make an opening statement before we proceed to the committee's questions.

Ms DANIEL-YEE: I have no opening statement. Fiona may or she may wish to just go to questions.

Madam CHAIR: Fiona, do you wish to make an opening statement?

Ms HARDY: Madam Chair, not particularly because as you are aware I made a general statement the last time the committee convened on 31 January when I gave a general overview of the bill. Also as you are aware, the committee provided written questions to which the department has provided a response. I do not know whether that has been tabled yet.

Madam CHAIR: Yes, we have received the response to the written questions.

Ms HARDY: I have also been listening this morning to the oral submissions made by various people so we are here in a more responsive capacity to what people have said today and any further questions the committee might have.

Madam CHAIR: Fantastic, thank you for that. I will now open it up to the committee for questions in regards to this hearing.

Mrs FINOCCHIARO: We talked a little about it offline and with Top End Women's Legal Service, but I was just curious around why the presumption—sorry, I know the document you provided explains it. Part of this bill is to ensure people are protected and they can come forward and ensure material is removed and prosecutions take place et cetera.

I was concerned as to whether or not the court process could act as a deterrent because it may actually shed more light on a very personal situation which might cause a victim to think twice about coming forward, and whether or not there should be more consideration had to reversing that presumption of an open public process and making it a closed process unless there is a good reason to make it an open process.

Ms HARDY: Okay. What we are doing in this bill is just one small part of addressing this issue.

Definitely, education and information is a huge part of addressing this issue. It was acknowledged by the Northern Territory Law Reform Committee in its report on this issue in recommendations 6 and 7. Yes, education is very important. As you know, the eSafety Commissioner launched a portal in October 2017 which is full of information and advice for people. Getting the message out there that that portal is available is very important and by providing education through the Department of Education, Territory Families and organisations like TEWLS. I heard the witnesses from TEWLS this morning saying they consider that they are well placed to provide this kind of information and education through CLEs. That is what we need to be doing.

As far as the Department of Justice is concerned, we will provide fact sheets which we can then provide to these organisations such as TEWLS and other NGOs, victims' services, Department of Education, Territory Families and Northern Territory Police, explaining the law and how it works and also resources that people can go to such as the eSafety Commissioner portal and the options that are available for people—whether it is pursuing criminal procedures, civil procedures or accessing services.

I do not know if that really answers your question. I do not know if there is anything more I can say in relation to that.

Madam CHAIR: That was quite descriptive. Thank you very much for that, Fiona.

One of the conversations we had earlier today during the public hearing was about how we can help to legislate if the intimate image is shared across borders. I am wondering how far this proposed legislation could go to see that prevented.

Ms HARDY: Well, the comment Mr Goldflam made earlier today was that social media is largely uncontrollable. It is not just in this area, it is any area to do with technology-facilitated offending. It is a huge challenge to the criminal justice system. Traditional criminal laws just make amazing challenges in trying to deal with the 21st century and the advances in technology. Our traditional criminal laws are all border jurisdictional based and the modern world has no borders. So, we find this issue arising not just in this area but in areas like cyber bullying, money laundering—it just goes on and on. Legal systems are playing a continual catch-up game in trying to address the issue.

As far as a small jurisdiction like the Northern Territory goes, this bill goes as far as it can. Particularly in Australia, which is a federation, there is a limit to what the states and territories can do. This bill, as I said, goes as far as it can go, which is what the other jurisdictions have done with legislation in this area—New South Wales, the ACT, South Australia and Western Australia. We cannot control the border, it is just not possible.

Madam CHAIR: Thank you, Fiona. Does the committee have any further questions?

Mrs FINOCCHIARO: Fiona, the Legal Aid Commission raised that it would be good for the bill to have some sort of immediate, perhaps, injunctive relief for a victim in removal of material. In the bill, it is not until someone is found guilty. Can you speak to why that was decided, given obviously that by the time a guilty verdict is obtained, you are sometime down the road and harm could continue to be perpetrated on the victim by virtue of having that image still in circulation.

