



LEGAL AFFAIRS AND COMMUNITY SAFETY COMMITTEE

Members present:

Mr PS Russo MP (Chair)
Mr JP Lister MP
Mr SSJ Andrew MP
Mr JJ McDonald MP
Mrs MF McMahan MP
Ms CP McMillan MP

Staff present:

Ms R Easten (Committee Secretary)
Ms K Longworth (Assistant Committee Secretary)
Ms M Westcott (Assistant Committee Secretary)

PUBLIC BRIEFING—INQUIRY INTO THE CRIMINAL CODE (NON-CONSENSUAL SHARING OF INTIMATE IMAGES) AMENDMENT BILL 2018

TRANSCRIPT OF PROCEEDINGS

MONDAY, 3 SEPTEMBER 2018

Brisbane

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The committee met at 10.00 am.

CHAIR: Good morning. I declare open this public briefing for the committee's inquiry into the Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018. My name is Peter Russo. I am the member for Toohey and chair of the committee. With me here today are: James Lister, the member for Southern Downs and deputy chair; Stephen Andrew, the member for Mirani; James McDonald, the member for Lockyer; Melissa McMahon, the member for Macalister; and Corrine McMillan, the member for Mansfield.

On 22 August 2018 the Attorney-General and Minister for Justice, the Hon. Yvette D'Ath MP, introduced the Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018 into the parliament. The parliament has referred the bill to the committee for examination, with a reporting date of 5 October 2018. The purpose of the briefing today is to assist the committee with its examination of the bill. The committee's proceedings are proceedings of the Queensland parliament and are subject to the standing rules and orders of the parliament. The proceedings are being recorded by Hansard and broadcast live on the parliament's website.

Media may be present and will be subject to the chair's direction at all times. The media rules endorsed by the committee are available from committee staff if required. All those present today should note that it is possible you might be filmed or photographed during the proceedings.

Only the committee and invited officers may participate in the proceedings. As parliamentary proceedings, any person may be excluded from the hearing at the discretion of the chair or by order of the committee. I remind committee members that witnesses are here to provide factual or technical information. Any questions seeking an opinion about policy should be directed to the minister or left to debate on the floor of the House. I ask everyone present to turn mobile phones off or to silent mode.

DEVESON, Ms Kristina, Principal Legal Officer, Strategic Policy and Legal Services, Department of Justice and Attorney-General

KAY, Ms Sarah, Director, Strategic Policy and Legal Services, Department of Justice and Attorney-General

ROBERTSON, Mrs Leanne, Assistant Director-General, Strategic Policy and Legal Services, Department of Justice and Attorney-General

CHAIR: I welcome representatives from the Strategic Policy and Legal Services Unit of the Department of Justice and Attorney-General who have been invited to brief the committee on the bill. I invite you to brief the committee after which committee members will have some questions for you.

Mrs Robertson: Thank you, Chair, for the opportunity to brief the committee regarding the Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018. The bill amends the Criminal Code to introduce new offences and provide new powers to the court targeting the non-consensual distribution of intimate images. The colloquial label 'revenge porn' is often attached to this behaviour. That term was a media generated term that tended to be used to describe the non-consensual uploading of nude images to the internet by ex-partners for the purposes of revenge. In fact, the non-consensual sharing of intimate images covers a broad range of conduct, relationships, motivations and modes of distribution. The term 'revenge porn' also labels the images themselves as pornographic, regardless of the nature of the image, which may not be for the purposes of sexual gratification. Therefore, the phrase 'non-consensual sharing of intimate images' is preferred as a more appropriate description of this behaviour.

During the 2017 state general election campaign the government committed to create a new offence related to the non-consensual sharing of intimate images that would apply to the sending of, or the threat to send, intimate material without consent. Also in 2017 a national ministerial council, the Law, Crime and Community Safety Council, as it was then known, agreed to non-binding, best practice national principles for offences criminalising the non-consensual sharing of intimate images. The bill introduces amendments implementing the government's election commitment.

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There are three main elements of this bill: firstly, a new offence of distributing intimate images without consent; secondly, two new offences of making threats to distribute intimate images or prohibited visual recordings; and, thirdly, rectification orders that will empower sentencing courts to direct offenders to remove or delete intimate images or prohibited visual recordings.

