



LEGAL AFFAIRS AND COMMUNITY SAFETY COMMITTEE

Members present:

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

Staff present:

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

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

TRANSCRIPT OF PROCEEDINGS

MONDAY, 17 SEPTEMBER 2018

Brisbane

MONDAY, 17 SEPTEMBER 2018

The committee met at 10.00 am.

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

On 22 August 2018 the Hon. Yvette D'Ath, Attorney-General and Minister for Justice, introduced the bill to the parliament. The parliament has referred the bill to the Legal Affairs and Community Safety Committee for examination, with a reporting date of 5 October 2018. The purpose of today is to hear evidence from stakeholders who made submissions as part of the committee's inquiry. Only the committee and invited witnesses may participate in the proceedings. Witnesses are not required to give evidence under oath, but I remind witnesses that intentionally misleading the committee is a serious offence.

These proceedings are similar to parliament and are subject to the Legislative Assembly's standing rules and orders. In this regard, I remind members of the public that, under the standing orders, the public may be admitted to or excluded from the hearing at the discretion of the committee. The proceedings are being recorded by Hansard and broadcast live on the parliament's website. Media may be present and will be subject to the chair's direction at all times. The media rules endorsed by the committee are available from committee staff if required. All those present today should note that it is possible you might be filmed or photographed during the proceedings. I ask everyone present to turn mobile phones off or switch them to silent mode.

WEEKS, Ms Katrina, Operations Manager, Centre Against Sexual Violence Inc.

CHAIR: I now welcome Katrina Weeks from the Centre Against Sexual Violence. I invite you to make an opening statement, after which the committee members may have some questions for you.

Ms Weeks: Thank you for inviting me to appear today. The Centre Against Sexual Violence is a not-for-profit community organisation funded by the Queensland state government. The core business of the organisation is to provide sexual assault counselling, advocacy and support to all women 12 years and over residing in the Logan, Beaudesert and Redlands regions who have experienced sexual assault at any time in their life. We have seven part-time counsellors. I am a social worker. I have been the counsellor to young women in the Logan area for the past 11½ years. In March this year we split the manager's role and I do the operations manager role, so that is anything to do with clients.

The CASV welcomes and supports the proposed new legislation. As a sexual assault counselling and support service that also provides community education in Queensland secondary schools, the CASV has direct experience of clients who have been victimised by the non-consensual sharing of intimate images and of secondary school students grappling with uncertainty around this issue. It is not just the students but also support staff and teachers. How to deal with these issues is new to all of us.

Clients of the CASV present having experienced various kinds of technology assisted sexual abuse or assault including sexting, non-consensual sharing of intimate images, pressure to participate in or watch pornography, victimisation on revenge porn sites, cyberstalking and repeated requests for sexualised photographs. This type of victimisation is particularly prevalent amongst younger clients of the service, but technology assisted abuse is increasingly becoming an issue that clients of all age groups are facing.

It is essential that legislation keeps pace with the realities of technology in Queenslanders' lives. This new legislation 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. The effects of this sort of abuse can be devastating and often result in disruption to education, mental pain and anguish, isolation from family and friends, affecting them in their work and professional lives, disruption to schooling or to dropping out of school altogether. A lot of our work is supporting people going through that.

Public Hearing—Inquiry into the Criminal Code (Non-consensual Sharing of Intimate Images)
Amendment Bill 2018

Victim blaming is normalised in our experience. Judging of young women or women who might have originally been filmed or photographed by consent is often brutal and uncompromising. We would caution that where there is a power imbalance, such as age difference or within an abusive relationship, rarely is there true consent. Victims of sexual assault have traditionally been shamed into silence, but with the advent of technology the shaming can be instantly widespread on social media.

Blaming women or girls for being involved in intimate photographs is rampant. Any legislation that seeks to prevent the abuse of all Queensland survivors of technology assisted abuse or limit ongoing victimisation is welcomed. The Queensland parliament is also 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.

The CASV supports the creation of a new misdemeanour that includes the threat to another person to distribute an intimate image or prohibited visual recording. Currently a victim might be less likely to seek help or disclose abuse if a perpetrator threatened to disseminate sexualised photographs of them. Something like this could stop people getting help for far worse things that are going on in their lives. This could be the thing that stops 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.

This new legislation is welcomed by the CASV service, but again it highlights the need for Queensland to have an urgent review and independent inquiry into sexual violence in the state. This review needs to hear the silenced voices of sexual violence survivors. Queensland needs a coordinated, whole-of-government plan to tackle this gender based violence. We need a holistic prevention plan that includes the training of law enforcement staff and a review of the lack of convictions in our court system for sexual offences, including the law around mistaken consent. Much more needs to be done to educate young people around healthy, respectful intimate relationships and consent.

Mr LISTER: Katrina, thank you for your appearance today. I congratulate you and your organisation on the really great work that you do. I take it that revenge porn and these sorts of things are primarily making females victims. Do you have any instances where men are involved or are victims?

Ms Weeks: Our service works with women and young women.

Mr LISTER: Exclusively women?

Ms Weeks: We work closely with the men's service Living Well. Particularly young boys or young men might be victimised by usually older men.

Mr LISTER: Is there anything in the bill that you like to see amended? Is there anything that you would like to see changed?

Ms Weeks: Not in the bill, but it will really need a lot of support around it. I think police would need a lot of support. I have really thought through it. I cannot see who might get into a lot of trouble by just being stupid. I think we need to be really careful around young people sharing amongst each other. I think the police do a really good job around that, but they will need to be supported and have more training perhaps.

