



6 September 2018

Committee Secretary
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane QLD 4000

Dear Hon Yvette D'Ath, Attorney-General and Minister for Justice

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

We are pleased that the Queensland Parliament is considering introducing new legislation to address the non-consensual sharing of, and threats to share, intimate images. The introduction of this legislation will bring Queensland in line with other states and territories which have introduced new criminal offences, including South Australia, Victoria, New South Wales, the Australian Capital Territory, and the Northern Territory, as well as the Federal Government which passed new legislation to amend the federal telecommunications law to introduce new criminal penalties for the non-consensual distribution of intimate images in August 2018. This submission expresses our support for the Queensland Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018.

IBSA DEFINITION & RESEARCH

We are Australia's leading researchers of image-based sexual abuse (IBSA) – also known as “revenge pornography” and the “non-consensual sharing of intimate images” (NCII). We are currently conducting a multi-country project on IBSA, funded by the Australian Research Council (ARC), with Associate Professor Anastasia Powell (RMIT University), Professor Clare McGlynn (Durham University, UK), Professor Erika Rackley (University of Kent, UK), Professor Nicola Gavey (University of Auckland, NZ) and Dr Adrian Scott (Goldsmiths, University of London, UK). We define IBSA as encompassing three key behaviours: (1) the non-consensual taking of nude or sexual images; (2) the non-consensual sharing of nude or sexual images; and (3) the making of threats to share nude or sexual images. We define images to include photographs and videos, as well as digitally altered photographs and videos.

Our research involves a mixed-methods approach to understanding the nature, prevalence and impacts of IBSA, as well as the legal and non-legal responses to this growing problem. Our 2016 national survey of Australians aged 16 to 40 years (n = 4,274) found that 1 in 5 respondents (22.7%) reported experiencing at least one form of IBSA. Most common were nude or sexual images being *taken* without the respondent's consent (20.2%), followed by nude or sexual images being sent onto others or *distributed* without consent (10.6%), and finally, experiencing *threats* that a nude or sexual image would be sent onto others or distributed without consent (8.6%) (Henry, Powell & Flynn, 2017). Upskirting and downblousing were also commonly experienced by women in our survey.

Significantly, victimisation was more common among marginalised groups, including young people, lesbian, gay and bisexual people, Aboriginal and Torres Strait Islander people, and those disclosing a disability. Our findings included the following:

- 1 in 2 Indigenous Australians reported IBSA victimisation;
- 1 in 2 Australians with a disability reported IBSA victimisation;
- 1 in 3 lesbian, gay and bisexual Australians reported IBSA victimisation;
- 1 in 3 young people aged 16 to 19 years reported IBSA victimisation;
- 1 in 4 of those aged 20 to 29 years reported IBSA victimisation; and
- 1 in 2 respondents had experienced pressure/coercion to send sexual self-images (Henry, Powell & Flynn, 2017).

In another study we completed in 2017, with the Social Research Centre on behalf of the Australian Office of the eSafety Commissioner (OeSC), we conducted a nationally representative survey (n=4,122) in which we found 11% of respondents said they had a nude or sexual photo or video posted online or sent on without their consent (OeSC, 2017). In this survey, we found that women (15%) over the age of 18 years were twice as likely as men over 18 years (7%) to have experienced someone sharing nude or sexual images of them without their consent, and that 24% of women and 16% of men aged between 18-24 years had experienced someone sharing a nude or sexual image of them without their consent. Similar to our 2016 national survey, this 2017 study found that Aboriginal and Torres Strait Islander Australians (25%) were twice as likely to have experienced this form of IBSA in comparison with non-Indigenous Australians (11%). Finally, 19% of lesbian, gay and bisexual participants said that someone had shared a nude or sexual image of them without their consent, compared to 11% of heterosexual participants. Prevalence was also high for those who spoke a language other than English at home (19% compared to 11%).

We have also conducted 75 semi-structured interviews with victim/survivors of IBSA in Australia, New Zealand and the UK, and while we are yet to analyse this data, our preliminary findings suggest that IBSA has significant social, financial, physical and psychological impacts, with some victim/survivors reporting post-traumatic stress disorder, anxiety, depression and suicidal ideation. It is also evident that IBSA is part of a continuum of violence and abuse, particularly in a gendered context, and that both legal and non-legal responses are required to address this significant social harm.

