



Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018

**Report No. 20, 56th Parliament
Legal Affairs and Community Safety
Committee
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Legal Affairs and Community Safety Committee

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Contents

Abbreviations	iii
Chair's foreword	v
Recommendation	vi
1 Introduction	1
1.1 Role of the committee	1
1.2 Inquiry process	1
1.3 Policy objectives of the Bill	1
1.4 Government consultation on the Bill	1
1.5 Should the Bill be passed?	2
2 Non-consensual sharing of intimate images	3
2.1 Image based abuse	3
2.2 Regulation of the non-consensual distribution of intimate images	6
2.2.1 Specific offences	6
2.2.2 Non-specific offences	7
2.2.3 Development of the Bill	7
3 Examination of the Bill	9
3.1 General stakeholder comments	9
3.2 Application of the offences in situations of domestic violence	9
3.3 Definition of intimate image	10
3.3.1 Religious or cultural sensitivity	12
3.4 Definition of consent	13
3.4.1 Mistaken belief	14
3.4.2 Children under the age of 16 years	15
3.5 Definition of distribute	16
3.6 Distribution of intimate images	16
3.6.1 Cause distress	18
3.6.2 Defences	20
3.7 Threats to distribute an intimate image or prohibited visual recording	22
3.8 Rectification orders	23
3.9 Penalties	24
3.10 Matters outside the scope of the Bill	24
3.10.1 Recording of intimate images	24
3.10.2 Child exploitation material	25
3.10.3 Education, training and procedures	25
4 Compliance with the <i>Legislative Standards Act 1992</i>	28
4.1 Fundamental legislative principles	28
4.2 Compliance with the <i>Legislative Standards Act 1992</i>	28
4.2.1 Distribution of intimate images	28
4.2.2 Penalties	29
4.2.3 Threats to distribute an intimate image or prohibited visual recording	29
4.3 Explanatory notes	30

5	Committee comment	31
	Appendix A – Submitters	32
	Appendix B – Officials at public departmental briefing and witnesses at public hearing	33
	Appendix C – Specific offences – non-consensual sharing of intimate images	34

Abbreviations

BAQ	Bar Association of Queensland
Bill	Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018
CASV	Centre Against Sexual Violence
CEM	child exploitation material
committee	Legal Affairs and Community Safety Committee
department / DJAG	Department of Justice and Attorney-General
DFV	domestic and family violence
eSafety Commissioner survey	2017 national online survey of 4,122 people aged 15 to 76+ years commissioned by the Commonwealth Office of the eSafety Commissioner
FLP	fundamental legislative principle
GCCASV	Gold Coast Centre Against Sexual Violence Inc.
LSA	<i>Legislative Standards Act 1992</i>
NSW	New South Wales
NT	Northern Territory
OIC	Office of the Information Commissioner
PACT	Protect All Children Today
QCCL	Queensland Council for Civil Liberties
QFCC	Queensland Family and Child Commission
QLS	Queensland Law Society
QPS	Queensland Police Service
R&DVSA	Rape and Domestic Violence Services Australia
RMIT survey	2016 national online survey of 4,274 people conducted by RMIT University
selfie	self portrait photograph
Triple J survey	2018 Triple J 'What's up in your world' survey of 11,000 Australians aged 18-29 years
WA	Western Australia

WLS	Women's Legal Service
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Chair's foreword

This report presents a summary of the Legal Affairs and Community Safety Committee's examination of the Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018.

The committee's task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

On behalf of the committee, I thank those individuals and organisations who made written submissions on the Bill. I also thank our Parliamentary Service staff and the Department of Justice and Attorney-General for their assistance throughout this inquiry.

I commend this report to the House.



Peter Russo MP

Chair

Recommendation

Recommendation

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The committee recommends the Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018 be passed.

1 Introduction

1.1 Role of the committee

The Legal Affairs and Community Safety Committee is a portfolio committee of the Legislative Assembly which commenced on 15 February 2018 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.¹

The committee's primary areas of responsibility are:

- Justice and Attorney-General
- Police and Corrective Services
- Fire and Emergency Services.²

The *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles.³

The Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018 (Bill) was introduced into the Legislative Assembly and referred to the committee on 22 August 2018. The committee is required to report to the Legislative Assembly by 5 October 2018.

1.2 Inquiry process

On 24 August 2018, the committee invited stakeholders, subscribers and the public to make written submissions on the Bill. Eighteen submissions were received. See Appendix A for a list of submitters.

The committee received a public briefing about the Bill from the Department of Justice and Attorney-General (department or DJAG) on 3 September 2018 and held a public hearing on 17 September 2018. See Appendix B for a list of the officials at the briefing and the witnesses at the hearing.

At the committee's request, the department provided a written briefing and a response to matters raised in submissions.

The submissions, correspondence from the department and transcripts of the briefing and hearing are available on the committee's webpage.

1.3 Policy objectives of the Bill

The objective of the Bill is to create new offences related to non-consensual sharing of intimate images that would apply to sending, or threatening to send, intimate images without consent.

1.4 Government consultation on the Bill

A consultation draft of the Bill was provided by the Government to key stakeholders who included legal, youth and women's advocacy groups. Stakeholders' feedback was taken into account in drafting the Bill.⁴

Protect All Children Today (PACT) was not one of the stakeholders consulted by the Government. On this matter PACT commented: '... given PACT's long-term experience dealing with child and young

¹ *Parliament of Queensland Act 2001*, s 88 and Standing Order 194.

² Standing Orders, schedule 6.

³ *Parliament of Queensland Act 2001*, s 93(1).

⁴ Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018, explanatory notes (explanatory notes), p 5.

person victims of crime, we would have appreciated being included in the initial consultation with the other Key Stakeholders identified.’⁵

1.5 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend that the Bill be passed.

Recommendation

The committee recommends the Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018 be passed.

⁵ PACT, submission 2, p 2.

2 Non-consensual sharing of intimate images

2.1 Image based abuse

Image based abuse is sometimes referred to as ‘non-consensual sharing of intimate images’ or ‘intimate image abuse’.⁶ It is also often labelled ‘revenge porn’ but research has shown that revenge is not the only motive underlying the sharing of, or making a threat to share, intimate images. Other motivations include ‘control, intimidation, sexual gratification, monetary gain and social status building’.⁷

The victim of image based abuse may know the perpetrator (eg. partner, ex-partner, family member, acquaintance, friend) or the perpetrator might be a stranger.⁸

Examples of image based abuse include:

- *Your current or ex-partner sharing an intimate image on social media without your consent.*
- *A work colleague Photoshopping an image of you with an explicit image and sharing it broadly via email.*
- *A stranger taking an intimate image without your consent, also known as ‘up-skirting’, or ‘down-blousing’ or ‘creepshots’, and sharing it on a website or porn site.’⁹*

The Gold Coast Centre Against Sexual Violence Inc. (GCCASV) identified the ease with which imaged based abuse can occur: ‘It only takes a few seconds to upload a photo and share an explicit image of a person without their consent, robbing them of their privacy and exposing them to potentially millions of viewers.’¹⁰

Sharing, or threatening to share, intimate images has been used by perpetrators of domestic and family violence to harass and/or control current and former partners.¹¹ A recent case in the Ipswich Magistrates Court, for example, heard evidence that the defendant threatened to, and later did, post intimate images of the victim, his ex-partner, online because of a dispute over access to their daughter.¹²

⁶ Office of the eSafety Commissioner, *Image-based abuse*, <https://www.esafety.gov.au/women/take-control/online-abuse/image-based-abuse>. All links in this report were accessed on 24 September 2018.

⁷ Nicola Henry, Anastasia Powell and Asher Flynn, *Not just ‘revenge pornography’: Australians’ experiences of image-based abuse – a summary report*, RMIT University, 2017, p 3.

⁸ Nicola Henry, Anastasia Powell and Asher Flynn, *Not just ‘revenge pornography’: Australians’ experiences of image-based abuse – a summary report*, RMIT University, 2017, pp 3.

⁹ Office of the eSafety Commissioner, *FAQ: What is image-based abuse?*, <https://www.esafety.gov.au/image-based-abuse/faq>.

¹⁰ Gold Coast Centre Against Sexual Violence Inc., submission 10, p 3.

¹¹ Nicola Henry and Anastasia Powell, ‘Beyond the ‘sext’: technology-facilitated sexual violence and harassment against adult women’, *Australian and New Zealand Journal of Criminology*, 2015, 48(1), p 113. See also Red Rose Foundation, submission 4, p 3; Women’s Legal Service Qld, submission 7, p 8; R4Respect, submission 8, p 3; Rape and Domestic Violence Services Australia, submission 11, pp 1-2; Centre Against Domestic Abuse Inc., submission 16, pp 1-3; Micah Projects / Brisbane Domestic Violence Service, paper tabled 17 September 2018, pp 1-2.

¹² Ross Irby, ‘Humiliating’: teen girl victim of Facebook revenge porn’, *The Queensland Times*, 21 February 2018, <https://www.qt.com.au/news/humiliating-teen-girl-victim-facebook-revenge-porn/3340990/>. The defendant was sentenced to six months jail, suspended for two years, for the distribution of a prohibited recording. For the use of the internet to menace, harass or cause offence, the defendant was sentenced to six months jail but was released on a \$2,500 good behaviour bond for two years.

Rape and Domestic Violence Services Australia (R&DVSA) submitted that the non-consensual sharing (and threatened sharing) of intimate images can have devastating consequences for the victim:

*... often causing them to experience similar complex trauma impacts to those experienced in relation to other types of sexual violence. The sharing of intimate images may also lead to adverse consequences for the victim in relation to their reputation, employment and relationships.*¹³

Image based abuse is widespread in Australia.¹⁴ A 2016 national online survey of 4,274 people conducted by RMIT University (RMIT survey) found:

- more than one in five Australians (23%) have experienced image based abuse, including:
 - sexual or nude images taken without consent (one in five Australians (20%))
 - distributing sexual or nude images to others without consent (one in ten Australians (10%))¹⁵
 - threatening to distribute sexual or nude image without consent (nearly one in ten Australians (9%))
- one in two Australians with a disability (56%) reported being a victim of image based abuse
- one in two Indigenous Australians (50%) reported image based abuse victimisation
- one in three people aged 16 to 19 years (31%) reported image based abuse
- four in five Australians (80%) agreed it should be a crime to share sexual or nude images without permission¹⁶
- one in three lesbian, gay and bisexual Australians reported image based abuse
- one in two respondents had experienced pressure/coercion to send sexual self-images.¹⁷

A 2017 national online survey of 4,122 people aged 15 to 76+ years commissioned by the Commonwealth Office of the eSafety Commissioner (eSafety Commissioner survey) made similar findings to that of the RMIT survey.¹⁸

¹³ Rape and Domestic Violence Services Australia, submission 11, p 1.

¹⁴ Image based abuse is also present in other jurisdictions. See for example Asia Eaton, Holly Jacobs and Yanet Ruvalcaba, *2017 Nationwide online study of non-consensual porn victimization and perpetration: a summary report*, Cyber Civil Rights Initiative, June 2017, p 11: Nearly 13% of participants in a national American survey reported having been victims of non-consensual porn (NCP) (having had a sexually-explicit image of themselves shared without their consent) or having been threatened with NCP.

¹⁵ The number of victims of image based abuse may actually be higher because, in some instances, victims may be unaware of the non-consensual distribution of intimate images: Nicola Henry, Anastasia Powell and Asher Flynn, *Not just 'revenge pornography': Australians' experiences of image-based abuse – a summary report*, RMIT University, 2017, p 5.

¹⁶ Nicola Henry, Anastasia Powell and Asher Flynn, *Not just 'revenge pornography': Australians' experiences of image-based abuse – a summary report*, RMIT University, 2017, pp 2, 5. Two thousand, four hundred and six women (56%) and 1,868 men (44%) participated in the online national survey. Participants ranged in age from 16 to 49, with an average age of 34 years. Three thousand, seven hundred and sixty-four participants (88%) identified as heterosexual; 510 (12%) identified as lesbian, gay or bisexual: Nicola Henry, Anastasia Powell and Asher Flynn, *Not just 'revenge pornography': Australians' experiences of image-based abuse – a summary report*, RMIT University, 2017, p 4.

¹⁷ Nicola Henry (RMIT University) and Asher Flynn (Monash University), submission 1, p 2.