Mrs McMAHON: I note that in your submission, as part of your support for the creation of the new offence including threatening to share or distribute, you acknowledge with this potential change that women will feel empowered knowing that they can now receive legal support around non-consensual sharing of images. Has this been an issue for women with these particular concerns—the fact that there has not been a specific offence for this so they have not been able to get legal support or legal advice? Do you have any examples of where the legal system has not been there to support women going through this because there has not been a specific offence for it?

Ms Weeks: It is hard for me, because it is usually all together in terms of the range of offences that might be happening to someone. The legal support might be there, but it is enough of a threat to say, 'If you go around this, I will spread it.' It is enough to keep them quiet. I am more likely to see people once they have decided to get some support, but there are people who come to us to get support after a long time of suffering. Part of the reason they have not is that they say, 'He has pictures of me and I'm smiling in the picture. I didn't want to be smiling in the picture. I didn't want the picture taken.' With those sorts of pictures it is hard to prove that it was not taken by consent.

Ms McMILLAN: Katrina, thanks for the great work you do. I know that sexting and sharing intimate images in a school is incredibly prevalent. Can you give the committee an idea of just how many women or girls you work with and how frequently? How prevalent is this issue?

Ms Weeks: There would not be many teenagers who would not have that pressure to do that.

Ms McMILLAN: The number of women who come to you—

Ms Weeks: I do not want to be the person who exaggerates. I am before a parliamentary committee. The way I work is that I just assume that that pressure is going on in their lives. That is where I come from to ensure that I am supporting them correctly. I do not come from the idea that that is not a pressure in their life because that would be leaving them unsafe.

Ms McMILLAN: I guess that says a lot.

CHAIR: From your submission, I understand that you deal with kids who are still in school?

Ms Weeks: We work with women from 12 years old to adults.

CHAIR: Of the people you see, what proportion who fall into this category of being victims are between, say, 12 and 17? Do more school-age kids between 12 and 17 use your service or is it equal?

Ms Weeks: I think about a third of our clients are in that age group.

CHAIR: The younger age group?

Ms Weeks: Yes, over both Logan and Redlands. People might have come to our service for a different type of victimisation. To ensure that they are safer, we need to address this area.

CHAIR: Would you agree that removing the provision of having to prove consent will help with those images where you described that the person—

Ms Weeks: May appear to be consenting but they are not really at all? That was my excitement when I saw the bill. I do hear that: 'I don't want to go to the police. He has a picture of me and I'm smiling in it.'

CHAIR: Does this legislation go far enough, as far as you are concerned, to cover the issue where it is not so much the taking of the image that is the issue but the distributing of the image? I guess it deals with two areas, doesn't it? It deals with the area where the victim and the perpetrator may both be juveniles and then it deals with the more—

Ms Weeks: I think this improves it, because we also do community education in high schools in Logan and Redlands and it is a big topic that we discuss. Distributing the images is an issue, yes. At the moment we are always talking about the federal law and it is child pornography, so we do not want to be making children feel like they are spreading child pornography.

CHAIR: No.

Ms Weeks: They should not be doing it—absolutely not—but I think it is better that we have our own state law around this that addresses this issue. It is about educating people and making them think about respecting one another rather than coming in with the big stick of the federal law and saying, 'This is child porn and you'll be in all sorts of trouble.' Let us educate and have our own state laws around this and a system where Queenslanders want to respect each other.

Ms McMILLAN: Katrina, you mentioned engaging in watching porn. I know this is probably off the topic just a little bit, but do you feel that we have adequate legislation in Queensland to address that issue, because I know how prevalent that is as well?

Ms Weeks: Can you ask one of the lawyers?

Ms McMILLAN: Okay.

Ms Weeks: No, probably not. A lot of that ends up being the federal law again. I gave evidence before the last election. There was a committee looking at education around technology assisted abuse and I do not know how far that went.

CHAIR: Is that the cyberbullying one?

Ms Weeks: Not really cyberbullying. It was about healthy relationships and technology assisted abuse.

CHAIR: As there are no further questions, I want to thank you for the work you do in the community. It is a very necessary adjunct to helping children have respectful relationships and underlying it is the key to helping rid some of the bullying and victimisation that occurs between individuals. In a nutshell, people can be very cruel to each other, and juveniles are no exception to that rule.

Public Hearing—Inquiry into the Criminal Code (Non-consensual Sharing of Intimate Images)
Amendment Bill 2018

Ms Weeks: I just think it can happen so quickly with technology. Someone can just press a button and cause a lot of pain, whereas before we probably used to have to think about it a bit more and you had time to reflect. In terms of that distance of doing it, it is not like it is a real person either. That is what some of our education needs to be about in terms of thinking, 'That's a real person. It's not just a picture.'

CHAIR: It is not just an image, yes. Thank you.

Ms Weeks: Thank you. Good luck.

Mr LISTER: And good luck in your work.

NICHOLSON, Ms Kirsten, Support and Advocacy Manager, Brisbane Domestic Violence Service/Micah Projects

SHEARMAN, Ms Rebecca, Team Leader, Brisbane Domestic Violence Service/Micah Projects

CHAIR: Good morning. I invite you to make an opening statement, after which committee members may ask you some questions.

Ms Shearman: Thank you for having us. I am a social worker and have been so for 18 years. I have been working in domestic and family violence for the last 15 years. With me is Kirsten Nicholson, who is one of the support and advocacy managers of the Brisbane Domestic Violence Service who has been working in the sector for nearly 10 years. Thank you for making some time to listen to us.

I am very pleased overall to see this bill coming into force from the perspective that this is an issue that we see a lot of with our client group, particularly post separation but also during the relationship. We are very pleased to note that the bill addresses both the sending of and the threat to send these images. That is certainly a big issue for our client group.