Each of the new offences in the bill is centred on the definition of ‘intimate image’ inserted by clause 4. An intimate image is defined as a moving or still image that depicts a person engaged in intimate sexual activity not ordinarily done in public, or a person’s genital or anal region when covered only by underwear or bare, or bare breasts of a female or a transgender or intersex person who identifies as female. This definition includes images that have been altered to appear to show any of the things mentioned in the definition of intimate images or images of these things that have been digitally obscured but still depict the person in a sexual way. There is no requirement that an intimate image be made in a private place or in circumstances where a person had a reasonable expectation of privacy. This is in contrast to the existing offences at section 227A, ‘Observations in breach of privacy’, and section 227B, ‘Distributing prohibited visual recordings’, of the Criminal Code which respectively prohibit the making and distribution without consent of visual recordings of persons in private places and in circumstances where a person would reasonably be expected to be afforded privacy.

Turning to the distribution offence, clause 5 of the bill creates a new offence of distributing intimate images. This offence will prohibit the distribution of an intimate image of another person without their consent and will carry a maximum penalty of three years imprisonment. The new offence will require the prosecution to prove beyond reasonable doubt that the intimate image was distributed in a way that would cause the person depicted distress reasonably arising in all the circumstances.

The prosecution will not be required to prove that the person intended to cause distress or that the person depicted in the image actually suffered distress as a result of the distribution. Rather, the offence will require the court to be satisfied that the way in which the intimate image was distributed would objectively reasonably cause distress to the person depicted in all of the circumstances. This will be determined on a case-by-case basis. Examples of relevant circumstances for the court to consider when applying this test are included, such as: the circumstances surrounding the distribution; the relationship between the parties; and the extent of any interference with a person’s privacy. The bill does not define distress and it is intended to take on its ordinary meaning.

The existing broad definition of ‘distribute’ in section 207A of the Criminal Code, which captures both online and real-life actions, will apply. Specific defences that allow for the distribution of images for law enforcement purposes or for a genuine artistic, educational, legal, medical, scientific or public benefit purpose, which are currently provided for the offences of distribution of child exploitation material, or CEM, or distributing prohibited visual recordings are similarly extended to this new offence.

The bill defines ‘consent’ for the purposes of the new offence to confirm that consent must be free and voluntary and given by a person with cognitive capacity to consent. In recognition of the greater vulnerability of young children, the bill provides that a child under 16 years of age cannot consent to the distribution of an intimate image. This approach is similar to that taken in the majority of other Australian jurisdictions.

Turning to the threats offences, clause 9 of the bill creates two new threat offences that prohibit threats to distribute either intimate images or prohibited visual recordings without the consent of the person depicted in the image. Prohibited visual recordings of a person cannot be made or distributed without consent under the existing offences at sections 227A and 227B of the Criminal Code. The conduct captured by these provisions includes voyeuristic offending such as peeping Toms and upskirting.

One new threat offence will apply when a threat is made to the person depicted in the intimate image or prohibited visual recording. Another offence will apply to threats made to distribute an intimate image or prohibited visual recording of another person. For example, this might include an ex-boyfriend threatening a woman’s new partner to distribute an intimate image of her.

Each of the new offences will carry a maximum penalty of three years imprisonment. Each offence requires that the threatened distribution be without consent of the person depicted and done in a way that would cause distress either to the person depicted or the person who was the subject of the threat reasonably arising in the circumstances. Each of the offences requires the threat to be made in a way that would cause the person threatened to fear, reasonably arising in the circumstances, that the threat would be carried out. Like the distribution offence itself, these new offences exclude the ability to consent from a child under 16 and include a definition of consent.

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I mentioned before that the bill also includes the power of the sentencing court to make rectification orders. Clause 9 of the bill introduces these new powers for a court to order a person convicted of the new offences or the existing offences at section 227A and section 227B of the Criminal Code to take reasonable steps to remove, delete or destroy relevant images. Noncompliance with the rectification orders will be an offence punishable by a maximum penalty of two years imprisonment.

The bill also includes some other minor amendments. These other minor amendments will provide further consistency between the new offences and the existing offences at section 227A and section 227B of the Criminal Code that similarly target interferences with a person's privacy and involve a lack of consent. Thank you for the opportunity to brief the committee on the bill. We are happy to take questions.

Mr LISTER: What interactions has the department had with the police department in identifying this need? I gather the police are on the front line here dealing with some of the issues that you have spoken about. Have you worked with them in developing the bill?

Ms Deveson: The Queensland Police Service has been consulted at a departmental level during the development of the amendments in the bill.

