



# QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

Protecting Queenslanders' individual rights and liberties since 1967

*Watching Them While They're Watching You*

7 September 2018

Committee Secretary  
Legal Affairs and Community Safety Committee  
Parliament House, George Street  
**BRISBANE QLD 4000**

**By Email: [lacsc@parliament.qld.gov.au](mailto:lacsc@parliament.qld.gov.au)**

Dear Committee Secretary,

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

1. The Queensland QCCL for Civil Liberties ("**the QCCL**") is a not-for-profit organisation that receives queries from members of the public regarding their civil liberties and individual rights.
2. We make this submission in response to the *Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018* ("**the Bill**").

**Offence in General**

3. In a similar way to how the QCCL supported the introduction of s. 227A of the *Criminal Code*, we support legislation involving the introduction of modern technology requires new and greater protections for personal privacy. The QCCL similarly supports legislation that encourages privacy by placing limits on the amount of personal information known by others.
4. The Bill is directed to circumstances in which person A has acquired an image of person B but they know that person B does not expect it to be distributed to other people or the image is of such a character person B would reasonably expect that the image would not be distributed without their consent.
5. The purpose of this legislation then is to protect a person's express or implied right to consent to the distribution of such images. Accordingly, we submit that the need to establish that person B suffered harm should be unnecessary for the section to take effect. This shifts the focus to the question of consent and when someone should be held criminally liable for taking actions without it.
6. We submit that clearly, distributing an image knowing there is a lack of consent could result in criminal liability. Likewise, we submit that that an honest and reasonable by mistaken belief of consent should stand as a defence to the charge.<sup>1</sup> However, it is our submission that this defence

<sup>1</sup> Section 24 of the *Criminal Code*.

**[qccl.org.au](http://qccl.org.au)**



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requires further explanation in such a context.

7. We propose that Queensland should implement the Victorian model which requires that community standards of acceptable conduct must be taken into account. 'Community standards' has been explained by the Victorian A-G as follows:

*"[this requirement] provides guidance to courts to determine the application of community standards of acceptable conduct in a particular case. The court is directed to consider the context in which the image was captured and distributed, the personal circumstances of the person depicted, and the degree to which their privacy is affected by the distribution. The purpose of the community standards test is to ensure that the offences do not unjustifiably interfere with individual privacy and freedom of expression, while at the same time targeting exploitative, harmful and non-consensual behaviour."*<sup>2</sup>

8. We also submit that 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, 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.

### **Intimate images of children under 16**

9. Queensland Sentencing Advisory Council (QSAC) research<sup>3</sup> indicates that nearly half of all offenders charged with child exploitation material (CEM) offences were aged 16 years or under, representing 1498 of the 3035 offenders sentenced between 2006-7 and 2015-16. While both the Queensland and Commonwealth Governments have legislated offences relating to CEM, the difference in focus is significant. The Commonwealth Government focuses on the use of communication services to transmit the material, compared to the Queensland offences that focus on its production, distribution and possession.
10. The offending patterns under both legislative regimes differ significantly between adult and juvenile offenders. Offences committed by minors were relatively evenly distributed across possession (35.4%), distribution (34.4%) and making of CEM (29.7%). Commonwealth offences constituted only 0.5% of all youth offences. Adult offenders however were much more likely to fall within the Commonwealth regime (34.3%) and were more likely to be charged with possession (49.6%) rather than making (8.3%) or distributing CEM (7.9%). It should be noted that having an image of a person under the age of 16 that appears to be of a sexual nature can count as CEM (including images of oneself if under 16).<sup>4</sup>
11. A victim not coming forward for fear of being charged for producing child exploitation material over such images has also been noted.<sup>5</sup>
12. These offending patterns clearly indicate that the Queensland government plays a crucial role in determining the circumstances where a minor may be found criminally liable under CEM laws. However, in Queensland there is currently no legislative response to prevent minors from being charged with child exploitation material (CEM) offences. Reliance is instead placed on police discretion regarding whether minors should be charged.
13. The Parliamentary Committee report before legislative changes in Victoria<sup>6</sup> noted that reliance on police discretion may have resulted in inconsistencies in how the sexting behaviour of minors was treated.<sup>7</sup> A key difference between Victorian and Queensland police approaches should also be noted in that at the time of the Parliamentary Committee report; the ability for Victorian police to give cautions in sexual offences were restricted to a high threshold of 'exceptional circumstances',

<sup>2</sup> Hansard (21/08/2014) The Honourable Robert Clark, Victorian Parliament, p 2935.