We are really pleased about the rectification orders to remove, because we believe that it is important to put the onus of removal back on to the person who has done this. Our experience is that until now generally women have been required to do all of the work to get these images removed and sometimes that has been very difficult and can take months or even years. It can cost them money and it might also be impossible, particularly if the websites in question exist overseas. We have also spoken to women who have been extorted by website owners, especially where they are dedicated to what we would call revenge porn, so asking women for \$500 or \$1,000 just to take the image down.

We also are pleased to see the acknowledgement that this type of crime does affect women and girls disproportionately. I would agree that young men can be negatively affected by this as well, particularly if the images relate to same-sex type intimate images, which is often the case. Our experience is that women and girls still pay a different sort of price in society than men might, which is why we do not see this sort of crime levelled at men so much, in essence.

I just wanted to note quickly a couple of concerns that we have or that maybe the committee is able to think about, if you have not already. One of my first concerns relates to our experience in domestic and family violence. We are worried about allowing the courts to make a rectification order without maybe some requirements about what the considerations are for the making of those orders which could mean that we do not see that many made. We saw that a lot, for instance, in the domestic and family violence court around things like ouster conditions until the legislation changed in 2012 requiring the ouster condition to be considered as a function of their order being awarded. That would be one of my worries. I really am a fan of the rectification orders, so I really would like to make sure it is utilised in terms of whose responsibility that is.

We also wanted to note that the subjective experience of shame and harm needs to be considered through the eyes of the victim. Some of the things that can happen might seem on the surface to be benign or innocent images, and I will give you an example that we had at our service. After a separation, an ex posted pictures of a woman giving birth and breastfeeding which she found to be really embarrassing and humiliating. They are obviously fairly intimate images but he was able to make the case that he was just sharing this beautiful experience, but he did so without her consent and probably designed to shame and humiliate her. Sometimes these images are not always about sex, per se, but they are about what that experience is like for women.

I think Katrina probably already addressed the nuanced nature of consent, but I would really like to highlight that as well. In our experience, women in DV relationships are very much constrained in their ability to give what should be freely given and informed consent. They may feel that they have to agree—and I use that term advisedly—to a number of different activities, both sexual and otherwise, in order to keep the peace or avoid violence. We do have some concerns about the bill talking about images being consented to originally in their construction, although obviously in many cases at least the making of the image was consented to but probably not the sharing of it. We just wanted to note that in some cases there may be a perception of consent where none actually exists because of the nature of the relationship.

We also wanted to acknowledge that the bill is awesome, and the type of online sexual and humiliation vilification that can occur is not only about images. One of the really common things that we see—I have a case study that I can provide if you like. The perpetrator of violence had posted details about her, including her current phone number and the type of sex that she liked, on a number of different sites and she got 50 to 100 messages within a very short space of time. Some of them were

pretty demeaning and disgusting, but that is because he had posted that that is what she liked. We have had a lot of women talk about that type of issue, in our experience, where they are getting approached by strange men. They will actually publish their address and phone number, so it is extremely unsafe that someone is going to consider that that is a real invitation. I have certainly spoken to many women—and people at our service have as well—about the suggestion that this is consented to and they have had strange men turning up at their door and all sorts of things.

CHAIR: Sorry to interrupt, and without putting words in your mouth, there is a gap in the legislation in that it does not cover—

Ms Shearman: That is one of our concerns, yes.

CHAIR: There could be a malicious email or posting, for want of a better description, that, although it does not contain an image, does contain bullying or—

Ms Shearman: Personal information, yes.

CHAIR: Yes, or something that almost amounts, I guess, to a form of assault, doesn't it, in that there are words that are meant—

Ms Shearman: Yes. That would be one of the things to consider.

CHAIR: Yes, concerns in that there could be some broadening of it to cover not only images but words that offend or something. I cannot think of anything off the top of my head.

Ms Shearman: Yes, I know, and I am sure there is legal language that covers it.

CHAIR: But there is not anything in this bill.

Ms Shearman: Yes, they are often placed on websites where women who are engaging in sex work might also post, so people looking for that type of information. It really places women in the line of fire and in a dangerous position sometimes, especially when he has listed her phone number and address. Our experience is that women have had to change their phone number and maybe even move to avoid that because of what has happened. That would just be an example of how this stuff can play out without images as well in terms of the way technology can be used to facilitate that type of abuse. That was one of our other points—that is, futureproofing of the legislation, not that I have any magic ideas about that in terms of the rapid ways in which technology is developing. Because of our support for the legislation, we would want it to be able to be used into the future as well. I am not necessarily the right person to ask for advice on the ways in which technology is developing, but there probably are others out there who have some ideas about things that might be worth considering.

The other thing—and I will echo Katrina in this as well—is that the enforcement of this type of legislation is critical. I am sure you know that already. Our experience in terms of what women report to us is that they are often viewed very poorly just because of the existence of the image itself, so the reception that they get from first responders is not ideal. We worry that this reduces the motivation for the investigation or charging of such crimes. We agree that education of the community is critical, but so is education of first responders in relation to what this means. There can also be a lack of understanding of the impact of this type of crime on women's sense of self and wellbeing, not to mention sometimes her income and employment.

There is another case study that we have included where the perpetrator actually sent intimate images to a woman's employers—to the four senior managers in her organisation—which seriously compromised her employment and really embarrassed her, for obvious reasons. I think that is an ongoing issue. This is something that the legislation cannot address, we understand, but these images might never go away. That has been our experience, too. Even if a woman gets the image taken down from one spot, it has already been copied into other websites. That can be a real challenge.