Mrs McMAHON: This is obviously an issue that has been bubbling away for a little while, as social media and the capability of technology to share this sort of thing is increasing. Do we have any statistics regarding the extent of the offending that this legislation would look to pick up? Do we have statistics or anything to show what is happening out there at the moment and the size of this?

Ms Deveson: I do not have statistics available today about the scope of offending; however, I do note that a lot of conduct that has previously been captured by other existing criminal offences under the Queensland Criminal Code and the Commonwealth Criminal Code could fall into the same statistical survey, as these offences will complement some existing offences. I do not have statistics available for the committee today.

Mrs McMAHON: I would imagine that in cases where there is a domestic relationship this would probably have been picked up under the behaviour that is considered domestic violence coercive or controlling behaviour?

Ms Deveson: Certainly if the circumstances of the offending fall within the definition of a relevant relationship under the Domestic and Family Violence Protection Act it has the scope to be domestic violence. In fact, if the new offences occur in a domestic violence situation they could be charged as a domestic violence offence. That would be an aggravating factor at sentence under the Penalties and Sentences Act and would also be recorded on an offender's criminal history as a domestic violence offence so that it would appear moving forward. That is the case with any criminal offence that is committed as an act of domestic violence.

Mrs McMAHON: Who are the main victims of these types of offences? Is there a particular group within the community?

Ms Deveson: That is a very interesting question to ask. I think there is a lot of research and there is an increasing amount of research being done. The difficulty with trying to summarise research is the underlying definition of what conduct is captured. The scope of the offence in the bill might not accurately align with the category of behaviour that is being captured by a particular body of research. However, I could refer the committee to some research done by the RMIT over the last few years that suggests that anyone could be captured by this kind of offending behaviour but it has, unsurprisingly, disproportionate impacts on young people, perhaps because of their involvement with social media and technology.

Mr ANDREW: I think of ways of people deflecting issues. Say, for instance, there was someone who shared an image with someone else and they sent it from a burner phone that had a paid-for SIM and obviously got that person in trouble because they actually took the photos or they were aligned with taking those photos. It is going to be hard to prosecute some of these people who are doing it from a distance. Do you know what I mean? Someone sends it to someone else and they are actually perpetrating the crime for that person, if you know what I am saying. You would have seen some of that—especially if this comes into play where there is an outcome for the criminal behaviour of that certain person so they can deflect it through some other resource or other avenue.

Ms Deveson: Is the question that you are asking—

Mr ANDREW: How would you actually prosecute? Is there going to be a provision for that? It is going to be hard to take it into consideration. I know it is a farfetched thing, but I know how people think these days.

Ms Deveson: Is your question about whether the offence would be able to be prosecuted for a person who sent an image or shared an image from a device that had particular anonymising qualities to it?

Mr ANDREW: Yes.

Ms Deveson: That is a matter for investigation for the police. It is an issue that comes up that is not discrete to the offence in the bill. With the increasing use of technology that applies across all areas of crime, the Police Service rely on their investigative powers to do that.

Mr McDONALD: Thank you, ladies, for the presentation this morning. The increasing sexualisation of young people is obviously of great concern to many in the community, including myself. I recognise the opportunity that this bill has given in terms of those under 16 not being able to provide consent. Obviously the bill goes some way to creating an offence under particular circumstances, but has the department thought about a multigovernment approach to promoting this legislation and ensuring that sexualisation of youth is perhaps corrected or minimised to the best extent possible?

Ms Deveson: I can really only speak to the first part of your question with regard to whether the department has considered a multiagency approach. It is certainly the intention of the department to invite officers of other identified agencies to come up with and identify the best communication strategy and to ensure that existing training materials or information materials that departments, for example the education department, might have will reflect the amendments in the bill once passed.

Mr McDONALD: I would really like to invite the department to maximise that opportunity because there are a lot of vulnerable children out there who do not know. One of the things that police grapple with enormously is youth sharing images with youth. Obviously prosecutions occur, but I see the opportunity for education. I wonder, Mr Chairman, in relation to the question that the member for Macalister asked with regard to statistics, if the department could take that on notice? I would be really interested to see the outcomes of that research.

Mrs McMAHON: Would that be a DJAG or a police question?

Mrs Robertson: Can I clarify whether you are after the RMIT material that we have referred to or the actual data itself?

Mr McDONALD: Yes, the statistics.