¹⁸ For example, that image based abuse is higher among younger adults, Indigenous Australians and those who identify as LGBTI: Office of the eSafety Commissioner, *Image-based abuse – National survey: summary report*, October 2017, pp 1-4. The percentages of those who have experienced image based abuse in the eSafety Commissioner survey were lower than that in the RMIT survey because the RMIT survey 'was

In July 2018, ABC Triple J published the results of its 'What's up in your world' survey of 11,000 Australians aged 18 - 29 years (Triple J survey). Amongst other things, the results showed:

- 22% of men and 56% of women have received an unwanted selfie or sexually explicit image
- 5% of men and 9% of women have had negative consequences from sending a naked selfie
- two in three respondents have seen a naked selfie that was not meant for them to see.¹⁹

The Triple J survey also revealed that 61% of respondents had sent a naked selfie.²⁰

It is not just young people, however, who take naked selfies: almost half of the RMIT survey participants had voluntarily sent a sexual image of themselves at least once, and just under a third of the participants had sent a sexual selfie either under pressure or when they didn't really want to.²¹

The eSafety Commissioner survey found that both men and women are victims and perpetrators of image based abuse but that:

- *Women are twice as likely to have their nude/sexual images shared without consent than men.*
- *Women are more likely to experience image-based abuse at the hands of a former intimate partner than men.*
- *Women are considerably more likely to report negative personal impacts as a result of image-based abuse.*
- *Experiences of stalking or threatening behaviour are higher amongst women than men, especially amongst young women aged 18-34 years.*²²

The Centre Against Sexual Violence Inc. (CASV) asserted that '*blaming women or girls for being involved in intimate photos is rampant.*'²³

In the RMIT survey, the most common sites reported by victims of where their images had been distributed included mobile phone messaging, email, Snapchat, Facebook, and other online sites (such as Reddit, Tumblr, and blogging sites). Forty percent of respondents said that their images were distributed across multiple devices and platforms.²⁴

broader, measuring not only the distribution of image-based abuse material, but also images taken without consent and the threat to distribute. The Office's survey focused only on measuring images distributed without consent. Another difference is the RMIT survey used a younger sample of respondents ...': Office of the eSafety Commissioner, *Image-based abuse – National survey: summary report*, October 2017, p 3.

¹⁹ ABC – Triple J Hack, *Young, smart, and kinda broke: what we learnt from our census for young people*, <http://www.abc.net.au/triplej/programs/hack/whats-up-in-your-world-the-census-for-young-people/10051266#digital>.

²⁰ ABC – Triple J Hack, *Young, smart, and kinda broke: what we learnt from our census for young people*, <http://www.abc.net.au/triplej/programs/hack/whats-up-in-your-world-the-census-for-young-people/10051266#digital>.

²¹ Nicola Henry, Anastasia Powell and Asher Flynn, *Not just 'revenge pornography': Australians' experiences of image-based abuse – a summary report*, RMIT University, 2017, p 6.

²² Office of the eSafety Commissioner, *Image-based abuse – National survey: summary report*, October 2017, pp 2-3.

²³ Centre Against Sexual Violence Inc., submission 13, p 2.

²⁴ Nicola Henry, Anastasia Powell and Asher Flynn, *Not just 'revenge pornography': Australians' experiences of image-based abuse – a summary report*, RMIT University, 2017, p 5. The eSafety Commissioner survey found that Facebook and/or Messenger was the most common channel through which the photos/videos were shared: Office of the eSafety Commissioner, *Image-based abuse – National survey: summary report*, October 2017, pp 6-7.

2.2 Regulation of the non-consensual distribution of intimate images

2.2.1 Specific offences

Most Australian jurisdictions have specific offence provisions covering the non-consensual distribution of intimate images or threats to distribute such images.²⁵

In 2013 South Australia was the first Australian jurisdiction to create an offence for distributing an ‘invasive image’ of another person.²⁶ The following year Victoria passed legislation which created offences of distributing, or threatening to distribute, intimate images without consent.²⁷ Specific offences have since been legislated in the Australian Capital Territory (ACT), New South Wales (NSW) and the Northern Territory (NT).²⁸ The Criminal Law Amendment (Intimate Images) Bill 2018 is currently passing through the Western Australian Parliament.²⁹ Tasmania and Queensland are the only states that do not currently have a specific offence targeting non-consensual sharing of intimate images.³⁰ The table in Appendix C summarises offences currently available in the Australian states and territories.

Regarding the similarities and differences between the laws of the various jurisdictions, the department advised:

*... The offences are broadly comparable between jurisdictions with some variation between what is captured by the relevant definitions of intimate image, the maximum penalties available and how the scope of the offences are limited.*³¹

Further:

*... New South Wales, the Australian Capital Territory and the Northern Territory have legislative provisions allowing a sentencing court to order the removal or retraction of relevant images upon conviction.*³²

On 23 August 2017 the Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2018 passed both Houses of the Commonwealth Parliament. The Act amends the *Enhancing Online Safety Act 2015* (Cth) to create a civil penalty provision providing that a person must not post, or make a threat to post, an intimate image of another person without consent on a social media service, a relevant electronic service, or a designated internet service.³³ The Act also establishes a complaints

²⁵ Explanatory notes, p 5.

²⁶ See *Summary Offences (Filming Offences) Amendment Act 2013* (SA). The threat to distribute offence was inserted in the *Summary Offences Act 1952* (SA) in 2016.

²⁷ See *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic).

²⁸ See *Crimes Act 1900* (ACT), *Crimes Act 1900* (NSW), *Criminal Code Act* (NT).

²⁹ In Western Australia, the [Criminal Law Amendment \(Intimate Images\) Bill 2018](#) was introduced into the Legislative Council on 22 August 2018. The objective of the Bill is to amend *The Criminal Code* (WA) to introduce offences of distributing an intimate image and threatening to distribute an intimate image and to make consequential and other amendments to the *Restraining Orders Act 1997* (WA) and the *Working with Children (Criminal Record Checking) Act 2004* (WA): Western Australian Parliament, ‘[Criminal Law Amendment \(Intimate Images\) Bill 2018](#)’.

³⁰ Tasmania has not passed legislation addressing ‘revenge porn’: Rob Inglis, ‘[Stakeholders welcome Libs’ ‘revenge porn’ plan, with caveats](#)’, *The Advocate*, 16 January 2018. See also, [Civil Digital Communications Bill 2017 \(Tas\)](#) which lapsed with the dissolution of the House of Assembly on 28 January 2018: *Tasmanian Government Gazette*, [28 January 2018](#).

³¹ Department of Justice and Attorney-General, briefing paper, p 2.

³² Explanatory notes, p 5.

³³ A penalty of 500 penalty units attaches to a contravention of the provision - \$105,000 for individuals and \$525,000 for bodies corporate: proposed s 44B; Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2018, revised explanatory memorandum, p 33.

and objections system to be administered by the eSafety Commissioner and provides the Commissioner with powers to issue removal notices or remedial directions. It is intended that the Act will complement existing Commonwealth, state and territory laws.³⁴

2.2.2 Non-specific offences

There are offences at both state and federal level that are sufficiently broad to encompass certain instances of non-consensual sharing of intimate images.

Section 474.17 of the Commonwealth Criminal Code (Using a carriage service to menace, harass or cause offence) has been used to successfully prosecute Queensland cases involving the non-consensual sharing of an intimate image.³⁵

Offences under the Queensland Criminal Code, such as s 227B (Distributing prohibited visual recordings) and s 359E (Punishment of unlawful stalking), may apply to instances of non-consensual sharing of intimate images.³⁶ However, a potential gap exists if, in relation to s 227B, the person depicted did not have a reasonable expectation of privacy, or, in relation to s 359E, the person did not suffer the requisite harm.³⁷ The department elaborated:

Practical examples of when this could arise are where an image of a person's face is superimposed onto a pornographic image of another person, or if a person has taken a photo of their own genitals while in a public place (such as, in the park or at a campsite, at the beach) and the distribution of the image cannot be proven to have caused the victim, for example, serious mental, psychological or emotional harm (i.e. because the distribution of the image would have to be proven to have caused the victim harm in order to fall within the ambit of the Unlawful Stalking offence).

*Further, Queensland does not have an offence to target threats to distribute this type of material; the existing offences deal with scenarios where the image has been distributed.*³⁸

2.2.3 Development of the Bill

In May 2017 the Law, Crime and Community Safety Council agreed to the *National statement of principles relating to the criminalisation of the non-consensual sharing of intimate images*.³⁹ The principles for nationally consistent criminal offences relating to non-consensual sharing of intimate images identify best practice principles to be considered as jurisdictions amend their criminal law, policy and practices.⁴⁰

³⁴ Parliament of the Commonwealth of Australia, House of Representatives, *Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2018: Revised explanatory memorandum*, p 2.

³⁵ ABC News, *Revenge porn: Are current laws punishing stupidity and naivety rather than criminality?*, <http://www.abc.net.au/news/2017-09-29/revenge-porn-are-current-laws-punishing-the-right-people/8997198>.

³⁶ Explanatory notes, pp 1-2.

³⁷ Department of Justice and Attorney-General, briefing paper, p 1; explanatory notes, p 2.

³⁸ Department of Justice and Attorney-General, briefing paper, pp 1-2.

³⁹ Law, Crime and Community Safety Council (LCCSC), *Communique*, 19 May 2017, p 6, <https://www.ag.gov.au/About/CommitteesandCouncils/Law-Crime-and-Community-Safety-Council/Pages/default.aspx>. The LCCSC consisted of ministers with responsibilities for law and justice, police and emergency management. Following a 2016-17 review, the Council of Australian Governments replaced the LCCSC with separate councils for Attorneys-General, and Ministers for Police and Emergency Management.

⁴⁰ LCCSC, *National statement of principles relating to the criminalisation of the non-consensual sharing of intimate images*, p 1, <https://www.homeaffairs.gov.au/crime/Documents/national-statement-principles-criminalisation-non-consensual-sharing-intimate-images.PDF>.

During the 2017 election campaign the Queensland Government committed to creating a new offence related to non-consensual sharing of intimate images that would apply to sending, or threatening to send, intimate material without consent.⁴¹

⁴¹ Department of Justice and Attorney-General, briefing paper, p 1.

3 Examination of the Bill

The Bill proposes to create new offences related to non-consensual sharing of intimate images that would apply to sending, or threatening to send, intimate images without consent.

Most stakeholders expressed support for the Bill but made recommendations about how the Bill could be improved. This section discusses issues raised during the committee's examination of the Bill, commencing with a selection of general comments about the Bill.

3.1 General stakeholder comments

The Office of the Information Commissioner (OIC) drew the committee's attention to the ubiquity of social media and the prevalence of people taking intimate images.

*Unequivocally, the need to provide some measure of privacy protection to a person depicted in an intimate image is essential. This is especially so in the context of a growing social acceptance of the taking of intimate images, the pervasive use of social media platforms and the ability for images to be instantaneously broadcast to a potentially unlimited audience.*⁴²

The Women's Legal Service (WLS) advised that non-consensual sharing or threatening to share intimate images is:

*... a common occurrence that our clients face both in circumstances where they were completely unaware of the existence of the materials (ie. It had been undertaken without her knowledge) or if it was with knowledge it was in circumstances that the items were to be shared as a couple and not for wider distribution. The sharing of these materials or the threat to do so is an effective tactic of abuse and causes our clients enormous distress, embarrassment and shame.*⁴³

CASV submitted that through the Bill, the Queensland Parliament is 'giving a clear message that the non-consensual sharing of intimate images is not acceptable and thereby showing support to the victims of this abuse.'⁴⁴ The organisation contended that the bill 'will assist as people will no longer have to prove consent or the absence thereof in the production of intimate images. This has always been a fraught area of prosecution.'⁴⁵

The Centre Against Domestic Abuse Inc. submitted:

*We believe this amendment will go well toward filling the gap that falls between domestic violence protection order provisions, stalking provisions and the provisions regarding telecommunications / digital communications contained in the commonwealth criminal code.*⁴⁶

Academics from Bond University argued that the Bill may be unnecessary because existing legislation may provide adequate protection and that a response beyond new legislation is needed, including improved law enforcement and education and awareness in the community.⁴⁷

3.2 Application of the offences in situations of domestic violence

The department advised that where the offending behaviour captured by the proposed new offences occurs within a relevant relationship, as defined by the *Domestic and Family Violence Protection Act*

⁴² Office of the Information Commissioner, submission 6, p 1.

⁴³ Women's Legal Service Qld, submission 7, p 1.

⁴⁴ Centre Against Sexual Violence Inc., submission 13, p 2.

⁴⁵ Centre Against Sexual Violence Inc., submission 13, p 1.

⁴⁶ Centre Against Domestic Abuse Inc., submission 16, p 3.

⁴⁷ Dr Terry Goldsworthy, Dr Matthew Raj & Mr Joseph Crowley (Bond University), submission 14, pp 1-2, 16-17.