Often women are advised to shut down their online presence as a way of dealing with this type of image sharing. That is not a realistic strategy in today's world. On a personal level, I think there are quite a few friends whom I would never speak to if we did not at least message each other on Facebook or who would not know my children had been born if I had not posted that. We need to be conscious that much of life is lived online for many people. Again, it is an impact on the victim, not the perpetrator, to suggest that they are the ones who have to remove themselves. Again, it reduces access to social support if we ask people to do that. They are our main points.

Mr LISTER: It is really good for the committee to hear from people at the coalface who understand this. It is quite an education for me personally. The bill provides for prospectivity. That means that people can only be charged and taken to court for what they do in the future. As you talked about, there can be prolific images and images that the victim knows to exist. They may have had a threat in the past and may still be living under that cloud. Do you have anything to say about that and any cases that you may know of where that is happening at the moment?

Ms Shearman: We would have a number of current cases in relation to that. That is a challenge. He may have uploaded it some time ago, but it exists in reality for her now. I am not sure what the solution to that is. Even if there is no charge, maybe there could be some provision that existing images are required to be removed by the perpetrator rather than the woman. One of the biggest issues that the women that we talk to face, apart from the humiliation and the shame, is the hoops they have to jump through to get those images taken down. It can really consume a lot of time and energy. It can be devastating, because they actually have to look for the images online and find them. There is a lot of horror embedded in routinely finding images of yourself on a website that you did not consent to being shared. I think the onus being on the person who has done it to remove them would be critical. Even if there were no charge, I think that would be really important.

Mr LISTER: You have given us quite a vivid account of your views on this. Is there anything else you would like to say or are there any other changes that you would like to see made to the bill before it is debated in the House?

Ms Shearman: I am not a lawyer—

Mr LISTER: Neither am I. I know how you feel.

Ms Shearman: I am not great at advising on legislation. I support what has already been said about the importance of the education and community support around legislation. These pieces of legislation are critical in helping us shift community perception, but they are not the only strategy that we need. That is still a really big issue.

Ideas around consent and body autonomy are critical concepts. I really liked what Katrina said before. The problem with image sharing is that it feels one step removed. There is not a connection to the person. I think that is very true of young people. In our experience with adult perpetrators, I think there is very much an intent to harm when they do that. They know the harm that it causes. They have the capacity to make adult decisions and understand the effect that it might have on a woman. I think that needs to be taken into account, too.

Mr ANDREW: Thank you for your insight. It is sad to hear some of the things going on. The ongoing humiliation must be terrible for the people involved. Would you consider that we should have a review of this in the next couple of years, given the way technology is evolving and the way we are doing things?

Ms Shearman: I think that would be wise.

Mr ANDREW: That is one thing I need to know.

Mrs McMAHON: We have discussed the issue of consent and consent being freely given versus consent being coerced in some way, shape or form. In your submission you list it as a nuanced concept. There are lots of circumstances around that particularly in abusive or domestic violence relationships. In terms of the definition that we have at the moment for consent, where do you see there is potential room for improvement if it is not otherwise captured in this amendment?

Ms Shearman: I feel like I want to talk about the use of examples, but I know there are concerns when you use examples in legislation that it becomes directive or prescriptive. Although I think they can be useful, the definition needs to make it really clear that these are just some ideas about the ways consent can be compromised or coerced.

In a previous job I did a lot of school education on the issue of consent particularly. It was really important to break down the concept into its components. It is not just about yes or no; it is about it being freely given and enthusiastically provided. The idea that consent is not the absence of no but the presence of yes I think is a critical factor to be considered. I do not really know how to write that into legislation, unfortunately. That would be how I would see it.

CHAIR: When you referred to examples, there is no harm in telling the committee what you think those examples should be. It is something that we see in legislation these days: the clause is there and then they give examples. Whether or not we can achieve that here, I do not know. It does not hurt—

Ms Shearman: I think it would be about that idea of informed consent, and what is being consented to needs to be clearly articulated. One of my worries is that it becomes a get-out-of-jail-free card for the person who has done it. It is certainly one of the concerns. Another relevant piece of legislation around that is the strangulation laws that we have recently seen. They are awesome, but what we are seeing is perpetrators using consent as a get-out-of-jail-free card when it comes down to it. How do you prove—

CHAIR: That you did not—

Ms Shearman: As Katrina said, women are smiling and they look like they are enjoying it, but they know the cost later on of not doing that.

Public Hearing—Inquiry into the Criminal Code (Non-consensual Sharing of Intimate Images)
Amendment Bill 2018

CHAIR: That brings us to the end of this session. Thank you for the work you do in the community. Thank you for coming along and addressing the committee. It is always helpful to hear from people in the field as to how legislation may assist you or hinder you in your good work.

Ms Shearman: Would you like me to leave these case studies? I am happy to leave them.

CHAIR: Leave is granted for those two documents to be tabled.

LYNCH, Ms Angela, Chief Executive Officer, Women’s Legal Service Queensland

SARKOZI, Ms Julie, Solicitor, Women’s Legal Service Queensland

CHAIR: I now welcome the representatives from the Women’s Legal Service. I invite you to make an opening statement, after which committee members may have some questions for you.

Ms Lynch: The Women’s Legal Service is a specialist community legal centre established in 1984. We provide statewide legal and social work services and support to Queensland women, assisting them in the areas of family law, domestic violence, child protection and sexual violence.

The Women’s Legal Service supports the object of the bill to create an offence specifically prohibiting the non-consensual sharing of intimate images. This is a common and increasing problem faced by our clients and it causes them enormous grief and embarrassment. In domestic violence it is used as a tool of threat and power over former partners.