Ms HARDY: Yes, certainly. During the development of the bill we were very influenced by two particular factors, one was the debate that had taken place in the New South Wales parliament in May 2017 during the passage of the New South Wales legislation and secondly the work that was being done at Commonwealth level with the release of a discussion paper in relation to civil remedies that was released by the Commonwealth Department of Communication and the Arts in May 2017.

We were very aware of what was going on in the Commonwealth space and also the debate that was had in New South Wales about the limits of what states and territories can do in a federation. The same issue came up in New South Wales and our proposed section 208AE is pretty much identical to what has been introduced in New South Wales and the ACT last year. That is where we had taken it from.

Opposition members in the New South Wales parliament were quite critical of the narrowness of the New South Wales equivalent of our proposed section 208AE. The New South Wales Attorney-General, the Honourable Mark Speakman SC MP on 31 May 2017 in his speech in reply at the end of the second reading stage said as follows:

> *The concerns expressed by those officers about the need for swift rectification actions are entirely legitimate, that they overlook the place of New South Wales in the federation and what is happening at the Commonwealth level.*

He went on to explain the difficulties of New South Wales and to an even greater extent, the case would apply in the Northern Territory of us doing anything productive. I think this is really pertinent what is happing at a Commonwealth level, which I will come to in a moment, but he also said:

> *We do not need two competing regimes. The states are dealing with criminal matters and the Commonwealth is looking at the broader range of civil penalties.*

That speech was made at the end of May 2017. On 6 December 2017 a bill was introduced into the Commonwealth Senate which was the Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2017. That bill does introduce the civil regime I think a lot of people are asking what has been progressing in this (inaudible).

It is the department's view that, echoing the words of the New South Wales Attorney-General, we do not need two competing regimes. The bill is going through Commonwealth parliament at the moment, there will be a Commonwealth regime for the civil and administrative action. The states and territories can have a complementary criminal regime. That is what we have done. I think the witnesses from TEWLS also mentioned having a tool kit and acknowledging that there might have to be two different actions, criminal and civil and administrative actions.

Mrs FINOCCHIARO: Foreseeably, someone seeking to have something removed immediately could do so under this new Commonwealth law?

Ms HARDY: That is right. There will be a complaint and objections system. The plan is it will all work through the eSafety Commissioner's office. That is the power for the commissioner to give a person a remedial direction, including a take-down notice. I do not think that is what they call it, but that is basically what it is. There is a range of remedial provisions proposed to be introduced for the *Enhancing Online Safety Act* and they include these take-down powers, which can be issued both to the alleged perpetrator, service providers and website hosts. This area is something, of course, the states and territories really cannot effective legislate against.

Mrs FINOCCHIARO: You are saying we could do it, but the ability for it to work in practice is next to non-existent?

Ms HARDY: It would just be futile. As I've mentioned twice now, I reiterate what the New South Wales Attorney-General said. We do not need two competing regimes. There is no point in having two competing regimes.

Given everything we have heard today, the fact that this kind of offending knows no borders, having a regime that is an Australia-wide regime is, I suggest, a better response than having individual responses or provisions in the various states and territories.

Mrs FINOCCHIARO: Assuming, I suppose, the responsive time …

Ms HARDY: In our proposed section 208AE, that provision is identical to the provisions that have been enacted in New South Wales and the ACT. Victoria and South Australia, which enacted their legislation a few years back do not have those provisions at all. They have no take-down power.

Mrs FINOCCHIARO: In respect to—sorry, lost my place. Have we already talked about the journalistic shield on streakers? Sorry, I lost my train of thought now. No? We did not bring that up yet? Okay, right. It has been a long day.

Do you mind, Fiona or Jenny, whether you talk us through the journalistic shield and how it might apply also to streakers or not?

Ms HARDY: Okay. There are two different issues. First of all, Mr Michie mentioned that the Northern Territory does not have journalist shield laws, unlike the other jurisdictions which have the *Uniform Evidence Act*. That is true at this precise moment. But on the very same day that this intimate images bill was introduced, the journalist shield bill was also introduced. That is making its way through the Northern Territory parliament at the moment. That bill was introduced on 23 November last year and it will bring the Northern Territory into line with the other jurisdictions that have the national *Uniform Evidence Act*.