2012, it may constitute a domestic violence offence. Conviction of a domestic violence offence is an aggravating factor for the purpose of sentence and is recorded on an offender's criminal history.⁴⁸

3.3 Definition of intimate image

'Intimate image', of a person, is defined in the Bill to mean a moving or still image that depicts:

- the person engaged in an intimate sexual activity that is not ordinarily done in public, or
- the person's genital or anal region, when it is bare or covered only by underwear, or
- if the person is female or a transgender or intersex person who identifies as female – the person's bare breasts.

The definition includes an image that has been altered to appear to show any of the things mentioned above. It also includes an image depicting a thing mentioned above even if the thing has been digitally obscured, if the person is depicted in a sexual way.⁴⁹ The definition would, for example, capture:

*... an image of a person's head superimposed onto an image of another person's naked body or an image of a naked person that is digitally altered, for example, by placing emoji stickers over the person's genitals or bare breasts before distribution when that person is still depicted in a sexual way.*⁵⁰

The Attorney-General explained that the definition of intimate image does not require that the image be made in a private place or in circumstances in which a person had a reasonable expectation of privacy because 'the culpable behaviour the new offences in this bill seek to address is the non-consensual distribution of the intimate image, not the time, place or manner in which the image was created.'⁵¹

The department highlighted the difference between the new and existing offences as regards the privacy of the location in which the image is made:

*There is no requirement [in the new offences] 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.'*⁵²

Stakeholders held a mix of views on the definition of intimate image.

Dr Nicola Henry and Dr Asher Flynn were pleased with the breadth of the definition of intimate image.⁵³

WLS were concerned that the proposed definition of intimate image 'creates unnecessary loopholes and may undermine the achievement of the bill's objects.'⁵⁴ The organisation contended that the

⁴⁸ Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 16.

⁴⁹ Clause 4, s 207A.

⁵⁰ Hon Yvette D'Ath MP, Attorney-General and Minister for Justice, Queensland Parliament, Record of Proceedings, 22 August 2018, p 1968.

⁵¹ Hon Yvette D'Ath MP, Attorney-General and Minister for Justice, Queensland Parliament, Record of Proceedings, 22 August 2018, p 1968.

⁵² Department of Justice and Attorney-General, public briefing transcript, Brisbane, 3 September 2018, p 2.

⁵³ Nicola Henry (RMIT University) and Asher Flynn (Monash University), submission 1, p 2.

⁵⁴ Women's Legal Service Qld, submission 7, p 2.

approach in the *Crimes Act 1900* (NSW) is ‘more straight forward and less open to ambiguity’⁵⁵ and therefore the Bill should be amended to adopt the NSW definition of intimate image.⁵⁶

In response to WLS’s suggestion, the department noted that the definition of intimate image ‘is largely consistent with that of several Australian jurisdictions’ and that the definition of intimate image in the NSW legislation ‘is limited to images of a person in circumstances where a person would reasonably expect to be afforded privacy.’⁵⁷

Rhys LG Michie was concerned that the proposed definition of intimate image is ‘too narrow and constrained by past technologies.’⁵⁸ He asserted that, at present, text, audio and 3D printed statues could also document a person’s sexual communication, but these would not fall within the definition of intimate image because they are not ‘a moving or still image’. Mr Michie recommended that consideration be given to a broader definition of intimate image.⁵⁹

Mr Michie also recommended that consideration be given to replacing the word ‘female’ with ‘woman’ in the definition of ‘intimate image’ to better reflect the Bill’s intention ‘to communicate the factor that applies to a social construction of a person being a woman, rather than that person’s biological sex.’⁶⁰

The department responded to Mr Michie’s concerns:

DJAG notes that an ‘intimate image’ as defined by the Bill is not limited to a ‘sexual image’ and that the use of the term intimate image is in line with the language used in the national principles and a number of other Australian jurisdictions.

DJAG notes the suggestion to amend the definition of intimate image to include the bare breasts of a transgender or intersex person who identifies as a woman rather than as a female. DJAG notes that the language of the proposed definition is consistent with that used in comparable provisions in a number of other Australian jurisdictions.

*DJAG notes that the definition of an intimate image has been drafted broadly however, intimate text and intimate audio recordings are not targeted by the definition of intimate image proposed in the Bill. This is consistent with the agreed national principles which require the form of the intimate images covered by the offences to include still images and visual recordings.*⁶¹

In response to concerns by Bond University academics that male breasts are not included in the definition of intimate image, the department advised that the decision to include in the Bill only the bare breasts of a person who is female, or a transgender or intersex person who identifies as female and not the bare breasts of a man was a policy decision and is consistent with the approach taken in other Australian jurisdictions.⁶²

⁵⁵ Women’s Legal Service Qld, submission 7, p 3.

⁵⁶ Women’s Legal Service Qld, submission 7, p 3. The Women’s Legal Service also recommended that the definition be extended: see 3.3.1. See also Queensland Law Society (QLS), correspondence dated 19 September 2018, p 2. The QLS noted that the definitions of ‘private parts’, ‘engaged in private act’ and ‘image’ would also need to be imported from s 91N of the *Crimes Act 1900* (NSW) for the definition of ‘intimate image’ imported from s 91N to operate effectively.

⁵⁷ Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 4.

⁵⁸ Rhys L G Michie, submission 12, p 4.

⁵⁹ Rhys L G Michie, submission 12, p 4.

⁶⁰ Rhys L G Michie, submission 12, pp 2-3.

⁶¹ Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 5.

⁶² Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 5.

The department also addressed the academics' doubts regarding the inclusion of 'digitally obscured' images in the legislation and the question whether 'intimate sexual activity' should be defined.⁶³

DJAG notes concerns regarding the inclusion of altered images in the definition of intimate image. This approach is consistent with that taken in the majority of other Australian jurisdictions and contemplates existing and emerging technologies as required by the national principles agreed by the Law, Crime and Community Safety Council in 2017 (the national principles). DJAG notes that a decision to prosecute the non-consensual distribution of such altered images would take into consideration the distress element of the offence ...

*DJAG notes that 'intimate sexual activity that is not ordinarily done in public' is not defined. This is consistent with the use of this phrase in the existing definition of private act in section 207A of the Criminal Code.*⁶⁴

Queensland Law Society (QLS) was supportive of the inclusive description of individuals who identify as female.⁶⁵

QLS was, however, concerned about the definition of intimate image, particularly the term 'in a sexual way'. QLS considered the phrase to be 'vague, unclear and subjective'.⁶⁶ The QLS recommended that the provision 'be amended to provide broad judicial discretion to determine whether an intimate image falls within the proposed definition in all the circumstances'.⁶⁷

The department did not have an opportunity to respond to the issues raised in QLS's submission.

3.3.1 Religious or cultural sensitivity

The WLS recommended that the definition of intimate image be extended to reflect the different perspectives of 'intimacy' of some cultures and religions as expressed in the *Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018*.⁶⁸ With respect to this, the department noted that the proposed definition of intimate image 'does not explicitly extend to the depiction of a person without attire of religious or cultural significance',⁶⁹ and added:

DJAG is aware that under new Commonwealth law Enhancing Online Safety (Non-consensual Sharing of Intimate Images Act 2018 (Cth), the definition of 'intimate image' includes any depiction of private parts; depiction of private activity; or depiction of person without attire of religious or cultural significance. However, DJAG notes that this definition applies only to the civil law reforms in the Commonwealth Bill and does not extend to the criminal law amendments which instead are centred on the definition 'private sexual material'. The corresponding criminal offences in other states and territories similarly do not explicitly extend to include religious or cultural sensitivity.

*DJAG notes however that the provisions of the Commonwealth civil scheme apply throughout Australia and are intended to complement state and territory as well as Commonwealth criminal provisions.*⁷⁰

⁶³ Dr Terry Goldsworthy, Dr Matthew Raj & Mr Joseph Crowley (Bond University), submission 14, p 13.

⁶⁴ Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, pp 4- 5.

⁶⁵ Queensland Law Society, submission 17, p 2.

⁶⁶ Queensland Law Society, submission 17, p 2.

⁶⁷ Queensland Law Society, submission 17, p 2.

⁶⁸ Women's Legal Service Qld, submission 7, p 3.

⁶⁹ Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 17.

⁷⁰ Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, pp 17-18.

3.4 Definition of consent

The Bill proposes to insert a definition of ‘consent’ into existing ss 227A and 227B of the Criminal Code and to include the same definition in the new offences.⁷¹

‘Consent’ is defined in the Bill as ‘consent freely and voluntarily given by a person with the cognitive capacity to give the consent’.⁷² The department advised that the definition ‘recognises the potential for vulnerable persons with reduced capacity to be victims of this offending behaviour and for the offending to arise in situations involving coercion or duress (such as domestic violence).’⁷³

Some stakeholders were concerned about the definition of consent.

WLS held the view that the proposed definition of consent is inadequate. It recommended that the definition of consent in s 91O of the *Crimes Act 1900* (NSW) be adopted, plus an additional provision that true consent does not include the circumstances where the defendant is ‘reckless as to whether the person consents or not’.⁷⁴

Drs Henry and Flynn submitted that the legislation should make it clear that consent given on one occasion does not apply to all other occasions:

*... consent from the victim at one time for the defendant to take or share an image does not equate to consent to take or share an image at another point in time; that a person may withdraw their consent; and that giving someone permission to possess an image does not constitute consent to distribute the image ..., regardless of the age of the individuals involved.*⁷⁵

Mr Michie noted the circular nature of the definition of consent and recommended that it be amended to read ‘consent means voluntary and free agreement given by a person with sufficient cognitive capacity’.⁷⁶

GCCASV had concerns about the issue of consent, commenting that within ‘an abusive relationship, where power and control are cornerstones, the victim will never have the power to freely and willingly give consent to any activity sexual or otherwise.’⁷⁷ Micah Projects submitted similarly:

*... It is our experience of working with young women, and those experiencing Domestic and Family Violence (DFV) that “consent” is a nuanced concept, and that there are many reasons that women may say “yes” in the context of sexual decision making (across a range of different scenarios) when they would rather say “no”. Current community understanding of the concept of informed and enthusiastic consent are still lagging. We also need to make a distinction between agreeing to create an image and agreeing to share an image.*⁷⁸

Regarding the concerns about consent, the department noted:

... a person’s consent is not freely and voluntarily given if it is obtained by force, by threat or intimidation, by fear of bodily harm, by exercise of authority, by false and fraudulent

⁷¹ The new offences are in cl 5, proposed new s 223; and cl 9, proposed new s 229A. Section 227A deals with observations or recordings in breach of privacy. Section 227B deals with distributing prohibited recordings.

⁷² Clause 5, proposed new s 223(5); cl 6, proposed new s 227A(3); cl 7, proposed new s 227B(2); cl 9, proposed new s 229A(5).

⁷³ Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 8.

⁷⁴ Women’s Legal Service Qld, submission 7, pp 4-5.

⁷⁵ Nicola Henry (RMIT University) and Asher Flynn (Monash University), submission 1, p 3.

⁷⁶ Rhys L G Michie, submission 12, p 3.

⁷⁷ Gold Coast Centre Against Sexual Violence Inc., submission 10, p 3.

⁷⁸ Micah Projects, submission 15, p 3. See also Centre Against Domestic Abuse Inc., submission 16, p 3.

representations about the nature or purpose of the act, or by a mistaken belief induced by the accused that they were the person's sexual partner.

... in each of the new offences in the Bill the element of lack of consent is specifically linked to the distribution of an intimate image or threatened distribution of an intimate image or prohibited visual recording as opposed to the taking or possession of an image.

With regards to the withdrawal of consent, DJAG notes that it cannot give legal advice on particular cases or circumstances. However, DJAG notes that the effect of a person withdrawing consent for an intimate image to be distributed would need to be considered and determined on a case by case basis. This may require consideration of the nature of the distribution that occurred as the term distribute is defined broadly and covers a range of actions.

DJAG notes that the Bill does not contain reference to whether a person was 'reckless as to whether the person consented' but rather that consent must be voluntarily and freely given. DJAG again notes that section 23(2) of the Criminal Code provides that it does not matter whether an accused person intends to cause a particular result unless intent is expressly declared to be an element of the offence.⁷⁹

The definition of consent in the Bill is consistent with the approach to drafting within the Criminal Code and is consistent with the existing definition of consent contained in s 348(1) of the Criminal Code.⁸⁰

3.4.1 Mistaken belief

Section 24 of the Criminal Code provides that a person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist. The excuse may be excluded by the express or implied provisions of the law relating to the subject.