Ms Kay: If we could just clarify the sorts of statistics. There are limits to what we can extract, but if perhaps the committee were able to particularise the statistics you were looking for we will do our very best to uncover them from whatever sources we can.

CHAIR: We will do that.

Mr McDONALD: In terms of other jurisdictions in Australia, obviously there is revenge porn legislation. Did the department look at that and are there positives or deficiencies that you have found through that process and have we catered for those deficiencies in our legislation?

Ms Deveson: Tackling the first limb of your question first, yes, the department has looked at other Australian jurisdictions that have moved in this space. As you would have heard Mrs Robertson mention this morning, there were national principles settled by ministerial council in 2017 that provided some guiding best practice principles for jurisdictions to look to. Those principles, however, did recognise that criminal laws in different Australian states and territories have some inherent differences. Some states have codified criminal laws whereas some rely more on a common law basis. However, we looked across the states that have acted. South Australia, Victoria, New South Wales, the Australian Capital Territory and the Northern Territory have all enacted provisions specifically addressing the non-consensual sharing of intimate images or threats to do the same and Western Australia has a bill currently before parliament.

There are a lot of similarities. There are a few differences. I think the key difference lies in the approach taken in the Australian Capital Territory and the Northern Territory in one regard. That is, in each of Queensland, Victoria, South Australia and New South Wales the offence is limited in some way to—obviously I cannot speak for why other jurisdictions might have taken that approach in crafting the offence—circumstances where the distribution would cause distress reasonably arising in the circumstances. In New South Wales and also in South Australia the offence is limited by reference to what sorts of images are captured—and, if passed, the Western Australian model has a similar impact—and broadly, and generalising across the three jurisdictions, limits the offences to images that were taken in circumstances where there was an expectation of privacy or they were in a private place.

The Queensland example goes beyond that and will capture images regardless of the time, place or manner in which they were created and focuses more on the acts of the offender in distributing. That approach is most similar to what was taken in Victoria. Victoria has a limit on their offence in that

the distribution must be contrary to community standards of acceptable conduct. That was their approach. Our approach is to focus on the impact of the distribution in a different way. The Northern Territory and the Australian Capital Territory do not limit the definition by reference to a reasonable expectation of privacy and similarly do not have a specific limit on the distribution or the effects of distribution.

As for the range of penalties that apply, the range is between two years—and in the Australian Capital Territory there is an aggravated version of the offence that ranges up to four years imprisonment. In addition to that, the committee may be aware that the Commonwealth government has recently passed amendments creating some additional powers for the eSafety Commissioner as well as introducing a civil penalty scheme that will apply to the non-consensual distribution of intimate images.

During their consideration of that bill amendments were made which will make amendments to the Commonwealth Criminal Code. The Commonwealth Criminal Code has an existing offence that could, depending on the circumstances, have been applied to the non-consensual distribution of intimate images. That offence is using a carriage service to menace, harass or cause offence. Some amendments have been made to the Commonwealth Criminal Code as to how that offence will operate and provide an aggravated penalty of five years imprisonment. If the committee is interested I can provide further information on how that will work, but otherwise I think that is a general summary of where the Queensland provision fits across the jurisdictions.

Mr McDONALD: I would be interested.

Ms Deveson: I think the starting point for the committee to understand about the Commonwealth offence is: because of the limits of Commonwealth power in criminal law, it only applies to things that occur using a carriage service under the telecommunications power, whereas state and territory based legislation can apply to an act of distribution either in person or online or over a telephone. It has that immediate difference from the Queensland proposed offence. The amendments that have been made will mean that if a person is convicted of the existing offence in circumstances where their conduct was non-consensually sharing what the Commonwealth are terming 'private sexual material', which is fairly consistent with the proposed definition of 'intimate images' in the bill, that would provide an aggravated penalty of five years imprisonment.

The bill also makes an amendment to provide guidance on how to interpret and consider the existing offence. The existing offence requires a person to use a carriage service, and their use of a carriage service has to be in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive. The three particular limbs are menacing, harassing or offensive. To give you an example of when the offence might apply, it could apply to persistent and repeated telephone calls as part of perhaps something you might think of as stalking conduct, but it obviously can apply in a lot of different circumstances. The Commonwealth amendments will require regard to be had to the issue of whether a person has consented to the distribution of private sexual material when they are deciding if a reasonable person would consider it as offensive. That is one part of what the amendments do.