We congratulate the Palaszczuk government for responding to community concern and introducing the legislation. Unfortunately, there are some fundamental problems with the current approach as the failure to address the issue of consent and mistaken belief in the Criminal Code will undermine the good intentions of the legislation and will provide fertile ground for perpetrators to avoid responsibility and not be accountable to the community for their actions.

The mistaken belief excuse contained in section 24 of the Criminal Code means a person is not criminally responsible if they have an honest and reasonable belief as to the state of things. This reasonableness referred to is not an objective reasonable person, as the Court of Appeal in Queensland has directed it is the belief of the offender which is critical, rather than that of the theoretical reasonable person. This excuse is used to great effect in sexual violence matters and will also be used in this offence.

The Women’s Legal Service, along with sexual violence prevention services and community members, has publicly called on the government to establish an independent inquiry into sexual violence in Queensland to better understand the low reporting rates and high attrition rates through the system. Any inquiry should incorporate the voices of sexual violence survivors. We also call for the development of a sexual violence prevention plan and for the immediate review of the consent and mistaken belief laws.

In our submission we have referred to the New South Wales drafting of the Crimes Act, their legislation, and in particular their definition of consent that we believe is superior as it extrapolates and makes clear a range of circumstances that would or should not give rise to consent in these circumstances. For example, if you consented on one occasion to an image being produced it does not mean that you consented on another occasion. We also ask for some additional items of cultural and religious sensitivity and also the issue of recklessness of consent to be covered.

Similar to New South Wales, we also ask for an additional offence in the new legislation—that is, the making and recording of an intimate image without consent. Although a current provision already exists in the Criminal Code at section 227A—that is, it makes it a criminal offence to observe or record breaches of privacy—this provision, to our knowledge, is rarely used in circumstances of intimate partner relationships or domestic violence relationships. That means those relationships where the parties know one another and may have been in a relationship. Traditionally it may well have been used more to cover off on public voyeuristic actions.

The new offence should be included in the new provision as it makes it clear to the police and the wider community that the context in which the offending occurs includes intimate relationships. If our arguments were accepted, it would also mean that the new offence would use the superior definition of consent.

We would also ask the committee to review the drafting and remove the necessity to prove distress to establish the offence. We believe that this puts unnecessary barriers on the prosecution and it is also traumatic to the victim to have to detail their own distress to establish the offence. The criminal culpability comes from the recording and sharing without consent.

In response to Mrs McMahan’s question about legal support, the Women’s Legal Service has called for the establishment of a victims legal service, or a victims legal service funding stream, which would be specialist legal services in domestic and sexual assault. Currently there is a real gap in victims getting criminal law advice in Queensland, as most legal services are set up for criminal law and, therefore, defence work rather than providing specialist assistance to victims. This specialist service could provide victims with information about their rights as victims in a criminal process, interaction with agencies such as the DPP, information about bail and parole and, obviously, also whether certain laws

relate to them. The Women's Legal Service can respond to a limited extent, but it is a much larger issue and there is a gap in the current service provision. Thank you. We are happy to take questions in relation to the submissions that we have made.

Ms McMILLAN: You talked about consent. Could you talk us through what that belief, understanding or discourse might look or sound like?

Ms Sarkozi: Yes, thank you. I am happy to. At this stage, the proposed bill and the amendments that are outlined in it that we are considering today, in our view, do not cover off on what consent looks like. The previous speaker has talked about an enthusiastic yes, not an absence. Really, what we find in law—and this is also reflected in our community—is that someone can, in effect, argue that consent was given when there has been no positive indication of consent whatsoever.

The New South Wales legislation—and I think our submission covers this, because it includes a copy of their legislation—talks about consent being given on one occasion does not mean that consent can be attributed to all of these other occasions, all of these other distributions to all of these other forums and formats.

It is very important to understand how this works practically. A good example is that it has now become quite standard and quite routine for partners in sexual relationships, or people who are consenting adults, to share intimate images of each other. Whilst consent is provided then, that should not mean that consent is attributed to other distributions of that material. We are very concerned that, as the legislation is proposed at the moment, those other instances of sharing will not be covered as consent was not given. When you look at the New South Wales legislation, you can see how clearly they have articulated those default positions—just because you gave consent on this one occasion for this particular occasion does not mean that consent can be imputed for other instances.

Ms Lynch: We have given those examples in our submission. We are concerned that at the moment, without a very extrapolated definition of consent and the exclusion of the mistaken belief excuse, perpetrators will argue, '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.' These will be open to perpetrators. They will use them and we argue that they will be successful.

Mr LISTER: Ladies, thank you very much for coming. It has been a great hearing for me. I am getting a lot of personal advancement in my understanding of these issues from you all. Can I ask about your group's view on the protections for law enforcement but, more importantly, for those who are going to say that it is for genuine artistic, education, legal, medical or scientific purposes? Do you have a view on those defences?

Ms Lynch: I do not have a view. Sorry, we have considered it from the perspective of our clients. Our clients are victims of sexual violence and domestic violence.

Mrs McMAHON: Going back to that issue of consent and what we have in New South Wales versus what we have proposed under this bill and the overarching criminal defences, particularly section 24—the mistaken belief—how do you feel that the proposed definition of consent that we have in this bill will intersect with defences under section 24? You have just touched on some examples. Do you see that as a particular gap in this bill?

Ms Lynch: Yes.