<sup>3</sup> Sentencing Spotlight on Child Exploitation Material Offences, May 2017.

<sup>4</sup> <https://mypolice.qld.gov.au/goldcoast/sexting>.

<sup>5</sup> Arnold and Smith, 'Private faces in public spaces: privacy and the Victorian sexting inquiry' (2013) 10(2) *Privacy Law Bulletin* 18.

<sup>6</sup> Law Reform Committee – *Inquiry into Sexting*, May 2013.

<sup>7</sup> *Ibid* at p 115.

leaving Victorian police with few options beyond either a warning or pressing charges.<sup>8</sup>

14. In a submission to the Parliamentary Committee report, Victoria Legal Aid included a case study where two 17-year olds were in a relationship that ended in acrimoniously.<sup>9</sup> Both spread lies and rumours about the other at school and, out of spite, the young man sent a topless picture of the girl to one of his friends. Her father reported the young man to police. The young man was angry and did not express regret, saying that the young woman 'deserved it' for spreading lies and saying he was bad at sex. The police 'did not like [the young man's] attitude and decided that he should learn a lesson and hear from the Court about the seriousness of his behaviour'. The young man was charged with offences relating to child pornography which were only discontinued once the young man's lawyer contacted the police officer to explain the severe negative impacts of those charges on the young man's future.
15. It is not alleged that the police took this course of action out of spite and it should be noted that in Queensland the vast majority of youth offenders are diverted away from the judicial system by police, with only 28 cases being found of those aged 17 or under proceeding to trial (of which 16 were dealt with in the juvenile courts). Of those offenders who were diverted, 92.9% were given a formal caution, with the remaining 7.1% proceeding to a youth justice conference. The majority of these cases were for 'sexting'. However, to be eligible to participate in these diversion programs the offender must plead guilty to the relevant offence.
16. Further, the case study illustrates the possible dangers of relying solely on police discretion to respond to sexting behaviour in young people. The consequences of being charged with child exploitation offences can be very serious; the police having the ability to use the law to teach a young person a 'lesson' without a full understanding of the life long consequences should be of concern. The Victorian report noted that CEM laws were originally designed to protect children from predatory and paedophilic adult behaviour. Consensual peer to peer sending of images was highly unlikely to have been considered by the original legislators.<sup>10</sup>
17. For these reasons our view is that Queensland should follow Victoria and enact specific defences and exemptions in relation to the distribution of child abuse material. While the Attorney-General's concern regarding ensuring that the proposed new offence does not become a lesser alternative to distributing CEM is a valid concern regarding adult offenders, it may be a valuable lesser alternative in the case of minors.

### **Scope of Threat Offence**

18. In examining the need for such an offence, it is clear that such distribution or the threat of such distribution clearly restricts the privacy of individuals and needs to be balanced alongside freedom of expression. The latter can be protected by public interest and consent defences. The former needs to be upheld by implementing the proposed legislative provision of s 229A into the Criminal Code 1899 (Qld). There is a need to specifically provide that the 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.
19. Given our view as to the purpose of this legislation we would not support an extension to cover a threat to release images of a third party. We note that it has not been thought necessary in New South Wales and the ACT to enact such an offence. If it were to proceed we would submit the community standards test should apply to this offence also.
20. We thank the QCCL interns, Nikita Aganoff, Alex Ladd and Amye Fairbairn, for their assistance in the preparation of this submission.
21. We trust that submission is of assistance and please do not hesitate to contact us should you

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<sup>8</sup> Ibid at p 113.

<sup>9</sup> Ibid at p 111.

<sup>10</sup> Ibid at p 74.

require any further information or comment.

Yours sincerely,

A handwritten signature in black ink, consisting of a vertical stroke followed by a horizontal stroke that curves upwards to the right.

Angus Murray  
Vice-President  
For and on behalf of the  
Queensland QCCL for Civil Liberties

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