If all of the elements of the offence are satisfied—and the way they are satisfied is because an intimate image or private sexual material was distributed—then a five-year maximum penalty will apply. Another amendment was made by the Commonwealth: the act creates a civil penalty scheme. If a person has contravened three civil penalty orders previously—and the civil penalty orders would apply to the same kind of conduct with the non-consensual posting of intimate images—then they would have an even further aggravated penalty of seven years imprisonment. Another difference between the two is that the Commonwealth's 'private sexual material' definition only applies to images of people 18 years and older.

Mrs McMILLAN: Good morning everyone. Can I congratulate our officers. This is a really important bill. As someone who has spent her career supporting young people at school, I know that the general laws are often a great step forward to provide support, advice and direction and some boundaries for our young people. Generally as a school leader I would suspend students who breached the law of the land—generally speaking. Obviously the sharing of intimate images, as the member has mentioned, is quite frequent and is a practice that our young people engage in. How are we going to deal with juveniles in the interim? We know that once the laws become known it will over time change behaviour, but how will we deal with juveniles?

Ms Deveson: Can I clarify that what you are asking is what kind of response there could be to a juvenile engaging in this kind of behaviour without resulting in prosecution?

Ms McMILLAN: Yes.

Ms Deveson: At the moment, the Queensland Police Service deals with this issue already, because the bill is aiming to support the legal response to an existing problem. The Queensland Police Service has operational guidelines as to how to deal with children who are engaging in youth sexting or experimental behaviour. That will be built upon moving forward and will be able to be used to reflect the new provisions. That response prefers a preventative and educative response over prosecution, but it recognises that in some circumstances prosecution is warranted.

The police *Operational Procedures Manual* sets out guidelines of how police should approach the issue of children engaging in sexting. It discusses, for example, circumstances involving young people of similar age sexting or engaging in consenting sexual experimentation, that police should adopt an alternative approach focused on prevention and education through relevant campaigns such as the QPS Your Selfie: Keep it to Yourself campaign. It sets out guidelines for when police should commence an investigation but certainly prefers the preventative and educative response, which should carry through with the new provisions.

Mr McDONALD: I really appreciate the work that has gone into this bill. This question perhaps relates to the subsequent dealing of offenders in terms of the victims of this sort of behaviour, which can be very devastating for the individuals. I can see this bill being an ideal place to introduce some restorative justice principles, where the victim truly is part of the process—if they want to be—and the offender can understand the damage that they may have caused. I am talking particularly about young people. Has the department thought about that? Are we looking at remaining within the current Penalties and Sentences Act and the treatment of offenders?

Ms Kay: With respect to adult offenders, they will be treated within the Penalties and Sentences Act. We are not experts in the youth justice system. Another department looks after that. We are very happy to get back to the committee with some of their youth justice conferencing information if that would be of any interest to the committee.

Mr McDONALD: Yes, that would be great, thank you.

Mrs McMAHON: I want to turn my head to the more practical aspects of the police being able to utilise this legislation, particularly with respect to jurisdictions and borders. A lot of these technologically assisted offences often travel over borders, both state and international. I am wondering how a victim may best act when the person who has the image or has distributed the image is not a Queensland based person, particularly where there might have been a separation and we now have a couple of different state jurisdictions or even potentially overseas? How will victims be able to operate within that system and how will police be able to get to the bottom of it? It is fantastic if we have the best laws in the land, but how are we going to work with that over borders?

Ms Deveson: I think there are a couple of useful tools that would be available in those circumstances. The first is that, as with many existing offences, there is scope for this offence to occur across borders and potentially even into other jurisdictions. The Criminal Code sets up some provisions about what kind of nexus is required with the state of Queensland for an offence to have been committed here. At a practical level, our colleagues in the Queensland Police Service are adept at working collaboratively with other police agencies across Australia.

For victims, a very beneficial outcome of the recent Commonwealth amendments is the civil reforms in that bill. The bill was introduced as a package of civil reforms. One of the key aspects of that was providing extended powers to the office of the Commonwealth eSafety Commissioner. The committee might be aware that the eSafety Commissioner has a broad role in providing education and resources relating to online activities across the country. In particular, it commenced operation as the children's eSafety Commissioner and had a really strong role in cyberbullying behaviour.