Queensland Council for Civil Liberties (QCCL) submitted that the defence of mistaken belief should be available as a defence to a charge of distributing an intimate image, and along with the defence Queensland should implement the Victorian model which requires that community standards of acceptable conduct be taken into account.⁸¹

In response, the department advised that the Bill 'allows for consideration of similar factors as the Victorian model but in a more victim focussed manner. In addition, the proposed approach avoids reference to community standards of conduct in an area where community opinion may be divided.'⁸²

WLS recommended that s 24 of the Criminal Code be explicitly excluded from the Bill.⁸³ WLS asserted that the issue of consent is 'undermined by the ability of defendants to utilise the Section 24 Mistaken Belief excuse' and unless s 24 'is explicitly excluded then there is potential for the effectiveness and protection of these new provisions for victims to be nullified and for perpetrator accountability to be avoided.'⁸⁴ In WLS's view, the Queensland Court of Criminal Appeal has interpreted the 'reasonableness' in the mistaken belief provision 'in a very generous way towards the defendant'.⁸⁵ The WLS provided the following as examples of arguments that may be successful under s 24:

⁷⁹ Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 8.

⁸⁰ Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 9.

⁸¹ Queensland Council for Civil Liberties, submission 5, p 1.

⁸² Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 18.

⁸³ Women's Legal Service Qld, submission 7, p 6.

⁸⁴ Women's Legal Service Qld, submission 7, p 5.

⁸⁵ Women's Legal Service Qld, submission 7, p 5.

“she consented to the video so I thought she would be fine to share it with my friends.”

“Sending intimate images was part of our relationship. Look at her Facebook and see what she sent me- so why would I think she had a problem with it now.”

“she is promiscuous anyway so sharing it shouldn’t be a problem.”⁸⁶

WLS further recommended:

That the Queensland Government establish [an] independent inquiry to undertake a broadbased review of sexual violence in Queensland that is inclusive of the experiences of sexual violence survivors, develop a sexual violence prevention plan and immediately review the laws on consent and mistaken belief to reflect modern understandings and attitudes, especially towards women.⁸⁷

With respect to the excuse of mistaken belief, the department advised:

The broader issues raised about whether the section 24 excuse of mistaken belief should be available in situations of consent and sexual offending, and sexual violence more broadly are outside the scope of this Bill.⁸⁸

The department noted the call for a review of Queensland’s consent laws, stating:

... This recommendation impacts other offences in the Criminal Code which use a definition of consent and is beyond the scope of the Bill. While this issue goes beyond the scope of the Bill, DJAG notes that the New South Wales (NSW) Government has recently asked the NSW Law Reform Commission (NSWLRC) to review and report on consent and knowledge of consent in relation to sexual assault offences as dealt with under section 61HA of the Crimes Act 1900 (NSW).⁸⁹

3.4.2 Children under the age of 16 years

The Bill provides that a child under the age of 16 years is incapable of giving consent to the new offences.⁹⁰ The department advised that this is ‘in recognition of the greater vulnerability of young children’⁹¹ and is a similar approach to that taken in the majority of other Australian jurisdictions.⁹² The department considered that it provides ‘appropriate protection for vulnerable child victims and will remove the potential for confusion regarding consent between children.’⁹³

Some stakeholders were concerned about the impact the proposed offences may have on children, with some expressing support for alternatives other than prosecution.⁹⁴

The Queensland Family and Child Commission (QFCC) noted that there is some concern that, if enacted, the Bill ‘may criminalise a large cohort of children under 16 who share intimate images in circumstances which should not be treated through a criminal response.’⁹⁵

⁸⁶ Women’s Legal Service Qld, submission 7, p 6.

⁸⁷ Women’s Legal Service Qld, submission 7, p 7.

⁸⁸ Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 14.

⁸⁹ Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 9.

⁹⁰ Clause 5, proposed new s 223(2); cl 9, proposed new s 229A(4).

⁹¹ Department of Justice and Attorney-General, public briefing transcript, Brisbane, 3 September 2018, p 2.

⁹² Department of Justice and Attorney-General, public briefing transcript, Brisbane, 3 September 2018, p 2. See also Department of Justice and Attorney-General, briefing paper, pp 3-4; Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 8.

⁹³ Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 8.

⁹⁴ There is further discussion of concerns about criminalisation of children in 3.10.2.

⁹⁵ Queensland Family and Child Commission, submission 18, p 1.

QLS supported 'the continued operational practices of the Queensland Police Service to educate our children and young people rather than resorting to investigation and prosecution.'⁹⁶

WLS recommended that consultation be conducted 'with child and youth experts to determine whether the inclusion of a provision in the legislation that permission for the Director of Public Prosecutions be required before commencing an offence against a person under the age of 16 years, is appropriate in Queensland.'⁹⁷ With respect to this, the department noted that there are no existing provisions within the Criminal Code that place a limitation on commencing a prosecution of a child under a nominated age and the commencing of prosecutions will be guided by police and prosecutorial discretion.⁹⁸

PACT strongly supported that a child under the age of 16 years is incapable of giving consent to having their intimate images distributed.⁹⁹

3.5 Definition of distribute

The existing 'broad'¹⁰⁰ definition of 'distribute' in s 207A of the Criminal Code will apply to the new offences. Under the definition, distribute includes:

- (a) communicate, exhibit, send, supply or transmit to someone, whether to a particular person or not
- (b) make available for access by someone, whether by a particular person or not
- (c) enter into an agreement or arrangement to do something in paragraph (a) or (b)
- (d) attempt to distribute.

It would not be necessary for the prosecution to provide that a person intentionally distributed an intimate image but the person would not be criminally responsible for:

- an act or omission that occurs independently of the exercise of the person's will, or
- an event that an ordinary person would not reasonably foresee as a possible consequence.¹⁰¹

3.6 Distribution of intimate images

The Bill would create a new offence prohibiting the distribution, without consent, of an intimate image of another person in a way that would cause the other person distress reasonably arising in all the circumstances. The maximum penalty is three years imprisonment.¹⁰²

The new offence would apply if distribution occurs after commencement of the Bill, regardless of whether the image was created or obtained before or after the commencement. Offenders would be dealt with summarily in the Magistrates Court.¹⁰³

The department advised on the application of the proposed new offence:

⁹⁶ Queensland Law Society, submission 17, p 3.

⁹⁷ Women's Legal Service Qld, submission 7, p 7.

⁹⁸ Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, pp 22-23.

⁹⁹ Protect All Children Today, submission 2, p 2.

¹⁰⁰ Department of Justice and Attorney-General, public briefing transcript, Brisbane, 3 September 2018, p 2.

¹⁰¹ Criminal Code, s 23(1), (2); Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 4.

¹⁰² Clause 5, proposed new s 223.

¹⁰³ Department of Justice and Attorney-General, briefing paper, pp 3-4.

Like all offences the application of the new distribution offence will be subject to the exercise of police discretion to investigate and charge, the exercise of prosecutorial discretion to prosecute the offence, and determination by the court.

To fall within the scope of the new distribution offence each element of the offence must be satisfied.

This requires each of the below elements of the offence to be proved beyond reasonable doubt:

- *The person distributed something*
- *The thing distributed was an intimate image of another person*
- *The person did not have the consent of the person depicted in the intimate image to distribute the image*
- *The way the person distributed the intimate image would cause the person depicted distress, reasonably arising in the circumstances.*

It is not necessary to provide that the person intended to cause, or did cause, the person depicted distress.¹⁰⁴

The department added:

It may be difficult for the required elements of the offence to be satisfied in circumstances where the person depicted has publicly distributed their intimate image for reward. Similarly, whether the required elements of the offence would be satisfied where the distribution of an intimate image was to the person depicted in the image would be a matter to be considered on a case by case basis.¹⁰⁵

PACT supported the new offence.¹⁰⁶

Mr Michie asserted that the disclosure of an intimate image can harm a person who is not the person in the intimate image, but is reasonably connected to that person, and therefore the proposed offence should be constructed in a way that distribution not be constrained to causing distress to the person in the image.¹⁰⁷ Regarding this the department advised:

‘Distress’ to a third party who is not depicted in the intimate image is not contemplated by the proposed distribution offence at section 223 (Distributing intimate images). However, the distress that can be caused to a third party when distribution of an intimate image is threatened by another person is addressed in the proposed new offence at section 229A(2) (Threats to distribute intimate image or prohibited visual recording).¹⁰⁸

The QLS asserted that ‘intention’ should be included as a fault element in proposed ss 223(3) and 229(3)(b):

We note that there are very valid circumstances where a defendant would genuinely not intend to distribute the material in question. For example, if the defendant was signed up to BitTorrent applications such as uTorrent or the like, where the program itself sets up automatic sharing and

¹⁰⁴ Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 19.

¹⁰⁵ Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 16.

¹⁰⁶ Protect All Children Today, submission 2, p 2.

¹⁰⁷ Rhys L G Michie, submission 12, p 4.

¹⁰⁸ Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, pp 11-12.

*distribution via peer-to-peer networks following download. In our view, defendants should only be liable for distributing material if they intend on its distribution.*¹⁰⁹

The department did not have an opportunity to respond to the issues raised in QLS's submission.

3.6.1 Cause distress

Some stakeholders argued that proposed new s 223 should be amended to omit the requirement that the distribution be in a way that would cause the other person distress reasonably arising in all the circumstances.

QCCL, for example, stated:

*The purpose of this legislation ... is to protect a person's express or implied right to consent to the distribution of [intimate images]. Accordingly, we submit that the need to establish that [the person depicted] suffered harm should be unnecessary for the section to take effect. ...*¹¹⁰

R&DVSA submitted that the distress element 'creates an excessive hurdle for the prosecution and distracts from the core wrong underlying these offences: the lack of victim consent.'¹¹¹ R&DVSA cited the Commonwealth Senate Legal and Constitutional Affairs References Committee in its 2016 report titled *Inquiry into the phenomenon colloquially referred to as 'revenge porn'*:

*The committee is persuaded by the arguments for consent to be the central tenet of any non-consensual sharing of intimate images offences. The committee is similarly convinced that non-consensual sharing of intimate images offences should not include 'an intent to cause harm' or 'proof of harm' elements: the perpetrator's intentions and whether or not the victim is harmed are not pertinent; the acts of nonconsensually taking and/or sharing intimate images should be sufficient for an offence to have been committed.*¹¹²

R&DVSA also cited the former Law, Crime and Community Safety Council in its 'National statement of principles relating to the criminalisation of the non-consensual sharing of intimate images': 'An offence for sharing intimate images should not require proof that harm has been caused to the person depicted in the image by the sharing of the intimate image.'¹¹³

R&DVSA acknowledged that 'an objective harm element is different and preferable to a subjective harm element'¹¹⁴ but believed that the inclusion of any harm element is undesirable because 'harm is inherent within the non-consensual element of the offence.'¹¹⁵ Further:

... to require that harm be proven as a separate element of the offence implies that only certain, especially egregious instances of non-consensual sharing of intimate images are serious enough to warrant a criminal response.

*... given that harm is intrinsic to the non-consensual element, it constitutes an unnecessary duplication to require that the prosecution prove each element separately. This duplication will inevitably result in longer and more costly trials.*¹¹⁶

R&DVSA noted that if the requirement for distress is omitted, there may be some circumstances that do not warrant criminal action that are not captured by the defence in s 223(4), such as a parent

¹⁰⁹ Queensland Law Society, submission 17, p 3.

¹¹⁰ Queensland Council for Civil Liberties, submission 5, p 1.

¹¹¹ Rape and Domestic Violence Services Australia, submission 11, p 2.

¹¹² Rape and Domestic Violence Services Australia, submission 11, p 2.

¹¹³ Rape and Domestic Violence Services Australia, submission 11, pp 2-3.

¹¹⁴ Rape and Domestic Violence Services Australia, submission 11, p 3.

¹¹⁵ Rape and Domestic Violence Services Australia, submission 11, p 3.

¹¹⁶ Rape and Domestic Violence Services Australia, submission 11, p 3.

sending family members and friends a photograph of their nude newborn baby.¹¹⁷ To overcome this potential issue, R&DVSA recommended that the Bill be amended to include a defence along the lines of s 91T(1)(d) of the NSW *Crimes Act 1900*.¹¹⁸

*... by positioning the reasonable test as a defence rather than an element of the offence, the NSW approach recognises that in absence of evidence to the contrary it can be assumed that the non-consensual sharing of intimate images is both harmful and unacceptable. In line with this assumption, it appropriately shifts the evidential burden from the prosecution to the defence.*¹¹⁹

Like R&DVSA and QCCL, WLS contended that distribution of an intimate image without consent should be sufficient to establish criminal culpability.¹²⁰ WLS advised that it is not a requirement in the Commonwealth or NSW legislation to prove distress.¹²¹

Drs Henry and Flynn also did not support the requirement in the Bill for the prosecution to prove that the distribution of an intimate image would cause distress.