One of the reasons why Mr Michie thought we needed that provision he suggests—I am just trying to find it in his submission—on the third page of his submission—and according to what he said today—is because the Northern Territory does not have journalist shield laws. Having said that, I personally think it is a different issue. I note that no other jurisdiction has created such a specific defence, and it is quite a problematical defence. I articulated the reason for that in the written submission provided to the committee.

I do not know whether you want me to go any further into that.

Mrs FINOCCHIARO: No, that is okay.

Ms HARDY: Okay. That was question three you were asking in your written submissions. I also note, just to round that off, that looking again at the Commonwealth civil penalties and then the *Online Safety Act*, that they also do not include that journalist shield defence.

Your second question was in relation to the streaker example, which is (inaudible) section 2(5) of the *Abusive Behaviour and Sexual Harm (Scotland) Act 2016*. That was also addressed in the written responses provided by the department, and at the time that the bill was being developed specific regards was not had to the Scottish Act. However, it is the view of the department that the issue that is addressed or thought to be addressed by that provision is covered by the definition of consent in the Northern Territory bill.

It is just a different way of approaching the issue. I think, one has to be a little careful about perhaps cherry picking from other jurisdictions, particularly in relation to exemptions or defences because you need to look at the legislation and those other jurisdictions as a whole and they are not identical to what we have done. But I think to say we should take something from the Scottish Act, we should take something else from the England and Wales Act—when you put them together you might end up creating something that just does not quite work. You have to be very, very careful with policy transfer from one jurisdiction to another.

In particular, the streaker example, would, I suggest, be covered by our consent provisions. If somebody wants to streak across the cricket field then one could argue—and I think there would be a very strong argument—that the person doing that to gain some kind of publicity. There could be implied consent or at the very least the person who distributes that image would not be reckless within the meaning of section 43AK of the Criminal Code.
In relation to other examples, and this, I think the danger of that provision in the Scottish Act is, it would not just cover the streakers it would cover, for example, if a person was sunbathing naked on a nudist beach—that is a place where the public can access—and the fact that somebody is sunbathing on a nudist beach does that mean that they are giving their consent or that it is appropriate for it to be assumed that they are giving their consent to having their image distributed?

Another example that I gave was, for example in a strip club, a pole dancer through a strip club—there might be a number of reasons why a person engages in that kind of employment in the first place, some of the reasons could be to do with economic disadvantage—there is a whole load, it is a very, very loaded and sensitive area—and if a person is engaging in that kind of employment, are they consenting to have their image distributed outside of a strip club? I think that Scottish provision is problematical.

Madam CHAIR: On that, here in Darwin, I think it might have been last weekend, there was a fund raising fun run that encouraged everybody to run in their underwear. I was wondering about this bill and how that would relate in regards to consent? If people were walking along Nightcliff foreshore and took photos of people participating in this amazing fun run and they are all in their underwear, I was wondering about the consent in regard to that matter.

Ms HARDY: It is very difficult to comment on specific situations. I do not want today to really get into a situation of almost seeking legal advice. That is quite dangerous and I do not want to do that.

Madam CHAIR: That is fine. It is making a point that you need to consider when they are participating in a public event …

Ms HARDY: I know.

Madam CHAIR: … what they potentially put themselves at risk of if someone is taking a photo of a large crowd for a fantastic fundraising opportunity. You are there and I worry about indecent exposure. We have an annual Hooker's Ball in Darwin. We are renowned for that. It has been running for probably the better part of three decades. I am wondering about the consent that rolls on from that as well.

That was a statement, not a question, Fiona.

Ms HARDY: The thing is …

Mrs FINOCCHIARO: It is a good question, Ngaree. I did not seem to hear any comments.

