

Mr Rhys L. G. Michie



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Legal Affairs and Community Safety Committee
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Re: The *Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill (2018)*

Dear Committee,

Thank you for the invitation to engage in the process of reforming the *Criminal Code* in Queensland to create new criminal offences regulating the disclosure, and threatened disclosure, of ‘intimate images’ without consent. I take this opportunity to provide my feedback and recommendations on the proposed *Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill (2018)*. I hope that we can improve the quality of this Bill and affect social change.

Introduction

I support the *Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill (2018) (Qld)*. I posit six recommendations to the proposed Bill.

Feedback on technical aspects of the Bill

Firstly, I think the Bill has been mislabelled. This Bill is titled the *Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill (2018)*. Attorney-General D’Ath stated in the Introductory Speech that:

“[t]he new offence is centred on a definition of ‘intimate image’. This term, used throughout the bill, captures moving or still images of an intimate sexual activity not ordinarily done in public; of a person’s genital or anal region when bare or covered only by underwear; and of bare female breasts”¹.

¹ D’Ath, Y.M. (2018) Introductory Speech: *Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill (2018)*, Hansard, Queensland Parliament, p. 1968.

The thing defined as an “*intimate image*”² is a moving or still image of a person that has the qualities of: “*an intimate sexual activity that is not ordinarily done in public*”³, or the “*genital or anal region*”⁴, or the “*bare breasts*”⁵ of a person who is female, transgender, intersex, or identifies as female. I highlight that sexual qualities of the thing have been placed at the centre of this concept. I agree that sexual images are intimate images; but not all intimate images are sexual images. My perception the relationship between Intimate and Sexual images is illustrated in *Figure 1*.

Venn Diagram of the relationship between Intimate and Sexual Images

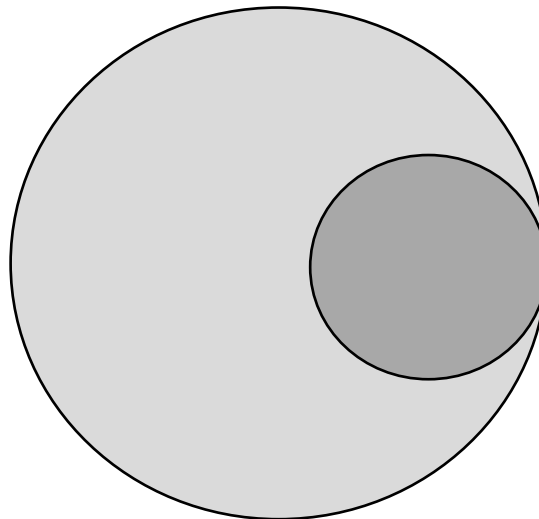


Figure 1.

There are some things that are intimate but not sexual images. Two typical examples of intimate but not sexual images are: an image of a Muslim woman without her hijab or a parent smacking their child. I detect no reference in the AG’s Introductory Speech, the *Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill (2018)*, nor the Explanatory Notes, that indicates an intention to capture images that have the quality of ‘intimate but not sexual’. The precision in labels that we use are important. I recommend the Committee consider relabelling this Bill as the *Criminal Code (Non-consensual Sharing of Sexual Images) Amendment Bill (2018)*.

Secondly, the reference in Clause 4 **Amendment of Section 207A** (1) (a) (iii), reads “*a transgender or intersex person who identifies as female*”⁶. The concept of ‘female’ is ordinarily used to indicate a biological quality, whilst the concept of ‘woman’ is ordinarily used to indicate a social construction of gender. In this situation, it seems to me the at the intention of this Bill is to communicate the factor that applies to a social construction of a person being a woman, rather than that person’s biological sex. This construction of words appears to me to be communicating an exclusionary factor: that is where the bare breasts are of a person who is a ‘socially constructed man’. I recommend the Committee consider re-labelling the quality of

² *Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill (2018)*, Clause 4 (1) Section 207A – Insert – ‘intimate image’.

³ *Ibid*, at (a) (i).

⁴ *Ibid*, at (a) (ii).

⁵ *Ibid*, at (a) (iii).

⁶ *Ibid*.

the person to whom this feature is directed to as “*a transgender or intersex person who identifies as woman*”.

Thirdly, the definition of ‘consent’ appears to me to be tautological. The Bill reads: “*consent means consent freely and voluntarily given by a person with the cognitive capacity to give the consent*”⁷. I recommend the Committee consider re-writing this definition to remove the circular nature of the definition. I propose that this section read “*consent means voluntary and free agreement given by a person with sufficient cognitive capacity*”.