*... Our concern is that even though this is meant as an objective test, the risk is that it defaults back to proving distress caused to the individual victim/complainant. Moreover, distress is difficult to define or quantify and people differ considerably within the community about what would and wouldn't cause distress.*¹²²

A couple of stakeholders expressed disquiet over the use of the term 'distress' in the proposed new offence. Bond University academics questioned why the term 'distress' is used and not 'detriment' which includes 'emotional harm'.¹²³ The QLS was concerned about the uncertainty of the element of distress:

*... The test of "distress" is novel. It is opaque and moveable. Criminal law tests which employ the standards of "harm" or "detriment" at least have some precedent in the criminal law, whereas the test of "distress" has no objective basis. In our view, the use of the test of distress might send a jury on a perilous journey having to determine whether an image, in the circumstances of the parties, causes distress to a particular member of society. ...*¹²⁴

The QLS recommended that the provision be amended, preferably by using the standard employed in analogous Criminal Code offences, such as the test of detriment in s 359B of the Criminal Code.

The department advised on the interpretation of the requirement that the distribution be in a way that would cause the other person distress reasonably arising in all the circumstances:

¹¹⁷ Rape and Domestic Violence Services Australia, submission 11, p 3.

¹¹⁸ Rape and Domestic Violence Services Australia, submission 11, p 3. Section 91T(1)(d) provides that a person does not commit an offence against section 91P or 91Q if a reasonable person would consider the conduct of the accused person acceptable, having regard to each of the following (to the extent relevant):

- (i) the nature and content of the image
- (ii) the circumstances in which the image was recorded or distributed
- (iii) the age, intellectual capacity, vulnerability or other relevant circumstances of the person depicted in the image
- (iv) the degree to which the accused person's actions affect the privacy of the person depicted in the image
- (v) the relationship between the accused person and the person depicted in the image.

¹¹⁹ Rape and Domestic Violence Services Australia, submission 11, p 4.

¹²⁰ Women's Legal Service Qld, submission 7, p 7.

¹²¹ Women's Legal Service Qld, submission 7, p 7.

¹²² Nicola Henry (RMIT University) and Asher Flynn (Monash University), submission 1, p 3.

¹²³ Dr Terry Goldsworthy, Dr Matthew Raj & Mr Joseph Crowley (Bond University), submission 14, p 13.

¹²⁴ Queensland Law Society, submission 17, p 3.

*The term Distress is not defined and will take on its ordinary meaning. It is intended that distress will provide a lower threshold of harm than currently required to satisfy the more serious offence of unlawful stalking. ...*¹²⁵

The department added:

... the definition of detriment, for the purpose of the offence of unlawful stalking, relevantly includes 'serious mental, psychological or emotional harm' (s 359A Criminal Code).

*Distress is the threshold used in this type of offence in England and Wales.*¹²⁶

In regards to proof of distress, the department advised:

*The prosecution will not be required to prove that the person depicted in the image actually suffered distress as a result of the distribution. Rather, the court must be satisfied beyond reasonable doubt that the way in which the intimate image was distributed would, objectively, reasonably cause distress to the person depicted in all the circumstances.*¹²⁷

The department advised that the special witness protections in section 21A of the *Evidence Act 1977* would apply to victims while giving evidence (such as giving evidence remotely or with a support person) as the new offences fall within Chapter 22 of the Criminal Code.¹²⁸ Section 590AO of the Criminal Code would also apply, limiting disclosure of sensitive evidence to protect the privacy of victims.¹²⁹

In response to stakeholders' recommendations that a distress element should not be included in the Bill, the department advised:

In the absence of a harm element limitation such as distress, the offence could arguably apply in situations where a photo is taken in a public place and distributed in an otherwise acceptable manner. For example, capturing a streaker in the background of a photograph taken at a sporting event and sending the image to a family member.

*The use of a harm element such as distress is consistent with the construction of the existing offence of stalking which builds on concepts that are readily understood by Queensland's legal profession.*¹³⁰

3.6.2 Defences

The Bill's provisions allow for two defences to the new distribution offence.¹³¹

¹²⁵ Department of Justice and Attorney-General, briefing paper, p 3. See also Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 11.

¹²⁶ Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 11.

¹²⁷ Department of Justice and Attorney-General, briefing paper, p 3. See also Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 15.

¹²⁸ Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 12.

¹²⁹ Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 12. Sensitive evidence 'is defined broadly and includes images of victims that would be considered obscene or indecent or that would interfere with a victim's privacy if disclosed without consent': Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 12; Criminal Code, s 590AF.

¹³⁰ Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 10.

¹³¹ In addition to the specific defences in the Bill, the provisions relating to criminal responsibility in Chapter 5 of the Criminal Code, such as s 24 (Mistake of fact), would apply to the proposed new offences: Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 14. See discussion above in 3.4.1 regarding s 24 of the Criminal Code.

Protection would be provided to law enforcement and other relevant officers acting reasonably in the course of their duties.¹³²

A defence would also apply if it can be proved that:

- (a) the person engaged in the conduct that is alleged to constitute the offence, for a genuine artistic, educational, legal, medical, scientific or public benefit purpose, and
- (b) the person's conduct was, in the circumstances, reasonable for that purpose.¹³³

The latter defence 'may include referral of an image to a law enforcement or professional body for investigation or disciplinary proceedings'.¹³⁴

The Attorney-General explained how the proposed defences would compare with defences for certain other offences in the Criminal Code:

*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 distributing child exploitation material or distributing prohibited visual recordings are similarly extended to this new offence.*¹³⁵

Drs Henry and Flynn were supportive of the defence in s 223(4) that the person engaged in the conduct that is alleged to constitute the offence for a genuine artistic, educational, legal, medical, scientific or public benefit purpose and the person's conduct was, in the circumstances, reasonable for that purpose.¹³⁶

The Queensland Nurses and Midwives' Union (QNMU) suggested that the defence in s 223(4) of the Bill should be extended to include clinical and research purposes. According to the QNMU, clinical images, such as of an injury, skin lesion or body fluid, may be shared between clinicians to 'diagnose, treat and manage a patient's condition more quickly and efficiently'.¹³⁷ In addition, 'advances in medicine and science also arise through research that relies on images'.¹³⁸

In response to the QNMU's suggestion the department advised:

... The wording of the defence in section 223(4) of the Bill reflects the current wording in the Criminal Code for defences to child exploitation material (CEM) offences. DJAG is not aware of difficulties which have arisen with the existing wording, and notes that any amendment would need to be considered within this broader context.

*DJAG anticipates that clinical or research work undertaken by nurses or midwives which involves the distribution of an intimate image would ordinarily be done with the consent of the person depicted or would not be in a manner that would cause distress, reasonably arising in all the circumstances as required by the proposed offence.*¹³⁹

QCCL submitted:

... the extent of the offence should be clearly defined and clarified to exclude third parties who distribute the images without knowledge of the circumstances of their creation – for instance,

¹³² Clause 8, amending s 227C.

¹³³ Clause 5, proposed new s 223(4).

¹³⁴ Explanatory notes, p 6.

¹³⁵ Queensland Parliament, Record of Proceedings, 22 August 2018, p 1968.

¹³⁶ Nicola Henry (RMIT University) and Asher Flynn (Monash University), submission 1, p 3.

¹³⁷ Queensland Nurses and Midwives' Union, submission 9, p 3.

¹³⁸ Queensland Nurses and Midwives' Union, submission 9, p 3.

¹³⁹ Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, pp 14-15.

*people who ‘collect’ pornographic images for pleasure or sexual gratification. It should not be a crime, for instance, to repost a stranger’s nude photos when the reposting individual had no idea that the person depicted intended the images to be kept private.*¹⁴⁰

Mr Michie contended that the defences in the Bill do not clearly provide for the situation in which a person consensually distributes an intimate image for reward and another party later distributes that image. Mr Michie’s view was that a person’s claim to harm ceases if an intimate image is consensually distributed for reward. He recommended that a particular defence provide for the situation where a person distributes their image for reward.¹⁴¹

As noted above, the department advised that it may be difficult for the required elements of the offence to be satisfied in circumstances where the person depicted has publicly distributed their intimate image for reward.¹⁴²

3.7 Threats to distribute an intimate image or prohibited visual recording

The Bill proposes to create new offences prohibiting threats to distribute intimate images or prohibited visual recordings without the consent of the persons depicted.¹⁴³ The department advised:

One offence (new section 229A(1)) will apply when a threat is made to the person depicted in the intimate image or prohibited visual recording.

*Another offence (new section 229A(2)) 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.*¹⁴⁴

The threatened distribution must be:

- without the consent of the person in the intimate image
- done in a way that would cause distress reasonably arising in the circumstances (either to the person in the intimate image or to the person who was subject to the threat).¹⁴⁵

The new offences would have a maximum penalty of 3 years imprisonment and be dealt with summarily in the Magistrates Court.

PACT and CASV supported the introduction of the threat to distribute offence.¹⁴⁶ CASV submitted:

*... Currently a victim might be less likely to seek help or disclose abuse if a perpetrator threatened to disseminate sexualised photographs of them. The new legislation has the potential to empower women and children to speak out and seek legal and community support; knowing that they can receive legal support around the non-consensual sharing of intimate images or the threat to do so.*¹⁴⁷

QCCL submitted that the non-consensual distribution, or threat of distribution, of an intimate image ‘clearly restricts the privacy of individuals and needs to be balanced alongside freedom of expression’.¹⁴⁸ QCCL was of the view that the proposed legislation ought ‘specifically provide that the

¹⁴⁰ Queensland Council for Civil Liberties, submission 5, p 2.

¹⁴¹ Rhys L G Michie, submission 12, p 3.

¹⁴² Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 16.

¹⁴³ Clause 9, proposed new s 229; explanatory notes, p 2; Department of Justice and Attorney-General, briefing paper, p 4.

¹⁴⁴ Department of Justice and Attorney-General, briefing paper, p 4.

¹⁴⁵ Department of Justice and Attorney-General, briefing paper, p 4.

¹⁴⁶ Protect All Children Today, submission 2, p 2; Centre Against Sexual Violence Inc., submission 13, p 2.

¹⁴⁷ Centre Against Sexual Violence Inc., submission 13, p 2.

¹⁴⁸ Queensland Council for Civil Liberties, submission 5, p 3.

threat can be express or implied (for example by sending the victim the image to prove its existence and ability to be sent or shared with others), to ensure proper coverage of a broader and more indicative set of circumstances.’¹⁴⁹

QCCL considered that the legislation should not include a threat to release images of a third party. The organisation noted that neither NSW nor the ACT have such an offence. If it were to be included, QCCL submitted that the community standards test should apply.¹⁵⁰

Drs Henry and Flynn supported the new offence in s 229A but considered it is currently unclear how ‘fear’ will be proved and who has the onus to prove that the victim was fearful. They questioned whether a fear requirement is necessary.¹⁵¹

The department advised:

The question of what amounts to a threat will be for the court to determine in each case. ...

Consistent with the approach taken in Victoria the Bill explicitly includes threats to distribute an image of another person, for example a partner or family member. This recognises that such threats can equally be used to coerce or control.

The new threat offences are limited by including a requirement that fear of the threat being carried out be reasonably arising in the circumstances.

*This requires the prosecution to prove, objectively and on a case-by-case basis, that fear could reasonably be caused by the actions of the offender.*¹⁵²

3.8 Rectification orders

The Bill proposes to introduce new powers for a court to order a person convicted of the new offences in ss 223(1) or 229A(1) or (2), or existing offences in ss 227A(1) or (2) or 227B(1) of the Criminal Code, to take reasonable action to remove, retract, recover, delete or destroy an intimate image or prohibited visual recording involved in the offence within a stated period. A failure to comply with such an order may result in a maximum penalty of 2 years imprisonment.¹⁵³

The court may make a rectification order against a person convicted of an offence against s 227A(1) or (2) or 227B(1) after the commencement of the proposed Act, even if the offence was committed, or the offender was charged with the offence, before the commencement.¹⁵⁴

Stakeholders supported the ability of the court to make rectification orders.¹⁵⁵

The BAQ agreed with the inclusion of the rectification orders in the Bill but submitted that the provision lacks clarity regarding the type of order a court may make and what would constitute ‘reasonable action’. The BAQ contended that consideration should be given to adding a further subsection to proposed new s 229AA requiring a court making such an order to state the particular action the person convicted of the offence is required to take. According to the BAQ, ‘This would provide greater

¹⁴⁹ Queensland Council for Civil Liberties, submission 5, p 3.

¹⁵⁰ Queensland Council for Civil Liberties, submission 5, p 3. See discussion above in 3.4.1 about community standards.

¹⁵¹ Nicola Henry (RMIT University) and Asher Flynn (Monash University), submission 1, p 3.

¹⁵² Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, pp 12-13.

