



6 September 2018

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

By email: LACSC@parliament.qld.gov.au

Dear Committee Secretary

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

Thank you, on behalf of the Bar Association of Queensland ('the Association'), for the invitation to make a submission in relation to the Legal Affairs and Community Safety Committee's review of the *Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018* ('the Bill').

Adequacy of the current Queensland Police Service operational response

The Association has, on previous occasions, expressed concern that young people who engage in consensual sexting are not adequately protected against offending child exploitation material ('CEM') laws or from being listed on the Register in Queensland. This concern was, in part, triggered by the Queensland Sentencing Advisory Council's ('the Sentencing Council') finding that the average age of a child exploitation offender is 14.3 years.¹

According to QPRIME data provided to the Sentencing Council,² 48% of the total number of CEM offenders in Queensland over the ten years to 2017 were young people who were diverted from the court system by the Queensland Police Service ('QPS'),³ mostly by way of a formal caution.⁴

¹ Queensland Sentencing Advisory Council, *Classification of child exploitation material for sentencing purposes: Consultation Paper* (2017) 17.

² Ibid; Queensland Sentencing Advisory Council, *Classification of child exploitation material for sentencing purposes: Final report* (2017) 15.

³ Queensland Sentencing Advisory Council, *Classification of child exploitation material for sentencing purposes: Consultation Paper* (2017) 17.

⁴ 92.9% of diversions took place by way of formal cautioning according to Queensland Sentencing Advisory Council, *Classification of child exploitation material for sentencing purposes: Final report* (2017) 15.

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The Sentencing Council also found that the number of young people diverted for CEM offences has '*increased dramatically*' in the last ten years.⁵ Based on QPS's data, the majority of these diversions related to sexting.⁶

The Association is concerned that diversion is being relied upon⁷ as a mechanism for dealing with the prevalence of CEM offending by young people in the context of consensual sexting. A reliance on diversion not only leaves a young person's future to the discretion of a QPS member⁸ but also has the potential to lead to inconsistencies⁹ in the application of the law. This is particularly so in relation to children from a disadvantaged background or suffering from intellectual or psycho-social disabilities who are unlikely to know of this operational approach.

Whilst a police caution may appear innocuous, given that its purpose is to divert a young person from the criminal justice system,¹⁰ the QPS Operational Procedures Manual¹¹ requires QPS members to create a charge on a young person's QPRIME record when a caution is performed.¹²

Furthermore, such cautions are recorded on a young person's Person History (Record of all Charges in Queensland)¹³ which may be disclosed to numerous parties¹⁴ and must be considered when determining whether to start a proceeding for any subsequent offence.¹⁵

In short, cautioning for consensual sexting may have a tangible impact on a young person's future and may provide an unnecessary introduction to the criminal justice system.

The specific CEM offences were introduced in 2005,¹⁶ when sexting was not yet a recognised phenomenon. Parliament's stated intention in introducing these offences was to '*respond to the growing incidence of child pornography*'¹⁷ following a '*national crackdown on an internet child pornography ring resulting in hundreds of arrests across Australia*'.¹⁸ It is evident that the intention of the introduced offences was to protect young people, not to target them.

⁵ Queensland Sentencing Advisory Council, *Classification of child exploitation material for sentencing purposes: Consultation Paper* (2017) 17.

⁶ *Ibid* 18.

⁷ Thomas Crofts and Murray Lee, 'Sexting', Children and Child Pornography' (2013) 35(85) *Sydney Law Review* 85, 97.

⁸ Ann L. Parker and Rick Sarre, 'Policing young offenders: what role discretion?' (2008) 10(4) *International Journal of Police Science and Management* 474, 474.

⁹ *Ibid* 474, 482; Carianne Blyth and Lynne D Roberts, 'Public Attitudes towards Penalties for Sexting by Minors' (2014) 26(2) *Current Issues in Criminal Justice* 143, 146.

¹⁰ Queensland Police Service, *Operational Procedures Manual* Issue 58.2, Public Edition, July 2017, chapter 5, 4.

¹¹ *Ibid*.

¹² *Ibid* 12.

¹³ Queensland Police, *Person History (Record of all Charges in Queensland)* (7 July 2017) Queensland Police Service <<https://www.police.qld.gov.au/corporatedocs/purchase/Person-History.htm>>.

¹⁴ Including parent(s), the chief executive of the Department of Justice and Attorney-General, a member of the police service of the Commonwealth or another State, a lawyer acting for the young person, or a person who has the function of investigating offences under an Act, pursuant to *Youth Justice Act 1992* (Qld) s 295(2).

¹⁵ *Youth Justice Act 1992* (Qld) s 11(2)(b).