Prior to the passage of the recent Commonwealth reforms, the eSafety Commissioner had powers to order the removal, or the taking down, of material on the internet that was related to cyberbullying or children. The recent Commonwealth reforms have extended that, and removal notices will now be able to be issued by the eSafety Commissioner to have intimate image material relevant to adults also to be removed. The eSafety Commissioner has strong relationships with social media and internet service providers. The Commonwealth legislation also provides teeth to support those orders of the Commonwealth. That is at the national level. That provides an excellent avenue for victims seeking recourse to have their images taken down.

As for working across the borders, that will be a matter for the police. Certainly it is not unique for the new offence. They will have the Queensland offence as well as the offence as amended under the Commonwealth Criminal Code and we will be able to determine that.

CHAIR: On the point about the eSafety Commissioner being able to make orders for images to be taken down, how will that work? For example, if a person is convicted in Queensland for offences under these amendments, will there be a mechanism for the eSafety Commissioner to issue those orders? Where will the request come from?

Ms Deveson: My understanding—and it is only my understanding, these laws being very new; I believe they commenced sometime over the past couple of days—is that a victim can make an application directly to the eSafety Commissioner. It is a very informal and easy process for an individual to undertake. It may be that that individual is able to have action taken by the eSafety Commissioner to remove an image before a criminal prosecution is finalised.

CHAIR: Okay. It could be just an informal request? On a more technical matter, if the person has been convicted, they would probably be able to get access to a certificate of conviction that they could provide to the commissioner and it would probably be sufficient proof for him to issue the order?

Ms Kay: Yes. It is worth noting that in the bill itself if you are convicted of this offence the sentencing court has the power to make those rectification orders and if you do not do that, then that in itself is an offence punishable by two years imprisonment.

CHAIR: The accused himself, or the defendant, could be the person who makes the request to satisfy any order of the court?

Ms Kay: We have not considered that scenario, but that is quite possible. I would really encourage members of the committee if they are interested to look on the website of the eSafety Commissioner. It is a very easy-to-use resource. It is written in language that is meant to be accessible to parents and children. It has links whereby you can make reports about offensive conduct online. I think the committee, when it is looking at this bill, would find it very interesting.

Ms McMILLAN: I know that this is out of the jurisdiction of the Queensland government, but do we know if there has been an increased allocation of resources to the eSafety Commissioner as a result of the changes in the acts across the country?

Mrs Robertson: I do not think we are aware of that. I do not think we have that information.

Ms McMILLAN: The definition of 'intimate image' includes 'bare breasts' but the definition of 'prohibited visual recording' does not. Is this intentional?

Ms Deveson: The definition of 'prohibited visual recording' does similarly include bare breasts in certain circumstances, but it is a little bit complicated. It requires looking at other definitions within the Criminal Code. The definition of 'prohibited visual recording' refers to the definition of a 'private act'. The definition of a 'private act' refers to the definition of a 'state of undress'. Once you get to the definition of a 'state of undress', that refers to if the person is naked, or the person's genital or anal region is bare, or, if the person is female, the person's breasts are bare. The same reference to female breasts is captured; it just requires stepping through a few separate definitions. That definition will similarly be amended by the bill to extend to explicitly cover the bare breasts of a transgender or intersex person who identifies as female.

Mrs McMAHON: Could I look at defences that have been outlined in the new legislation? We have a specific defence in relation to the distribution of intimate images, and that is if the person did so for 'genuine artistic, educational, legal, medical, scientific or public benefit purpose' and that the 'person's conduct was, in the circumstances, reasonable for that purpose'. How often are we seeing, or are we likely to see, defences like this raised? Do we have any cases that have made their way through the legal system in which we have had to look specifically at this defence?

Ms Deveson: Perhaps that is a matter that we could take on notice. That defence applies to the existing child exploitation material offences. The difficulty with finding information on defences is that if they are successful it is difficult to locate data on them, because the defence that is relied on that results in an acquittal is not readily recorded and able to be retrieved from statistics.

Mrs McMAHON: Is there some case law?

Ms Deveson: If the committee were interested, perhaps we could take that on notice and come back to the committee with some information about any judicial consideration of the defence.

Mrs Robertson: That phrase is often used in this sort of area. It is not a new phrase; it is quite a common phrase.

Mrs McMAHON: That leads me to think that this is something that has been relied upon before.

Mrs Robertson: That language is not unusual in this scenario.

Ms Deveson: It is used for the existing offences targeting child exploitation material. It is also used in part for the offence of carrying or wearing prohibited items in public, which is the offence for the wearing of colours of outlaw motorcycle gangs. It has a comparable offence as well.