¹⁵³ Clause 9, proposed new s 229AA.

¹⁵⁴ Clause 10, proposed new s 742.

¹⁵⁵ See for example Nicola Henry (RMIT University) and Asher Flynn (Monash University), submission 1, p 3; Protect All Children Today, submission 2, p 2; Bar Association of Queensland, submission 3, p 4; Centre Against Sexual Violence Inc., submission 13, p 2; Centre Against Domestic Abuse Inc., submission 16, p 3.

certainty to offenders in complying with these orders, and to police and prosecutors in considering prosecution action for failure to comply with a rectification order.’¹⁵⁶

With respect to the BAQ’s concerns, the department advised:

A court may only order a person convicted of a relevant offence to take reasonable action to remove, retract, recover, delete or destroy an intimate image involved in the offence within a stated period. A court cannot order a person to achieve the desired outcome as this may be beyond the control of the defendant.

*The question of what will amount to reasonable action will be a matter for the court to determine in the particular circumstances of each case. This may require consideration of the nature of the distribution that has occurred in a particular case. A provision has been included to allow a rectification order to be made upon conviction for the new threat offence. DJAG notes the approach in the Bill is consistent with the approach in the ACT, NT and WA.*¹⁵⁷

The QLS recommended that a provision be included which ‘mirrors section 359F of the Criminal Code’ where a rectification order could be made “*whether the person is found guilty or not guilty or the prosecution ends in another way*” because removal of the material will be the most important issue for many complainants.¹⁵⁸

The QLS also recommended the inclusion of a ‘without reasonable excuse’ exception on the basis that there is no provision allowing for the possibility where a court order is made but the defendant is incapable of complying with the court order.

*... For an example, if the defendant has already distributed the material and is incapable of locating / deleting every copy, or where the defendant suffers a head injury after the order is made and forgets all their passwords or is in a coma, or if the defendant is a reportable offender and has restrictions on online access of material etcetera. ...*¹⁵⁹

The department did not have an opportunity to respond to the issues raised in the QLS’s submission.

3.9 Penalties

The Bill proposes to increase the maximum penalty from two years imprisonment to three years imprisonment for the offences of distributing a prohibited visual recording (s 227B) and observing or recording in breach of privacy (s 227A). The explanatory notes advised that the proposed increases in maximum penalty ‘provide consistency with the newly introduced offences and ensure offending behaviour which interferes with personal privacy can be sufficiently deterred.’¹⁶⁰ Stakeholders who commented on the penalties for the new and existing offences stated their support for them.¹⁶¹

3.10 Matters outside the scope of the Bill

3.10.1 Recording of intimate images

WLS submitted that the recording of intimate images without consent should be an offence, such as it is in NSW.¹⁶²

¹⁵⁶ Bar Association of Queensland, submission 3, p 4.

¹⁵⁷ Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 13.

¹⁵⁸ Queensland Law Society, submission 17, p 4.

¹⁵⁹ Queensland Law Society, submission 17, p 4. See also Queensland Law Society, correspondence dated 19 September 2018, pp 1-2.

¹⁶⁰ Explanatory notes, p 4.

¹⁶¹ See for example Nicola Henry (RMIT University) and Asher Flynn (Monash University), submission 1, p 3; Centre Against Sexual Violence Inc., submission 13, p 2; Protect All Children Today, submission 2, p 2.

¹⁶² Women’s Legal Service, submission 7, p 2. See also *Crimes Act 1900* (NSW), s 91P.

The department noted that the conduct captured by s 91P of the *Crimes Act 1900* (NSW) would in most cases be covered under the existing offence in s 227A (Observations or recordings in breach of privacy) of the Criminal Code.

3.10.2 Child exploitation material

BAQ called for a review of the child exploitation material (CEM) laws with the aim of having them fulfil their objective of protecting young people rather than targeting them.¹⁶³ BAQ was concerned that young people who engage in consensual sexting are not adequately protected against offending CEM laws or from being listed on the Child Protection Register in Queensland.¹⁶⁴

BAQ was also concerned that diversion is being used in cases of consensual sexting by young people. Diversion is at the discretion of a Queensland Police Service (QPS) member and may lead to inconsistencies in the application of the law. A caution given at the time of the diversion may have an adverse impact on a young person's future because it is included on the young person's record.¹⁶⁵

BAQ suggested that the Government consider introducing defences to CEM offences for children that are similar to those in Victoria.¹⁶⁶

QCCL commented similarly to BAQ.¹⁶⁷

QLS was of the view that persons under 18 years of age 'should be exempt from Queensland's child exploitation material legislation and excluded from being placed on the sex offender register.'¹⁶⁸

*... We support the approach taken in Victoria where anyone under 18 year of age who creates, possesses or distributes an intimate image or sext of himself or herself or of another minor who is less than two years younger than them will not be guilty of a child pornography offence. We consider that the legislation should recognise that teenagers who engage in consensual peer-to-peer sexting are distinct from child pornographers. This would strike the right balance by ensuring child exploitation offences are appropriately addressed and children are protected, whilst not criminalising the peer-to-peer sexual conduct of children and young people.*¹⁶⁹

In her introductory speech on the Bill, the Attorney-General addressed stakeholders' concerns about the criminalisation of children under CEM offences:

*During this consultation a number of stakeholders commented on the existing child exploitation material offences under the Criminal Code and the way in which they apply to children engaging in consensual sexting behaviour. This feedback noted the importance of the police continuing to prioritise prevention and education when dealing with youth sexting but raised concerns that this may not provide sufficient protection for children engaged in this conduct. While some comments and suggestions dealt with broader issues of child exploitation material and were outside the scope of this bill, they are important concerns and I would like to assure stakeholders that the government will consider those issues during consultation over the coming months.*¹⁷⁰

3.10.3 Education, training and procedures

Some stakeholders made recommendations regarding implementation of the Bill.

¹⁶³ Bar Association of Queensland, submission 3, p 3.

¹⁶⁴ Bar Association of Queensland, submission 3, pp 1-2.

¹⁶⁵ Bar Association of Queensland, submission 3, pp 1-2.

¹⁶⁶ Bar Association of Queensland, submission 3, p 3.

¹⁶⁷ Queensland Council of Civil Liberties, submission 5, pp 2-3.

¹⁶⁸ Queensland Law Society, submission 17, p 3.

¹⁶⁹ Queensland Law Society, submission 17, p 3.

¹⁷⁰ Queensland Parliament, Record of Proceedings, 22 August 2018, p 1967.

R4Respect was of the view that every young Queenslander must receive mandatory respectful relationships education, which could include strategies to challenge image based abuse rather than being a bystander.¹⁷¹

Micah Projects submitted that if the Bill is passed there would need to be additional law enforcement training and resourcing, and community education.¹⁷²

GCCASV focussed on training for police:

*Training must be developed and delivered to all police in relation to their understanding of, response to and investigation of this offence and the interplay between state, interstate and federal and trans national legislation. ...*¹⁷³

WLS made a recommendation regarding the QPS practice and operations manual:

*That the Queensland Police Service review its practice and operations manual in relation to the new offence and in circumstances of domestic violence elect not to pursue criminal charges (or certain criminal charges) against the person who is in most need of protection (the victim of the domestic violence) that may arise or be evidenced in the image/ video evidence to ensure uptake of the new offence and that victims of domestic violence are protected.*¹⁷⁴

QFCC recommended 'an operational focus on education for police officers regarding exercising discretion in matters involving children.'¹⁷⁵

The department addressed submitters' comments regarding non-legislative action to support the Bill:

It is generally recognised that this issue requires a multi-faceted response which includes civil remedies, education and awareness-raising schemes in addition to comprehensive criminal laws. DJAG intends to invite officers of other identified agencies to help develop a communication strategy and to ensure that existing departmental education, training or information materials will reflect the amendments in the Bill once passed.

DJAG notes that the Commonwealth Office of the e-Safety Commissioner plays an important role in co-ordinating and leading online safety efforts within Australia particularly with regards to educating Australians about online safety. The Office provides audience-specific content to various groups including young people, women, teachers, parents and community groups.

The Commonwealth Government has recently passed laws establishing a national civil penalties scheme designed to deter and penalise people and content hosts who share intimate images without consent and provide extended enforcement powers to the eSafety Commissioner including the power to issue removal notices.

Within Queensland various agencies, including within our schools, are actively working to educate and raise awareness of online safety including the potential dangers of sharing intimate images.

...

*DJAG notes that, once enacted, the operation of the provisions in the Bill will be monitored by justice and law enforcement agencies in the ordinary course of business.*¹⁷⁶

¹⁷¹ R4Respect of YFS Ltd, submission 8, p 4. See also Micah Projects, submission 15, p 3.

¹⁷² Micah Projects, submission 15, p 3.

¹⁷³ Gold Coast Centre Against Sexual Violence Inc., submission 10, p 4.

¹⁷⁴ Women's Legal Service Qld, submission 7, p 8.

¹⁷⁵ Queensland Family and Child Commission, submission 18, p 1.

¹⁷⁶ Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, pp 20-21.

The department advised that it would provide the QPS with stakeholders' feedback regarding the QPS operational responses.¹⁷⁷

¹⁷⁷ Department of Justice and Attorney-General, correspondence dated 14 September 2018, attachment, p 16.

4 Compliance with the *Legislative Standards Act 1992*

4.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LSA) states that ‘fundamental legislative principles’ are the ‘principles relating to legislation that underlie a parliamentary democracy based on the rule of law’. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals
- the institution of Parliament.

The committee has examined the application of the fundamental legislative principles (FLPs) to the Bill. The committee brings the following to the attention of the Legislative Assembly.

4.2 Compliance with the *Legislative Standards Act 1992*

In its examination of the Bill, the committee considered that clauses 5, 6, 7, 9 and 10 raise potential issues relating to FLPs.

4.2.1 Distribution of intimate images

Clause 5 inserts s 223 in the Criminal Code to create a new offence of distributing an intimate image of another person in a way that would cause the other person distress reasonably arising in all the circumstances. The penalty is a maximum of 3 years imprisonment. Regarding the creation of new offences, the explanatory notes state:

*The distribution of, or threat to distribute, intimate images of a person without their consent is a form of technology-facilitated abuse and can be humiliating and distressing, provoke fear or be used to control or coerce another. The creation of new offences is considered justified to address and deter this offending behaviour where it is not currently covered by the Criminal Code.*¹⁷⁸

Subsection (4) of s 223 will provide a defence against the offence of distributing an intimate image, if the defendant can prove that they engaged in the conduct for a genuine artistic, educational, legal, medical, scientific or public benefit purpose, and, the conduct was, in the circumstances, reasonable for that purpose.

It is a FLP that legislation should not reverse the onus of proof in criminal matters, and it should not provide that it is the responsibility of an alleged offender in court proceedings to prove their innocence. For a reversal to be justified, the relevant fact must be something inherently impractical to test by alternative evidential means and the defendant must be particularly well positioned to disprove their guilt.¹⁷⁹ An accused will also usually bear the evidential onus when they wish to rely on a defence or excuse available to them.¹⁸⁰ The explanatory notes justify the reversal of onus inherent in subsection (4) -

*The defence necessarily reverses the onus of proof as the defendant is best placed to provide evidence of the purpose of their conduct.*¹⁸¹

¹⁷⁸ Explanatory notes, p 3.

¹⁷⁹ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 36.

¹⁸⁰ Office of the Queensland Parliamentary Counsel, *Principles of good legislation: OQPC guide to FLPs Reversal of onus of proof*, p 6.

¹⁸¹ Explanatory notes, p 4.

Given that a person accused of breaching proposed s 223 would be the person best placed to adduce evidence in their own defence about the purpose of their conduct, the committee is satisfied that the reversal of onus of proof in s 223(4) is justified in the circumstances.

4.2.2 Penalties

Clauses 6 and 7 increase the maximum penalty for offences for observations or recordings in breach of privacy and distributing prohibited visual recordings (existing ss 227A and 227B of the Criminal Code) from 2 years imprisonment to 3 years imprisonment.

In relation to this increase, the explanatory notes state:

*The proposed increases in maximum penalty are considered justified to provide consistency with the newly introduced offences and ensure offending behaviour which interferes with personal privacy can be sufficiently deterred.*¹⁸²

Given the need for legislation to have proportionate and consistent penalties for comparable offences, and the need to deter these kinds of offending behaviours, the committee considered that the increase in the maximum penalties is justified in the circumstances.