Ms HARDY: Whatever the definition ends up being and however you deal with it, there will always be outlier situations. There will always be these things on the edges. I mentioned when I gave evidence that no matter what you do, it will never, ever be perfect. What you really have to rely on—for the outlier type of situations—is prosecutorial discretion and common sense.

Will these police prosecute someone if they distribute or publish—for example, the *Northern Territory News* might have published a picture of a fun run that …

Ms NELSON: Which they did.

Ms HARDY: Will that be prosecuted? Unlikely.

Mrs FINOCCHIARO: But technically, they could.

Ms HARDY: I do not know that necessarily they could, because it might come down to a question of consent—that there is implied consent. I do not know and I do not want to be put in the situation—with all due respect—of seemingly giving legal advice on an issue or scenario.

I totally understand what the issue is, but I do not know that amending the definitions, particularly in the way it has been done in Scotland, will solve that problem. It might solve that problem, but it will create another problem.

Ms NELSON: I agree. This is Sandra Nelson, the Member …

Ms HARDY: But you will have that situation. For example, with that provision in Scotland it would not be an offence to distribute a photograph of people on the fun run. It also would not be an offence to distribute photograph of the pole dancer in the strip club, or the person sunbathing naked at the nudist beach.

As a matter of policy, that would be wrong. The way that the government has asked for this bill to be drafted, the policy line, I guess, is that we would want people to be prosecuted in that kind of pole dancer/person on a nudist beach situation. Or at least have the possibility to be there for that to be done.

Mrs FINOCCHIARO: Is there any provision in the bill for withdrawing consent? Say you consented at the time and then you changed your mind. How is that dealt with or not?

Ms HARDY: Consent is something that needs to be freely and voluntarily given. It is not carte blanche, not just given in all circumstances. The bill deals in part with this in proposed section 208AB(4) through to (6) where it talks about situations where, just because there has been consent in one situation does not mean there is consent in other situations.

Those subsections are giving the court some guidance as to what the general principle is, that consent has to be for particular circumstances.

The same thing happens in sexual offences. Just because someone has consented to have sexual intercourse with someone on one occasion it does not mean they consented to having sexual intercourse with them on another occasion. Consent is an ongoing agreement.

Ms NELSON: Basically, there is no changing your mind.

Ms HARDY: That is exactly how it would work here as well. For example, if someone consented to their image being distributed to a certain group of people that does not mean they are consenting to it being distributed to the public at large or more people.

Mrs FINOCCHIARO: Following on from that, if person x consents to putting their image on Instagram and then someone screenshots that and shares it, where does the consent end there? Is that also a separate offence every time it is shared? I suppose every time it is shared it is a new breach.

Ms HARDY: There are two different issues there. The person who put their picture up on Instagram is not committing an offence because it is their picture. It is the sharing of that picture that is the offence. This is something we touched on when I gave evidence two weeks ago. There are two different things here, what you do with your own image—it is your property and image. That is not giving consent to other people to do things with your image.

The permission needs to be given, there needs to be that consent to do something with that image like share it. I think the example I gave last time was 16-year-old girl who sends a sexy picture to her boyfriend. At school her boyfriend shows it to all his mates. He does not have permission to do that unless she has consented either expressly or implicitly for that to be done.

It is not his property; he has been given this image to look at by the girlfriend but it is not his to share. This is where I think the issue about education and information is so important, just getting the message across. It is not the receiver's property, it is the giver's property. So much harm can be caused by sharing what is essentially a private, intimate image with other people.

Mrs FINOCCHIARO: This is interesting because in that situation it is clear because it is private between one person and another. If someone was walking along the Esplanade, down the mall or in Casuarina or anywhere public, naked in the middle or lunch time and someone took a photo and put it on Facebook or something saying, 'oh my gosh, look what I saw at lunch time', that person has not consented because they probably did not know the photo was taken. How do you see the law as treating that situation?

Ms HARDY: I think it comes down to implied consent and the definition of recklessness.

Mrs FINOCCHIARO: Okay.