Ms Sarkozi: Yes, absolutely. The reason is that there are much more common and frequent instances where people provide these images with initial consent. More broadly, under our existing law, we are one of the only states in which you cannot withdraw your consent in relation to rape and sexual assault offences after you have originally given it. We do not have that in our law. We do not even have that when it comes to rape and sexual offences—the chapter 22 offences. Certainly, to have it not explicitly articulated when it comes to the non-consensual sharing of images, in my view, is very concerning and certainly opens the floodgates to exactly those kinds of arguments, which are, 'In this context it was okay. Why would I not think that? It turns out that I was mistaken. Why would I not think that it was okay to do this?' and then you get an acquittal.

Ms Lynch: New South Wales has extrapolated it so clearly, because they are very well aware of the arguments that will be made by perpetrators and the accused. They are trying to offset those arguments. You can see it in the section. That is why we are supporting it. Why not be as clear as possible in relation to the laws that we have here in Queensland? It just makes sense that we would, especially in this area where it is unclear.

CHAIR: Thank you for your attendance and thank you for the work that you do in the community.

DE SARAM, Ms Binari, Legal Policy Manager, Queensland Law Society

TAYLOR, Mr Ken, President, Queensland Law Society

WHITE, Ms Brittany, Criminal Law Committee Member, Queensland Law Society

CHAIR: I now welcome the Queensland Law Society. Good morning. I invite you to make an opening statement, after which the committee members may have some questions for you.

Mr Taylor: Thank you for inviting the Queensland Law Society to appear at the public hearing on the Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018. I am the president of the Queensland Law Society. The society is an independent, apolitical representative body and the peak professional body for the state's legal practitioners, over 13,000 of whom we represent, educate and support. In carrying out its central ethos of advocating for good law and good lawyers, the society proffers views that are representative of its member practitioners. In particular, I note the efforts of the Criminal Law Committee in compiling written submissions on this bill. I would now like to hand over to our Criminal Law Committee member, Brittany White, to outline our key issues in relation to the bill.

Ms White: The QLS supports the policy objectives for the creation of the new offences insofar as it is acknowledged that there is a gap in the legislation with respect to certain offence provisions. However, there are some aspects of the bill about which the Law Society has concerns. We propose to go into three of them today. Firstly, proposed section 223(3) of the bill states that, for the purposes of subsection (1)(b)—

It is immaterial whether the person who distributes the intimate image intends to cause, or actually causes, the other person distress.

It does not appear—at least I cannot see it in the explanatory notes or in the bill itself—that there is a reason behind the proposal to remove intention as a fault element for this provision specifically. It does not appear that there is an ascertainable purpose for the removal of intention as a fault element in this regard, other than potentially some expected ease of prosecution of individuals following the distribution of this material.

The QLS does not support the removal of intention as a fault element under this provision. The requirement for a fault element for criminal offending is historically an important one. There is no justification that I can see that makes this a strict liability offence. Indeed, the explanatory notes for this offending make it clear that the bill is drafted principally to address the issues of revenge porn, which would imply an intention in itself.

Indeed, in such criminal conduct of distribution of that kind of material it is usually quite easy to prove intention. The distribution itself would often be enough to prove intention, but the removal of intention as a fault element would preclude circumstances where material is distributed genuinely, not with the intent of the distributor, such as through the use of BitTorrent websites, for example, or even circumstances where a photograph has been given to a person, they drop it on the ground, they walk away and somebody else picks it up. Those sorts of situations should not come within the ambit of offending behaviour. I think the objectives of the bill could be easily met without the need to remove intent as a fault element for such criminal behaviour.

Secondly, we take issue with the vagueness of distress as a test. That is set out in new section 223 and in point 2 of the Queensland Law Society's submission. The test of distress in this provision is quite subjective. Criminal law tests employing standards of harm or detriment are used quite often in our system, but the test of distress is a relatively new one. Our concern is that it is too subjective to have any real meaning in that the requirement for the prosecution to prove distress is somewhat redundant, because distress can be felt by different persons in different circumstances. 'Harm or detriment', I think, would be the more appropriate test in these circumstances and also would have a lot of criminal law behind it to be able to prove it more easily. For example, we have included the test for detriment as seen in section 359B of the Criminal Code, which defines unlawful stalking.

The problem with it is that different persons feel different distress. Historically, in criminal offences, it should require a similar standard of proof with respect to each instance of offending as opposed to putting it in the experience of the victim as a standard of proof at least. Certainly, it is an aggravating factor that can be taken into account by a sentencing court in a sentence. It is not that the distress of the victim would not be listened to; it is just that, in requiring a standard of proof, it becomes quite difficult to ascertain.

The third issue that we have spoken about in our submissions is that, in its current drafting, children can fall within the ambit of an accused in the legislation—for example, children who engage in consensual sexting. Young people being liable to this sort of offending to the same extent as adults with no discrimination in the offence provision itself can lead to very significant difficulty, because it leads to very severe consequences to a young person if they are convicted of such an offence—for example, being included on the reportable offenders register and the like.

For that reason, we have had the opportunity to review the Queensland Bar Association's submission to this committee on the subject. They have proposed some options for reform of this issue, including circumstances where, if a person possesses or produces child exploitation material, it is a defence if the person possessing or producing it depicts only the accused themselves. That could encompass situations where the laws designed to combat such offending are not being used to punish the children themselves who are the subject of it.

Further to that, the Bar Association proposes—and we support—an exception to the legislation where the material possessed or produced depicts a person no more than two years younger than the accused if the accused is a child themselves. We would support the addition of such provisions that would protect a juvenile themselves from being charged with these provisions and having those otherwise very harsh consequences on them should they be convicted of such an offence. We are open to questions if the committee has any for us.

Mr LISTER: Thank you very much for your appearance today. The QLS submission raised concerns about the definition of 'intimate image'. You have concerns about how that could be misinterpreted. Do you have any ideas as to how that definition might be improved?