4.2.3 Threats to distribute an intimate image or prohibited visual recording

Clause 9 creates a new offence of making a threat to distribute an intimate image or prohibited visual recording of a person (without their consent) in a way that would cause distress reasonably arising in all the circumstances and would cause the person to fear the threat will be carried out. Another new offence will apply where threats are made to a person ("A") to distribute an intimate image or a prohibited visual recording of another person ("B"), without B's consent. The maximum penalty is 3 years imprisonment for both these offences. The explanatory notes to the Bill acknowledge that distributing, or threatening to distribute, intimate images of a person without their consent is abusive, can be humiliating and distressing, provoke fear or be used to control or coerce a person.⁶ The committee considered the creation of the new distribution and threat offences was justified by the need to deter these behaviours in a way that is not currently achieved within existing Criminal Code provisions.

Clause 9 also provides for rectification orders for these types of offences, allowing a court to order a person convicted of an offence to take reasonable action to remove, retract, recover, delete or destroy an intimate image or prohibited visual recording involved in the offence, within a stated period. Failure to comply with a rectification order is an offence, attracting a maximum penalty of 2 years imprisonment. In respect of this new offence of failing to comply with a rectification order, the explanatory notes state:

*The proposed offence ... is justified to support compliance with a court order designed to address ongoing distress a victim may suffer as a result of the distribution of an intimate image. The offence will not apply in circumstances where an offender has taken reasonable steps to comply with the order.*¹⁸³

Clause 10 has a partially retrospective operation to the extent that it allows a court to make a rectification order upon conviction for an offence (conviction after commencement), even where the offence was committed or the offender was charged *before* commencement. This has the potential to adversely affect the rights and liberties of individuals who have to comply with a rectification order in respect of images they uploaded or otherwise distributed before commencement of these new laws.

¹⁸² Explanatory notes, p 4.

¹⁸³ Explanatory notes, p 4.

Section 4(3)(g) of the LSA provides that legislation should not adversely affect rights and liberties, or impose obligations retrospectively. Strong argument is required to justify an adverse effect on rights and liberties, or imposition of obligations, retrospectively.

The explanatory notes state:

*The provision is justified to ensure that steps can be taken to protect victims from ongoing stress or fear that could be caused by the continued access by an offender or the public to such an image or recording.*¹⁸⁴

The committee weighed the fact that the offending conduct had occurred prior to commencement with the fact that the continuing online presence of offending images would likely continue to distress the unwilling subject of those images for as long as the pictures are available and accessible by others.

Given that rectification orders can only be imposed for convictions occurring after commencement (ie. prospectively) and the policy objective of reducing ongoing victim distress as far as possible, the committee considered that any potential breach of fundamental legislative principles from the retrospective aspects of the provision are justified.

4.3 Explanatory notes

Part 4 of the LSA requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain. Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins.

¹⁸⁴ Explanatory notes, p 4.

5 Committee comment

The committee supports the introduction of new offences that would target image based abuse. Even though Queensland currently has offences that would cover some instances of non-consensual sharing of intimate images, the new laws would ensure that all non-consensual sharing of intimate images, not just those images made in circumstances in which a person would reasonably expect to be afforded privacy, and those where harm is caused, would be covered. The committee is also pleased that the Bill would enable a court to order an offender to take action to delete intimate images or prohibited visual recordings.

The committee recognises that technology is constantly changing and that this may impact on the efficacy of the new laws. The committee considers that it would be beneficial for the new laws to be reviewed three years after they commence operation to ascertain whether they are operating as intended, in light of continuing technological advances.

The committee also received evidence that some women are subject to advertisements posted online by others (such as ex-partners) which state that the women are available for sex and provide their contact details. The committee is concerned that this type of unsavoury behaviour is not sufficiently covered by current legislation. The committee believes that consideration should be given to ways to combat this sort of conduct.

Appendix A – Submitters

Sub #	Submitter
001	Dr Nicola Henry & Dr Asher Flynn
002	Protect All Children Today
003	Bar Association of Queensland
004	Red Rose Foundation
005	Queensland Council for Civil Liberties
006	Office of the Information Commissioner
007	Women’s Legal Service Queensland
008	R4Respect of YFS Ltd
009	Queensland Nurses & Midwives’ Union
010	Gold Coast Centre Against Sexual Violence Inc.
011	Rape & Domestic Violence Services Australia
012	Rhys. L. G. Michie
013	Centre Against Sexual Violence Inc.
014	Dr Terry Goldsworthy, Dr Matthew Raj & Mr Joseph Crowley (Bond University)
015	Micah Projects
016	Centre Against Domestic Abuse Inc.
017	Queensland Law Society
018	Queensland Family and Child Commission

Appendix B – Officials at public departmental briefing and witnesses at public hearing

Public briefing

Department of Justice and Attorney-General

- Ms Leanne Robertson, Assistant Director-General, Strategic Policy and Legal Services
- Ms Sarah Kay, Director, Strategic Policy and Legal Services
- Ms Kristina Deveson, Principal Legal Officer, Strategic Policy and Legal Services

Public hearing

Centre Against Sexual Violence Inc.

- Ms Katrina Weeks, Operations Manager

Micah Projects / Brisbane Domestic Violence Service

- Ms Rebecca Shearman, Team Leader
- Ms Kirsten Nicholson, Support and Advocacy Manager

Women's Legal Service Queensland

- Ms Angela Lynch, CEO
- Ms Julie Sarkozi, Solicitor

Queensland Law Society

- Mr Ken Taylor, President
- Ms Brittany White, Criminal Law Committee member
- Ms Binari De Saram, Legal Policy Manager

Appendix C – Specific offences – non-consensual sharing of intimate images

Jurisdiction	Intimate / invasive image	Distribution offence	Consent	Exemptions / Defences / Exceptions	Threaten to distribute offence	Rectification
Australian Capital Territory	A still or moving image, in any form— (i) of the person’s genital or anal region; or (ii) for a female or a transgender or intersex person who identifies as a female—of the person’s breasts; or (iii) of the person engaged in a private act; or (iv) that depicts the person in a	A person (the offender) commits an offence if— (a) the offender distributes an intimate image of another person; and (b) the offender— (i) knows the other person does not consent to the distribution; or (ii) is reckless about whether the other person consents to the distribution. Maximum penalty: 300 penalty units (\$45,000), ¹⁸⁶ imprisonment for 3 years or both. ¹⁸⁷ A person commits an offence if— (a) the person distributes an intimate image of another person; and	A person does not consent to the distribution of an intimate image of the person by another person (the offender) if the consent is caused by a circumstance set out in s 67(1)(a) to (j). ¹⁸⁹ Also, a person does not consent to the distribution of an intimate image of the person by the offender only because the person— (a) consented to the offender distributing the image or another intimate image on another occasion; or (b) consented to someone else distributing the image or another intimate image; or	An offence against s 72C or s 72D does not apply to the distribution of an intimate image— (a) by a law enforcement officer acting reasonably in the performance of the officer’s duty; or (b) for a lawful and common practice of law enforcement, criminal reporting or a legal proceeding; or (c) for the purpose of reporting unlawful conduct to a law enforcement officer; or (d) by a licensed security provider acting reasonably in the performance of a security activity; or	A person commits an offence if— (a) the person threatens to capture or distribute an intimate image of another person; and (b) the person— (i) intends the other person to fear that the threat would be carried out; or (ii) is reckless about whether the other person would fear that the threat would be carried out. Maximum penalty: 300 penalty units (\$45,000),	If a person is found guilty of an offence against s 72C or s 72D or s 72E, the court may order the person to take reasonable action to remove, retract, recover, delete or destroy an intimate image involved in the offence within a stated period. The person commits an offence if the person fails to comply with the order.

¹⁸⁶ A penalty unit is \$150 (for an offence committed by an individual): *Legislation Act 2001* (ACT), s 133.

¹⁸⁷ *Crimes Act 1900* (ACT), s 72C.

¹⁸⁹ Section 67(1) sets out circumstances in which consent is negated.

Jurisdiction	Intimate / invasive image	Distribution offence	Consent	Exemptions / Defences / Exceptions	Threaten to distribute offence	Rectification
	sexual manner or context; and (b) includes an image, in any form, that has been altered to appear to show any of the things mentioned above. ¹⁸⁵	(b) the other person is under 16 years old. Maximum penalty: 500 penalty units (\$75,000), imprisonment for 5 years or both. ¹⁸⁸	(c) consented to the offender or someone else distributing the image or another intimate image in a different way to the way the offender distributed the image; or (d) distributed the image or another intimate image to someone else. ¹⁹⁰	(e) for a scientific, medical or educational purpose; or <i>Eg: a patient consents to her doctor providing an image of a mole on her breast to another doctor for a second opinion about the mole.</i> (f) by a person in the course of reasonably protecting premises owned by the person; or (g) of a child or other person incapable of giving consent in circumstances in which a reasonable person would regard the distribution of the intimate image as acceptable; or	imprisonment for 3 years or both. ¹⁹³	Maximum penalty: 200 penalty units (\$30,000), imprisonment for 2 years or both. ¹⁹⁴

¹⁸⁵ *Crimes Act 1900* (ACT), s 72A.

¹⁸⁸ *Crimes Act 1900* (ACT), s 72D(1).

¹⁹⁰ *Crimes Act 1900* (ACT), s 72F.

¹⁹³ *Crimes Act 1900* (ACT), s 72E.

¹⁹⁴ *Crimes Act 1900* (ACT), s 72H.

Jurisdiction	Intimate / invasive image	Distribution offence	Consent	Exemptions / Defences / Exceptions	Threaten to distribute offence	Rectification
				<p><i>Eg: sharing a photograph or movie of a naked newborn relative.</i></p> <p>(h) in circumstances or for a purpose prescribed by regulation.¹⁹¹</p> <p>It is a defence to a prosecution for an offence regarding the distribution of an intimate image of a young person if the defendant proves that—</p> <p>(a) at the time of the offence—</p> <p>(i) the defendant believed on reasonable grounds that the person against whom the offence is alleged to have been committed was at least 16 years old; or</p> <p>(ii) the person against whom the offence is alleged to have been committed was—</p>		

¹⁹¹ Crimes Act 1900 (ACT), s 72G.

Jurisdiction	Intimate / invasive image	Distribution offence	Consent	Exemptions / Defences / Exceptions	Threaten to distribute offence	Rectification
				<p>(A) at least 10 years old; and</p> <p>(B) not more than 2 years younger than the defendant; and</p> <p>(b) the person against whom the offence is alleged to have been committed consented to the distribution of the intimate image.¹⁹²</p>		
New South Wales	(a) an image of a person's private parts, or of a person engaged in a private act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy, or	<p>A person who intentionally distributes an intimate image of another person:</p> <p>(a) without the consent of the person, and</p> <p>(b) knowing the person did not consent to the distribution or being reckless as to whether the person consented to the distribution,</p> <p>is guilty of an offence.</p>	<p>A person consents to the distribution of an intimate image if the person freely and voluntarily agrees to the distribution of the intimate image.</p> <p>A person who consents to the recording or distribution of an image on a particular occasion is not, by reason only of that fact, to be regarded as having consented to the recording or distribution of that</p>	<p>A person does not commit a distribution offence if:</p> <p>(a) the conduct alleged to constitute the offence was done for a genuine medical or scientific purpose, or</p> <p>(b) the conduct alleged to constitute the offence was done by a law enforcement officer for a genuine law enforcement purpose, or</p>	<p>A person who threatens to record an intimate image of another person:</p> <p>(a) without the consent of the other person, and</p> <p>(b) intending to cause that other person to fear that the threat will be carried out, is guilty of an offence.</p>	<p>A court that finds a person guilty of an offence against s 91P or s 91Q may order the person to take reasonable actions to remove, retract, recover, delete or destroy any intimate image recorded or distributed by</p>

¹⁹² Crimes Act 1900 (ACT), s 72D(2).