Ms HARDY: Also the fact that the prosecution would have to prove that the person who distributed the picture was reckless as to the lack of consent, that person would also have available to them the defence of mistake of fact—(inaudible) consent. If someone is walking naked through Casuarina—which is not something people would normally do—the very fact of making such an exhibition, it may be that in the circumstances—as I say, it is either implied consent or the person is not reckless as to distributing the image.

Again, I feel concerned about giving what is, essentially, a legal opinion about the situation or scenario.

Madam CHAIR: Fiona, it is Ngaree Ah Kit. Just on that, it is quite interesting to have the discussion. I understand we do not want you to feel like you are in a position where we are asking you for that legal advice. But on the flip side of

someone walking completely naked in a public place, the first thing I worry about is mental capacity and whether or not they are aware of their actions. I guess there would be a case of having to prove that implied consent on their behalf, for our person to not be deemed reckless in sharing that image.

I will hand you over the Sandra Nelson, the Member for Katherine, who has a couple of questions for you.

Ms HARDY: Okay, thank you.

Ms NELSON: Thank you. I am getting concerned that we are getting into the nitty-gritty of the definition of what consent is and public imaging. I have to pick up on what you mentioned earlier about your response to the Member for Spillett's comment regarding posting a photo on Instagram, for example.

Ms HARDY: I am sorry. I cannot hear anything you say.

Ms NELSON: Is that better?

Ms HARDY: Yes, because it is on the telephone, I think the paper was rustling. I heard you talking about getting into the nitty-gritty and then you were moving onto something, but I did not hear what that something was.

Ms NELSON: We are getting stuck into the nitty-gritty of what the definitions are – of consent, public imaging, sharing—and I pick up on the Member for Spillett's comment regarding sharing a photo on Instagram. If I share a photo on a social media platform that is public, like Instagram or Facebook, I know I am sharing it on a public platform. Right?

Ms HARDY: Yes.

Ms NELSON: Your response was that if that is then shared by someone else, that is the sharing of an intimate image. Is that correct? Did I hear that correctly? I did not …

Ms HARDY: That is potentially an offence? Yes.

Ms NELSON: But how can that be though? How can that be because I knowingly shared my image on a public platform that already states on there that if you are sharing images on this platform or social media app, you do not own it. Does that make sense?

Ms HARDY: I know you do not want to talk about the nitty-gritty but it would probably come down to this issue of consent.

Ms NELSON: Yes, it does. It comes down to …

Ms HARDY: I think Mr Goldflam mentioned as well that he is an old person. I am also an old person and I do not even understand how Instagram works. My children have Instagram and I do not understand how it works.

Ms NELSON: Instagram is just one example. If I put a photo on Facebook and someone shares that—what I am saying is because I am putting that photo up on a social media app, website or whatever, it is public. Because I am putting it up there, I am basically giving my consent because it is up there. That is where—yes, the consent issue is a big one.

Ms HARDY: You have used the word yourself. You have said, 'If I put it up there then I am consenting'. That may well be the case.

Ms NELSON: That is my point …

Ms HARDY: Something people need to bear in mind is that in order for a criminal prosecution to commence in the first place, there needs to be a complaint.

Ms NELSON: Okay.

Ms HARDY: If someone puts something up on Instagram and it ends up being shared, unless that person makes or someone else makes a complaint about it, it is not even going to become a criminal investigation.

Ms NELSON: No, you are absolutely correct. It is only an offence if there is a complaint—I get that—but we just have to be really careful about the consent issue and it needs to be very, very clear in this piece of legislation—what is consent.

Ms HARDY: I think it is clear what is consent and we have looked very carefully at what other the jurisdictions have done we have drawn, we are particularly influenced by what New South Wales and the ACT did last year because those bills were introduced after the National Principles were published and endorsed by ministers in May 2017, and what we are looking for is as much uniformity as we can get, and so we have really drawn on, particularly in relation to definition of consent and what has been done in New South Wales and the ACT—and also our own experience and our own definition of consent in other parts of the Criminal Code in the Northern Territory.

Madam CHAIR: Thank you for clarifying that Fiona. I think through all the discussions it has become quite evident that a lot of education needs to take place in regard to informing people about social media platforms and the consent that needs to be gathered before we share somebody else's property.