¹⁶ *Criminal Code (Child Pornography & Abuse) Amendment Act 2005* (Qld).

¹⁷ *Criminal Code (Child Pornography and Abuse) Amendment Bill 2004* – Explanatory Notes p.1.

¹⁸ Explanatory Notes, *Criminal Code (Child Pornography and Abuse) Amendment Bill 2004* (Qld) 2.

There has been significant development in the technological capabilities of computers and smartphones since 2005 and in the use by young people of such equipment. Of note, the photo sharing application, Instagram, was released in 2010 and the instant photo messenger, Snapchat, was released in 2011. There has also been a significant increase in the availability of the internet, with ABS statistics evidencing that 86% of Queensland households had access to the internet in 2015, compared to only 56% of Queensland households in 2005.¹⁹

Despite this, CEM offences under the Criminal Code have remained the same, apart from increased penalties that were introduced in 2013 and 2016.²⁰ It is submitted that this has created a well-recognised paradox that *'laws designed to combat child pornography are now being used to punish children themselves'*.²¹

It is the view of the Association that the law needs to be reviewed in order to fulfil its true intention of protecting young people rather than targeting them.

Proposed reform

The Association submits that children who engage in consensual sexting should be protected by a defence written into the law and not by an operational response which entails individual and unreviewable discretion. It is an injustice to young people who engage in consensual sexting that they are liable to being forced through the criminal justice system and, potentially, onto the Child Protection Register.

The Association urges the Government to consider introducing defences to CEM offences for children, similar to those in Victoria, such as the following:

1. to the offence of possessing CEM, it is a defence if the accused unintentionally came into possession of the CEM, and took all reasonable steps to cease possession once becoming aware;²²
2. to the offences of possessing and producing CEM, it is a defence if the CEM possessed or produced depicts only the accused themselves;²³
3. to the offences of possessing and producing CEM, it is a defence if:
 - a. the CEM possessed or produced depicts a person or persons no more than two years younger than the accused; and
 - b. the CEM is possessed or was produced by the accused with the consent of each person who is depicted in the CEM.²⁴

¹⁹ Queensland Sentencing Advisory Council, *Classification of child exploitation material for sentencing purposes: Final report* (2017) 110.

²⁰ *Ibid* 12.

²¹ Carolina Villacampa, 'Teen sexting: Prevalence, characteristics and legal treatment' (2017) 49 *International Journal of Law, Crime and Justice* 10, 11.

²² Adapted from *Crimes Act 1958* (Vic) s 51T.

²³ Adapted from *Ibid* s 51O(1) and Law Reform Committee, Parliament of Victoria, *Report of the Law Reform Committee for the Inquiry into Sexting* (2013) 142.

²⁴ Adapted from *Crimes Act 1958* (Vic) s 51N(1) and Law Reform Committee, Parliament of Victoria, *Report of the Law Reform Committee for the Inquiry into Sexting* (2013) 142.

4. to the offence of distributing CEM, it is a defence if:
 - a. the CEM distributed depicts a person or persons no more than two years younger than the accused; and
 - b. the CEM was distributed with the consent of each person who is depicted in the CEM; and
 - c. the accused did not distribute the CEM to anyone not depicted in the CEM.²⁵

Proposed rectification orders

The Bill proposes a new rectification order that would be available to a court dealing with a person convicted of an offence against sections 223(1), 227A(1) or (2), 227B(1) or 229A(1) or (2) of the Criminal Code. The Association agrees that it is appropriate for the court to have the power to make such an order and that, in order to ensure and enforce compliance with those orders, it is appropriate to create an offence for failure to comply with such an order.

However, the Association has previously expressed concern about the terms of the rectification order provision. It is unclear, from the current proposed wording of the new provision, whether a court would be required to specify the particular action an offender is required to take, or if it could simply make an order “to take reasonable action to remove, retract” etc. the intimate image involved in the offence. If an order under proposed section 229AA were to be in those general terms, it is not clear by what standard it would be determined what constitutes “reasonable action” and, as a result, there may be difficulties in complying with, or enforcing compliance with, such an order. What constitutes “reasonable action” may vary substantially depending on how the image was distributed, the period of time between the distribution and the detection of the offence, and the technical expertise or otherwise of the offender.

The Association submits that consideration should be given to adding a further subsection to the proposed rectification order provision requiring a court making such an order to state the particular action the person convicted of the offence is required to take. This would provide greater 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.

Conclusion

Thank you for the opportunity for the Association to provide feedback on the Bill.

The Association would be pleased to provide further feedback, or answer any queries you may have on this matter.

Yours faithfully



G A Thompson QC
President

²⁵ Adapted from *Crimes Act 1958* (Vic) s 51P(1).