Ms White: Yes, we are happy to take that question on notice. However, we have had the opportunity to review the Women's Legal Service submission in which they address that issue and that the legislature in New South Wales adopts a straightforward definition. We would take that on notice, but we have had the opportunity to review that and we happen to initially agree with that. I am happy to take you through it, except I think you have probably had the opportunity of going through it already prior to us being here. Essentially, it is the New South Wales definition. We have addressed those issues.

Mr LISTER: Thank you. Because of the thoroughness of your submission, I do not have any more questions. Thank you very much.

Ms White: Thank you.

Ms McMILLAN: You referred to the person sharing an image of themselves.

Ms White: Yes.

Ms McMILLAN: Can you talk to us a little bit more about that?

Ms White: From my reading of the legislation, if, for example, a young girl was in possession of such material and shared it with her boyfriend, that might come within the ambit of the legislation. Where the images are depicting her, she would be the only person who could foreseeably be a victim in such a situation. We accept that the police would usually not prosecute or exercise their discretion in circumstances of that nature, but it still makes a person in that situation technically liable even if she is sharing the image herself.

Ms McMILLAN: The example that comes to my mind, having worked in schools, has been generally young boys who have shared images of themselves and then realised the extent of the issue.

Ms White: Yes, absolutely, but young girls also do it, as I am sure your experience would show.

Ms McMILLAN: Yes.

Ms White: This is something that happens and is happening with more frequency in schools. The concern is that this legislation would operate in the exact same circumstances for children of that age as it would for adults, where the situation is quite different. An adult sharing images of his partner or of an under-age child would be vastly different from children sexting and one withdrawing their consent.

Ms McMILLAN: We know that a change in legislation tends to move society somewhat. Can you talk to us a little bit about what the social campaign might look like?

Ms White: Can you elaborate?

Ms McMILLAN: The social campaign that exists with the legislation. Can you talk to us a little bit about your thoughts on that?

Ms White: Sorry, I do not understand the question.

Ms McMILLAN: Okay. Along with the legislation there would need to be some education in the community.

Ms White: Sure, absolutely.

Ms McMILLAN: If we think about the context that you just described, what would that look like?

Ms White: Are you talking about the circumstances where this legislation was passed and then—

Ms McMILLAN: Yes.

Ms White: To make it clear, the QLS does not support the passing of the legislation in its current form to criminalise activity by children. However, if it were passed, I think it would be appropriate to educate schools about the impact of sharing sexting material and the fact that it can constitute an offence. We have concerns that it is almost a victim blaming type of aspect—telling young girls that it is an offence to share material of themselves when really they are the people who the legislation is designed to protect. There are problems and that is what we have tried to set out in our submissions.

Mrs McMAHON: I refer to the issue of rectification orders. There are two parts that I see. I raised this issue earlier. It stipulates that, on conviction, rectification orders can be made. I note that your submission proposes to use clause 359F of the Criminal Code to make a rectification order whether the person is found guilty or not. What does a rectification order look like? What does it tell a defendant, or a person found guilty, is a reasonable step? If it were a photo that was shared on Facebook, is it just taking down the photo, or does it extend to the people they shared it with? I want to know what that rectification might look like and what legally would constitute 'reasonable steps', considering there is now an offence proposed if they fail to take those reasonable steps?

Ms White: That is a very good question. It was something that I was considering on my way here as well. We would have to take that question on notice. However, for some preliminary thoughts, I do not think that any such court order could expand to anybody else who has not been charged with that offence. As you have already identified, it would have limited scope. It would be able to apply only to the defendant who has been convicted or otherwise of the offence. You are quite right in identifying that it would not be able to encompass persons with whom that person has already shared the images. I think we would have to take the remainder of that question on notice. We would be happy to put some proposals as to how the order would be drafted to best serve the purpose of the legislation.

Mrs McMAHON: We know the one image has potentially been shared. If a victim says, 'I know there are several hundred images that were taken,' could a rectification order for a specific image that was shared cover the hundreds of other images that that person possesses that were taken potentially consensually? They would remain in their possession unless the rectification order says, 'You must delete those.' The fear is that a person holds all of those images, even if they have not yet shared them. That victim would certainly have a very real, ongoing fear, even if the distribution of that stock of images has not occurred.

Ms White: I definitely see your point. I think the problem with that is the standard of proof. If somebody has been convicted of this offence and an order is made, an order encompassing more material is then put before the court for consideration in their finding of guilty or otherwise with respect to the offence. How does a court know how many images that person has? How does a court know where the images are stored? How do they know whether they have been shared or not if that has not been put before the court in the first place? Whilst it is definitely admirable that that situation be addressed, I think there would be practical problems in a court enforcing that if it is not put before them to the ordinary standard of proof.

I think perhaps a way to address that could be by the inclusion of maybe an investigatory type of provision so that if someone is found guilty of this offending the court can make an order to investigate further material that might be in the possession of the person. If that were to be the way to go about it, I think their conviction or finding of guilt would have to be a prerequisite.

Mr ANDREW: The Women's Legal Service referred to the consent of ongoing distribution and they referred to the New South Wales legislation. I am not sure if you are aware of that.

Ms White: I have had a read through their submission.

Mr ANDREW: Do you think that, if those provisions in the New South Wales legislation were put into this bill, that would give the bill more traction in terms of being able to prosecute people or put the provisions in better perspective?

Ms White: I take their point about consent being the requisite element to be proved in such legislation as opposed to the less objective test of potentially distress and that sort of thing—perhaps for different reasons from what they put forward, but I am in agreement with them. I cannot talk for the committee, of course. I can say that, historically in criminal law, consent is easier to prove. For that reason, although we can take it on notice, it seems reasonable, having read through that.