Does the committee have any further questions for the department?

Fiona, that concludes our line of questioning in regards to the Criminal Code Amendment (Intimate Images) Bill. Do you have any final comments that you would like to leave with the committee this afternoon?

Ms HARDY: I just have one comment, and this is something that arose in a couple of the submissions, I think, and it was answered in the written response, but I would just like to say orally as well—this issue about whether an image exists or does not exist in relation to the threat offence—and I think a couple of submissions mentioned, and I think Mr Goldflam mentioned again this morning, that it was not covered in the bill and actually is covered, it is covered quite clearly in section 208AC(2).

The way it has been done is to say that a person—and it is in paragraph (c)—a person may be found guilty if carrying out the threat is impossible. Rather than saying carrying out the threat, if the image does not exist and they are listing a whole load of other reasons, what we have done is just the general category, 'if it is impossible', and a way in which something could be impossible is if it does not exist. We were very aware that is an issue and very clearly have incorporated what is National Principle seven of the National Principles into the bill.

I also want to respond to the comments that were made about the offences being in the bill not being included as serious offences for the purposes of section 39 of the *Youth Justice Act* and there is no intention that they be so included. They have to be physically included, they have to be made by regulation to become serious offences. Unless on the advice of the Executive Council the Administrator makes regulations, that will not happen. As Mr Goldflam has mentioned, and as the Committee I am sure is aware, Territory Families is leading a review of the Act in response to the (inaudible) recommendations of the Royal Commission into Detention and Protection of Children in the Northern Territory and section 39, as I understand it—Mr Goldflam mentioned this morning—is being considered as to whether there in fact needs to be amendment of section 39 (inaudible).

I think that is a bit of a non–issue as far as this bill is concerned. They are not serious offences. There is no intention that they may be made serious offences. In no other legislation in the Northern Territory do you have a provision that says 'this is not a serious offence for the purpose of the *Youth Justice Act'*, it is not the way things are done.

Finally, we take on board the comments made about recording. The offence of recording an intimate image is not covered in this bill. The Northern Territory Law Reform Committee report, which was the main instigator for this bill, did not address recording of intimate images and the National Principles are about distribution and threatening - is what this bill is about.

Recording is certainly an issue, it is an issue that probably needs further consideration before the government would be able to decide how to proceed. I note that recently there was a case in the ACT where somebody was charged under section 61B of the *Crimes Act* which is their recording provision and was acquitted. The circumstances were taking photographs of a woman's crotch on public transport and that was found to not fall within the ambit of the ACT legislation.

That example I submit suggests we have to be very careful about, if an offence of recording is to be introduced at some point in the future, how that should be structured to make sure that this kind of situation that happened in the ACT does not arise because I know the ACT legislation was supposed to cover this kind of situation and it clearly does not. It is something that needs to be considered more fully and not as a last minute amendment to this bill.

Madam CHAIR: thank you very much for providing that information, Fiona. That was a point I had noted that we had not actually raised with you. You answered the question which was great. On behalf of the committee I just wanted to tank yourself and Jenni for taking the time out to be a part of today's public hearing on the Criminal Code Amendment (Intimate Images) Bill. It has been very insightful.

I want to know we appreciate you taking the time out and clarifying and responding to the questions we had in regards to all the submissions that were provided as a part of our bill inquiry. On behalf of the committee thank you for your time.

Ms HARDY: It was a pleasure.

Madam CHAIR: And happy Valentine's Day!

Ms HARDY: Right, is it Valentine's Day? It is also Ash Wednesday. It is almost light here in London.

Madam CHAIR: Thank you for your time, Fiona.

Ladies and Gentlemen that concludes today's public hearing. I just wanted to say on behalf of the committee thank you to all those who provided submissions in to the two bills we went through today, the Domestic and Family Violence (Information Sharing) Bill and the Criminal Code Amendment (Intimate Images) Bill 2017. Thank you for your time and enjoy your Valentine's Day.

The committee suspended.