Jurisdiction	Intimate / invasive image	Distribution offence	Consent	Exemptions / Defences / Exceptions	Threaten to distribute offence	Rectification
	(b) an image that has been altered to appear to show a person's private parts, or a person engaged in a private act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy. ¹⁹⁵	<p>Maximum penalty: 100 penalty units (\$11,000) or imprisonment for 3 years, or both.¹⁹⁶</p> <p>A prosecution of a person under the age of 16 years for an offence is not to be commenced without the approval of the Director of Public Prosecutions.¹⁹⁷</p>	<p>image or any other image on another occasion.</p> <p>A person who consents to the distribution of an image to a particular person or in a particular way is not, by reason only of that fact, to be regarded as having consented to the distribution of that image or any other image to another person or in another way.</p> <p>A person who distributes an image of himself or herself is not, by reason only of that fact, to be regarded as having consented to any other distribution of the image.</p> <p>A person does not consent to the recording or distribution of an intimate image:</p>	<p>(c) the conduct alleged to constitute the offence was required by a court or otherwise reasonably necessary to be done for the purpose of legal proceedings, or</p> <p>(d) a reasonable person would consider the conduct of the accused person acceptable, having regard to each of the following (to the extent relevant):</p> <ul style="list-style-type: none"> (i) the nature and content of the image, (ii) the circumstances in which the image was recorded or distributed, (iii) the age, intellectual capacity, vulnerability or other relevant circumstances of the 	<p>Maximum penalty: 100 penalty units (\$11,000) or imprisonment for 3 years, or both.</p> <p>A person who threatens to distribute an intimate image of another person:</p> <ul style="list-style-type: none"> (a) without the consent of the other person, and (b) intending to cause that other person to fear that the threat will be carried out, <p>is guilty of an offence.</p> <p>Maximum penalty: 100 penalty units (\$11,000) or</p>	<p>the person in contravention of the section within a period specified by the court.</p> <p>A person who, without reasonable excuse, contravenes an order made under this section is guilty of an offence.</p> <p>Maximum penalty: 50 penalty units (\$5,500) or imprisonment for 2 years, or both.</p> <p>(3) An offence against this</p>

¹⁹⁵ *Crimes Act 1900* (NSW), s 91N.

¹⁹⁶ A penalty unit is \$110: *Crimes (Sentencing Procedure) Act 1999* (NSW), s 17.

¹⁹⁷ *Crimes Act 1900* (NSW), s 91Q.

Jurisdiction	Intimate / invasive image	Distribution offence	Consent	Exemptions / Defences / Exceptions	Threaten to distribute offence	Rectification
			<p>(a) if the person is under the age of 16 years or does not otherwise have the capacity to consent, including because of cognitive incapacity, or</p> <p>(b) if the person does not have the opportunity to consent because the person is unconscious or asleep, or</p> <p>(c) if the person consents because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person), or</p> <p>(d) if the person consents because the person is unlawfully detained.¹⁹⁸</p>	<p>person depicted in the image,</p> <p>(iv) the degree to which the accused person's actions affect the privacy of the person depicted in the image,</p> <p>(v) the relationship between the accused person and the person depicted in the image.¹⁹⁹</p>	<p>imprisonment for 3 years, or both.²⁰⁰</p> <p>A prosecution of a person under the age of 16 years for an offence is not to be commenced without the approval of the Director of Public Prosecutions.²⁰¹</p>	<p>section is a summary offence.²⁰²</p>

¹⁹⁸ *Crimes Act 1900* (NSW), s 91O.

¹⁹⁹ *Crimes Act 1900* (NSW), s 91T.

²⁰⁰ *Crimes Act 1900* (NSW), s 91R(1)-(2).

²⁰¹ *Crimes Act 1900* (NSW), s 91R(6).

²⁰² *Crimes Act 1900* (NSW), s 91S.

Jurisdiction	Intimate / invasive image	Distribution offence	Consent	Exemptions / Defences / Exceptions	Threaten to distribute offence	Rectification
Northern Territory	<p>An image that depicts or has been altered to appear to depict:</p> <p>(a) a person engaged in a sexual act of a kind not ordinarily seen in public; or</p> <p>(b) a person in a manner or context that is sexual; or</p> <p>(c) a breast, whether bare or covered by underwear, of a female person or of a transgender or intersex person who</p>	<p>A person commits an offence if the person:</p> <p>(a) intentionally distributes an image of another person; and</p> <p>(b) the image is an intimate image and the person is reckless in relation to that circumstance; and</p> <p>(c) the other person did not consent to the distribution and the person is reckless as to the lack of consent.</p> <p>Maximum penalty: Imprisonment for 3 years.²⁰⁴</p> <p>A prosecution of a child for an offence must not be commenced without the consent of the Director of Public Prosecutions.²⁰⁵</p>	<p>Consent means free and voluntary agreement.</p> <p>A person who consents to the distribution of an intimate image on a particular occasion is not, by reason only of that fact, to be regarded as having consented to the distribution of that image or any other image on another occasion.</p> <p>A person who consents to the distribution of an intimate image to a particular person or in a particular way is not, by reason only of that fact, to be regarded as having consented to the distribution of that image or any other image to another person or in another way.</p>	<p>The distribution offence does not apply to the distribution of an intimate image in the following circumstances:</p> <p>(a) to only the person depicted in the image;</p> <p>(b) by a law enforcement officer acting reasonably in the performance of the officer's duty;</p> <p>(c) for the purpose of reporting unlawful conduct to a law enforcement officer;</p> <p>(d) when required by a court or reasonably required for the purpose of a legal proceeding;</p> <p>(e) for a scientific, medical or educational purpose;</p>	<p>A person commits an offence if the person:</p> <p>(a) intentionally threatens to distribute an intimate image of another person; and</p> <p>(b) intends the other person to fear that the threat would be carried out.</p> <p>Maximum penalty: Imprisonment for 3 years.</p> <p>A prosecution of a child for an offence must not be commenced without the consent of the Director of Public Prosecutions.²⁰⁸</p>	<p>A person commits an offence if the person:</p> <p>(a) knows the person is subject to a rectification order; and</p> <p>(b) intentionally engages in conduct; and</p> <p>(c) the conduct results in non-compliance with the court order and the person is reckless in relation to that result.</p> <p>Maximum penalty:</p>

²⁰⁴ *Criminal Code Act* (NT), s 208AB(1).

²⁰⁵ *Criminal Code Act* (NT), s 208AD.

²⁰⁸ *Criminal Code Act* (NT), s 208AD.

Jurisdiction	Intimate / invasive image	Distribution offence	Consent	Exemptions / Defences / Exceptions	Threaten to distribute offence	Rectification
	identifies as female. ²⁰³		<p>A person who distributes an intimate image of the person is not, by reason only of that fact, to be regarded as having consented to any other distribution of the image.</p> <p>This section does not limit the grounds on which it may be established that a person does not consent to the distribution of an intimate image.²⁰⁶</p>	<p><i>Eg. A doctor sends an image of a female patient's breast to another doctor for a second opinion about the patient's medical condition.</i></p> <p>(f) by a person solely in that person's capacity as an internet service provider, internet content host or a carriage service provider;</p> <p>(g) of a child, or other person incapable of giving consent, in circumstances that a reasonable person would regard as acceptable.</p> <p><i>Eg. Sharing a photograph or movie of a naked newborn relative.²⁰⁷</i></p>		<p>Imprisonment for 2 years.</p> <p>A prosecution of a child for an offence must not be commenced without the consent of the Director of Public Prosecutions.²⁰⁹</p>
South Australia	If it depicts the person in a place other	A person who distributes an invasive image of another person, knowing or having	An apparent consent will not be an effective consent if—	It is a defence to a charge of distributing an invasive image to prove—	A person who— (a) threatens to distribute an invasive	n/a

²⁰³ *Criminal Code Act* (NT), s 208AA.

²⁰⁶ *Criminal Code Act* (NT), s 208AB(3)-(8).

²⁰⁷ *Criminal Code Act* (NT), s 208AB(2).

²⁰⁹ *Criminal Code Act* (NT), s 208AD.

Jurisdiction	Intimate / invasive image	Distribution offence	Consent	Exemptions / Defences / Exceptions	Threaten to distribute offence	Rectification
	<p>than a public place—</p> <p>(a) engaged in a private act; or</p> <p>(b) in a state of undress such that—</p> <p>(i) in the case of a female—the bare breasts are visible; or</p> <p>(ii) in any case—the bare genital or anal region is visible.</p> <p>However, an image of a person that falls within the</p>	<p>reason to believe that the other person—</p> <p>(a) does not consent to that particular distribution of the image; or</p> <p>(b) does not consent to that particular distribution of the image and does not consent to distribution of the image generally,</p> <p>is guilty of an offence.</p> <p>Maximum penalty:</p> <p>(a) if the invasive image is of a person under the age of 17 years—\$20,000 or imprisonment for 4 years;</p> <p>(b) in any other case—\$10,000 or imprisonment for 2 years.²¹⁰</p>	<p>(a) given by a person who is under the age of 17 years or with a cognitive impairment; or</p> <p>(b) obtained from a person by duress or deception.²¹¹</p> <p>The following persons do not commit an offence against this Part:</p> <p>(a) law enforcement personnel and legal practitioners, or their agents, acting in the course of law enforcement or legal proceedings;</p> <p>(b) medical practitioners, or their agents, acting in the course of medical practice or for genuine educational or research purposes.²¹²</p>	<p>(a) that the conduct constituting the offence—</p> <p>(i) was for a purpose connected to law enforcement; or</p> <p>(ii) was for a medical, legal or scientific purpose; or</p> <p>(b) that the image was filmed by a licensed investigation agent within the meaning of the <i>Security and Investigation Agents Act 1995</i> and occurred in the course of obtaining evidence in connection with a claim for compensation, damages, a payment under a contract or some other benefit and the distribution of the image</p>	<p>image of a person; and</p> <p>(b) intends to arouse a fear that the threat will be, or is likely to be, carried out, or is recklessly indifferent as to whether such a fear is aroused,</p> <p>is guilty of an offence.</p> <p>Maximum penalty:</p> <p>(a) if the invasive image is of a person under the age of 17 years—\$10,000 or imprisonment for 2 years;</p> <p>(b) in any other case—\$5,000 or imprisonment for 1 year.²¹⁵</p>	

²¹⁰ *Summary Offences Act 1953* (SA), s 26C(1).

²¹¹ *Summary Offences Act 1953* (SA), s 26E(1).

²¹² *Summary Offences Act 1953* (SA), s 26E(2).

²¹⁵ *Summary Offences Act 1953* (SA), s 26DA.

Jurisdiction	Intimate / invasive image	Distribution offence	Consent	Exemptions / Defences / Exceptions	Threaten to distribute offence	Rectification
	standards of morality, decency and propriety generally accepted by reasonable adults in the community will not be taken to be an invasive image of the person.			<p>was for a purpose connected with that claim.²¹³</p> <p>It is a defence to a charge of threatening to distribute an invasive image to prove—</p> <p>(a) that—</p> <p>(i) the person filmed consented to that particular distribution of the image the subject of the filming; or</p> <p>(ii) the person consented to distribution of the image the subject of the filming generally; and</p> <p>(b) that the person had not, at the time of the alleged offence, withdrawn consent to the distribution of the image.²¹⁴</p>		

²¹³ *Summary Offences Act 1953* (SA), s 26C(2).

²¹⁴ *Summary Offences Act 1953* (SA), s 26D(3).

Jurisdiction	Intimate / invasive image	Distribution offence	Consent	Exemptions / Defences / Exceptions	Threaten to distribute offence	Rectification
Victoria	<p>A moving or still image that depicts—</p> <p>(a) a person engaged in sexual activity; or</p> <p>(b) a person in a manner or context that is sexual; or</p> <p>(c) the genital or anal region of a person or, in the case of a female, the breasts.²¹⁶</p>	<p>A person (A) commits an offence if—</p> <p>(a) A intentionally distributes an intimate image of another person (B) to a person other than B; and</p> <p>(b) the distribution of the image is contrary to community standards of acceptable conduct.</p> <p><i>Eg. A person (A) posts a photograph of another person (B) on a social media website without B's express or implied consent and the photograph depicts B engaged in sexual activity.</i></p> <p>A person who commits an offence is liable to level 7 imprisonment (2 years maximum).²¹⁷</p>	<p>Consent means free agreement.²¹⁸</p>	<p>A person (A) does not commit an offence if—</p> <p>(a) B is not a person under the age of 18 years; and</p> <p>(b) B had expressly or impliedly consented, or could reasonably be considered to have expressly or impliedly consented, to—</p> <p>(i) the distribution of the intimate image; and</p> <p>(ii) the manner in which the intimate image was distributed.²¹⁹</p>	<p>(1) A person (A) commits an offence if—</p> <p>(a) A makes a threat to another person (B) to distribute an intimate image of B or of another person (C); and</p> <p>(b) the distribution of the image would be contrary to community standards of acceptable conduct; and</p> <p>(c) A intends that B will believe, or believes that B will probably believe, that A will carry out the threat.</p>	n/a

²¹⁶ Summary Offences Act 1966 (Vic), s 40.

²¹⁷ Summary Offences Act 1966 (Vic), s 41DA(1)-(2).

²¹⁸ Summary Offences Act 1966 (Vic), s 40.

²¹⁹ Summary Offences Act 1966 (Vic), s 41DA(3).

Jurisdiction	Intimate / invasive image	Distribution offence	Consent	Exemptions / Defences / Exceptions	Threaten to distribute offence	Rectification
					(2) A person who commits an offence is liable to level 8 imprisonment (1 year maximum). ²²⁰	

²²⁰ *Summary Offences Act 1966* (Vic), s 41DB.