CHAIR: There is some Commonwealth legislation that I think would perhaps assist in this area. I believe it is called the Enhancing Online Safety Act 2015.

Ms White: Yes.

CHAIR: I could be incorrect in this assumption, but I think it deals with a process for having images taken down.

Ms White: Yes, sure.

CHAIR: From my brief look at it, it would appear to be perhaps a little bit more user friendly.

Ms White: Sure. If you are happy to refer us to the provision, we can take that on notice and provide an overview as well.

CHAIR: I knew you were going to ask me that. I do not know the exact provision. When you go to the site they have an image based abuse portal.

Ms White: My experience in dealing with Commonwealth legislation—and I am sure this is your experience as well—is that the provision exists, but the difficulty comes not with the provision but the practicality of doing that. If the images are shared, it is all well and good to make an order that they are taken down, but by that point it might be too late. The images could be shared.

CHAIR: Yes, but my understanding is that there is an online form that you can fill in that allows you to direct that organisation, for example, especially in relation to the ISP being overseas, whereas we are limited. We cannot make enforceable legislation that binds the Commonwealth whereas the Commonwealth can.

Ms White: Sure.

CHAIR: I thought there may have been some way that we could dovetail—

Ms White: We are definitely happy to have a look at it and provide some further submissions—

CHAIR: I am not trying to create more work for you but I thought I would raise it.

Ms White: Not at all; we are happy to look at it.

CHAIR: The way I looked at it is that it took some of the complexities out of having the images removed.

Ms White: As you have already pointed out, Queensland is more limited in what it can do than the Commonwealth with the jurisdiction it has.

CHAIR: From your experience, when the magistrate makes an order he could order the defendant or the accused to send an email as part of his action.

Ms White: I think so. The only thing that I want to draw to your attention—we have put it in our submissions already—is that there should be provision made for where a defendant is incapable of complying with such an order for one reason or another. They can certainly take steps to send emails by a certain date or contact certain providers, but they should not be held responsible for whether or not those providers then comply with that email or that request because they cannot be.

CHAIR: No, but a magistrate could make an order that you contact the federal body by a certain date and there is proof that they went online and made the request. It is a while since I have appeared before a magistrate, but most of them would be fairly amenable to the fact that that action has taken place.

Ms White: I think so as well, as long as it made clear what the defendant is doing versus what needs to be done that they might not have power to do. For example, the defendant can email the ISP but the ISP might not take it down.

CHAIR: No, but if he utilised this Commonwealth service it would have the expertise to do it in this space. You are right: for some individuals that step may be beyond their—

Ms White: Capabilities.

CHAIR: Yes.

Mr LISTER: A while back you touched on the treatment of juveniles.

Ms White: Yes.

Mr LISTER: Could I take you back to the society's submission regarding subsection 223(2)?

Ms White: Certainly.

Mr LISTER: You have proposed that offenders under the age of 18 sharing images of themselves or others in the same age group should not be eligible to find themselves on the sex offenders register.

Ms White: Absolutely.

Mr LISTER: And you referred to the Victorian context—

Ms White: Yes.

Mr LISTER:—which I think is if the age difference between the two is no more than two years.

Ms White: Yes.

Mr LISTER: Can you conceive—as I think I can—of a situation where you could establish deliberate and malicious intent in doing that and someone's age does not necessarily reflect their maturity or they are a danger to others?

Ms White: Most certainly.

Mr LISTER: What do you have to say about that?

Ms White: I agree. I think that is the problem, which is an ongoing problem in the youth justice system versus the adult criminal justice system. I have to be careful with my words here because—

Mr LISTER: Because you are a lawyer?

Ms White: No, because we have not discussed it within the committee. We would have to take the question on notice, but we certainly would not support any inclusion of children on the reportable offenders register, full stop. If there is some provision that could be drafted in the relevant legislation precluding children, if convicted, of this offence from being added to the register, that would go some way to address that issue.

In my personal view, I think the circumstances that you are seeking to address are so different between the conduct of adults versus children. If you are not prepared to accept that juveniles should not be prosecuted at all for this, then this legislative provision should apply to adults only and a completely separately offence provision should apply to juveniles. I am not sure if that view would be shared by the QLS and for that reason we would have to take that on notice. It is my personal view that should not be addressed towards juveniles at all. However, if you are set on doing it then that would be a way to resolve that issue perhaps.

Mr LISTER: Thanks very much.

CHAIR: That is all the questions we have this morning. Thank you for your submissions. You kindly offered to take some questions on notice. We are more than happy to put them on notice, but unfortunately the cut-off is 2 pm tomorrow.

Ms White: If you wanted to address the provision with respect to the register that you were talking about before, I am happy to look at it tonight.

Mr Taylor: Chair, we noted that there were four items we may have had—what the rectification order would look like, who it would apply to, the issue around the Commonwealth legislation and then the recent issue which was just discussed.

CHAIR: I understand from the secretariat it is close of business tomorrow.

Ms White: I have a bit of time, Mr Russo.

CHAIR: I know you have lives outside of committee work.

Mr Taylor: We will do our best with that time frame, Chair.

CHAIR: Thank you for your assistance to the committee. As always, it is very important that we receive that type of information from the Queensland Law Society. It helps us in our deliberations. That concludes this hearing. Thank you very much to all of you who have given evidence this morning. I also thank stakeholders who have participated by written submissions and also participated today. I also thank the Hansard reporters. A transcript of these proceedings will be available on the committee's parliamentary web page in due course. I declare this public hearing for the committee's inquiry into the Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill closed.

The committee adjourned at 11.23 am.