Fourthly, I am concerned that the defences do not adequately delineate derivative use distribution in a situation where the initial distribution was for reward accruing to the subject of that intimate image. I think that a person’s claim to harm ceases if an intimate image is consensually distributed for reward. I think that it is inconsistent with the policy objectives of this Bill, for a person to sell their intimate image, and then claim that an external actor who then distributes that image on another occasion has harmed them in such a way to warrant criminal conviction and imprisonment for a maximum of 3 years. I agree that distribution on one occasion for one purpose does not imply distribution on another occasion for another purpose. However, my proposition is that distributing one’s intimate image for reward is a reason for limiting that person’s claim to how other people distribute that intimate image on another occasion. The current construction of the defences contained in this Bill appear vague to me on this matter and that greater clarity would diminish uncertainty. I recommend that the Committee consider creating a particular defence to provide for the situation where a person distributes their intimate image for reward.

Fifthly, it appears to me from AG D’Ath’s Introductory Speech that the focus of this proposed offence is the activity of the person distributing, rather than the mode of documentation of the thing being distributed. In that speech, the AG stated: “*the non-consensual sharing of intimate images covers a broad range of horrendous behaviour that causes humiliation and distress to its victims*”⁸ and that “*it is important to remember that the impact of the non-consensual distribution of an intimate image on the victim can be devastating*”⁹. The AG further stated that:

“*[t]he continuing evolution of modern technology and ease of access to instant and wide-reaching modes of communication makes dealing with this increasingly prevalent conduct an important priority for government*”¹⁰.

It is my interpretation that this social problem seems to be associated with changes in Information Communication Technologies and norms in our society. According to AG D’Ath, the purpose of this Bill is to remedy that problem. The AG stated in the Introductory Speech that:

“*[t]he introduction of the new offences in this bill will ensure that people who engage in this harmful conduct can be held properly accountable and reflects the community’s condemnation of such hurtful and blatant interferences with personal privacy*”¹¹.

⁷ *Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill (2018)*, Clause 5 (5).

⁸ D’Ath, Y.M. (2018) Introductory Speech: *Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill (2018)*, Hansard, Queensland Parliament, p. 1967.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*, at p. 1969.

If the intended focus of this Bill is on the relationship between the distribution of the thing, and the effect which that distribution has on a person, I think that the nature of the documentation of the a person’s sexual communication is a less relevant factor to be taken into consideration, than the effect that the act of non-consensual distribution of that thing has on a person. I think that it is important to consider how existing, emerging, and future changes in technology may affect the operation of this law. I think that the proposed definition of an ‘intimate image’ as meaning “*a moving or still image*”¹² is too narrow and is constrained by past technologies. I think that the type of thing that can document a person’s sexual communication, at present, could include text, audio, or 3D printed statues. These types of documentation are presently excluded from the definition of an ‘intimate image’, but (to varying degrees) the disclosure of a person’s sexual communication documented in these modes could potentially cause “*humiliation and distress to its victims*”¹³. I recommend that the Committee consider taking a broader and more abstract approach to defining the thing that documents a person’s sexual communication.

Sixthly, Clause 5 of the Bill inserts new sections 223 (1) (a) and (b) which reads:

“223 Distributing intimate images

- (a) *A person who distributes an intimate image of another person— without the other person’s consent; and*
(b) *in a way that would cause the other person distress reasonably arising in all the circumstances;*
commits a misdemeanour”¹⁴.

This construction of the offence where the identities of the parties involved are coded in this Bill as ‘a person’ and ‘the other person’ seems to me to imply that it is assumed that the person harmed by the distribution of an intimate image can only be the person documented in the intimate image. I highlight that the disclosure of an intimate image can harm a person who is not the person in that intimate image. I do not think that the person who is the harmed by the distribution of the intimate image is a necessarily identical to the identity of the person documented in the intimate image. I recommend that the proposed offence be constructed in a way that distribution not be constrained to causing distress to the person in the image. However, I do think there ought to be a reasonable connection between the person who was harmed by the distribution and the person documented in the ‘intimate image’.

Conclusion

I judge that the *Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill (2018)* is a good allocation of our values. I recommend the Queensland Parliament pass this Bill, with amendments.

Yours Sincerely,

Mr Rhys L. G. Michie

¹² *Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill (2018)*, Clause 4 (1) Section 207A – Insert – ‘intimate image’ (a).

¹³ D’Ath, Y.M. (2018) Introductory Speech: *Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill (2018)*, *Hansard*, Queensland Parliament, p. 1967.

¹⁴ *Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill (2018)*, Clause 5.