Mrs Robertson: Perhaps we could make some endeavours to see if we could find any judicial articulation of those words? For the reasons that we have outlined already we may not be able to get much, but we will see what we can do. Are you comfortable with that?

CHAIR: Yes, of course.

Ms McMILLAN: Do the bill provisions cover fake porn made using artificial intelligence technology, also known as deepfakes?

Ms Deveson: I am not familiar with the term 'deepfakes' or exactly what that would capture, but the bill specifically provides that the definition includes an image that has been altered to appear to show any of the things mentioned otherwise in the definition. If an image has been altered to appear to show a person engaged in an intimate sexual activity not ordinarily done in a public place, or the person's genital or anal region, whether bare or covered only by underwear, or the bare breasts of a female or a transgender or intersex person who identifies as female, then in those circumstances an altered image is going to be captured.

Mr McDONALD: Coming back to the question on statistics, I have been giving it some thought. I think that perhaps, as Mrs Robertson suggested, that RMIT research—

Mrs Robertson: We can get that reference.

Mr McDONALD: That probably covers the issue of who are the main victims and, as Ms Deveson has said, it could be anybody. I would be very interested to see that. I wonder if the department could—and maybe you have to contact the police department—provide statistics regarding the extent of offending in terms of non-consensual sharing of intimate images happening at the moment, so that we have a baseline when considering what happens after the legislation comes into being.

Ms Kay: I anticipate that might be difficult, because they will be trying to measure an offence that is not currently statistically measured. They could give us statistics for the existing offences under 227A and 227B and other offences that are used to cover similar conduct. One of the issues that you will appreciate is also the reporting of this offence. People may not report it if they do not think it is a criminal offence at the moment. In terms of trying to measure the offence, it will be quite difficult. We will ask the police what they can do, but I want to make sure that your expectations are not too high with respect to that.

Mr McDONALD: I fully understand the restrictions that you are talking about.

CHAIR: Obviously if a person can be charged under this legislation, perhaps there are more serious offences under the Criminal Code that they could be charged with for the same set of facts. For example, a person who is trying to extort something from another person perhaps may not be charged under this legislation but with a more serious offence under the code, even if these elements were made out.

Ms Deveson: Again, that is not a unique situation across the statute books and would be managed by the police in determining what charge to proffer. Certainly, at a prosecution stage, the reference to the guidelines of the Director of Public Prosecutions will certainly guide prosecution agencies as to what may be the appropriate charge in a particular circumstance.

CHAIR: When dealing with a person for committing this type of offence, a magistrate makes an order in accordance with the legislation for the images to be taken down. Could they also make an order that the Commonwealth equivalent of the eSafety Commissioner be notified?

Ms Deveson: The provision as drafted in the bill allows the magistrate to order the person to take reasonable action. It would be a matter for the court to determine what 'reasonable action' would include.

Ms McMILLAN: I guess that is a further indication of how difficult it is to gather statistics, because some of the sharing of intimate images could be captured under DV law, others under the Criminal Code and others under the consensual sharing act. Therefore, I understand the difficulty of trying to gather the evidence.

Ms Kay: I think that is correct. The Attorney-General's explanatory speech set out that this type of offending occurs in many different contexts, so it is not just the end of relationships, it is not just juveniles and in some instances, as you have correctly pointed out, it can be domestic violence. We are limited by the fact that, as we know, the level of crime is not always what is revealed in a statistic; it takes someone to actually report that conduct happening. Because this is not an offence yet, of

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course the hope would be that, as you have alluded to, with community education and people becoming more aware of the fact that this is now criminal conduct, more of it may be reported. In terms of trying to measure the scale, that can be very difficult.

As I said, we will talk to the Queensland Police Service. We will do our very best to get you some sort of indication, if we can, but there will be limitations on the figures that we can give you and in terms of your actually being able to extrapolate anything accurately from that.

Ms McMILLAN: Questions of validity, yes.

CHAIR: There are no further questions. In relation to questions taken on notice, could we have the responses to the secretariat by Friday, 7 September so that they can be included in our deliberations, please?

Mrs Robertson: That is fine, Chair.

CHAIR: That concludes the briefing. Thank you, Mrs Robertson, Ms Kay and Ms Deveson, for your appearance this morning. I thank our Parliamentary Service staff and our Hansard reporter. A transcript of the proceedings will be available on the committee's parliamentary web page in due course. I declare closed the public briefing for the committee's inquiry into the Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018.

The committee adjourned at 10.52 am.