FEEDBACK ON THE PROPOSED BILL

s 207A: Definitions

We are pleased that the definition of “intimate images” extends to include any image (still or moving) that depicts a person engage in an intimate sexual act, a person’s genital or anal region, or a female, transgender or intersex person’s bare breasts. The layout of (a), (b) and (c) are somewhat confusing owing to the use of the “ands” between (a), (b) and (c), which could suggest that all three are required for an image to constitute an “intimate image”.

We are also unsure why the definition of a “prohibited visual recording” and “observations or recordings in breach of privacy” does not also include a recording of a female, transgender or intersex person’s bare breasts.

s 223: Distributing intimate images

We do not believe there should be a requirement on the prosecution to prove that the distribution of an intimate image would (objectively) cause distress (s 223(1)). 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.

We are supportive of subsection (3) which states that it is "immaterial whether the person who distributes the intimate image intends to cause, or actually cause, the other person distress". This raises some question around the relevance of requiring 223(b). If there is no requirement to prove intent to cause distress, then there should not be a requirement for the prosecution to prove that the distribution of an intimate image would cause distress.

We are supportive of the other defences listed in subsection (4) and the onus being on the defendant to raise these defences.

Finally, while we are supportive of the definition of consent, however, it should be made clear that 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 (Citron 2014), regardless of the age of the individuals involved.

It is unclear how s 227B (distributing prohibited visual recordings) is distinct from the new offence of distributing intimate images.

s 229A and 229AA: Threats to distribute intimate image or prohibited visual recording

We are supportive of the new offence contained in s 229A. However, some clarification may be needed for s229A(1)(b) regarding how "fear" is proved and who has the onus to prove that the victim was fearful. If there is no requirement to prove the defendant intended to cause fear, there may be some question as to whether a fear requirement is necessary.

We are pleased to see the inclusion of the statement that it is immaterial whether the image exists or not, or whether the person making the threats intended to cause, or actually causes, fear.

Clause 9: Rectification orders

As significant harm can be caused to victim/survivors when images remain on personal devices or online, we are highly supportive of a new offence for failure to comply with rectification orders.

Penalties

We believe that the penalties are sufficient in relation to: the non-consensual distribution of intimate images (max. 3 years); observations or recordings in breach of privacy (max. 3 years); threats made to distribute intimate images (max. 3 years); and failure to adhere to rectification orders (max. 2 years).

In conclusion, our research demonstrates that IBSA is common amongst the Australian population, with wide-ranging and significant impacts. We strongly support changes to criminal laws in Queensland in line with those implemented in other Australian jurisdictions, to address the problem of IBSA. We believe that the law plays an important symbolic role in recognising the harms of IBSA, deterring future offenders, holding offenders accountable, and helping victim/survivors to seek justice for wrongs done against them. However, we also note the limitations of this one mechanism alone and more broadly support a range of different legal and non-legal options to address and prevent IBSA, such as education, civil penalties, and victim support services. Finally, we note that any changes to the law should be accompanied by an education and marketing campaign that raises awareness of the new laws, as well as providing a tool to communicate to the community that this form of behaviour is not acceptable and not tolerated in Queensland.

Thank you for considering our submission. We are happy to respond to any further questions. We are also happy for this submission to be made public.

Yours sincerely,



Dr Nicola Henry, Associate Professor and Principal Research Fellow, Social & Global Studies Centre, RMIT University & Dr Asher Flynn, Senior Lecturer, Criminology, Monash University

Contact for this submission

Dr Nicola Henry
Associate Professor & Vice-Chancellor's Principal Research Fellow
Social and Global Studies Centre
RMIT University
Melbourne VIC 3000
T: +61 3 9925 2467 | E: nicola.henry@rmit.edu.au

References

Henry, N, Powell, A & Flynn, A (2017). *Not Just 'Revenge Pornography': Australians' Experiences of Image-based Abuse: A Summary Report*. Melbourne: RMIT University.

Office of the eSafety Commissioner (OeSC) (2017). *Image-based Abuse National Survey: Summary report*. Melbourne: Office of the eSafety Commissioner. <https://www.esafety.gov.au/image-based-abuse//-/media/15469f65e05e4d02b994010def7af3bb.ashx>