

9<sup>th</sup> September 2018

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

[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**

**A. Introduction**

The Women's Legal Service Queensland (WLSQ) is a specialist community legal centre, established in 1984, that provides free legal and social work services and support to Queensland women. We assist women in the areas of family law, domestic violence, child protection and sexual violence. WLS provides State-wide assistance through our legal Domestic Violence Helpline, and have a designated Rural, Regional and Remote telephone line to increase women's access to our service in non-metropolitan regions.

We undertake outreach work at the Brisbane Women's Correctional Centre and at Family Relationship Centres in Brisbane. We also conduct duty lawyer services at three Courts: Holland Park, Caboolture and Ipswich. Our specialist domestic violence units in Brisbane, Southport and Caboolture (opening in October 2018) provide intensive case work and court representation for our most vulnerable clients. As part of the Caboolture office we employ a First Nation's cultural liaison support worker to assist First Nation's women's access to WLSQ. We conduct Health Justice Partnerships with a domestic violence solicitor visiting weekly the Gold Coast, Logan, Redlands, RBH hospital and being on call to the PA and QE2 hospitals and soon to be established Caboolture and Redcliffe hospitals. We thank the Parliamentary Committee for the opportunity to provide this submission.

WLS supports the objects of the bill to create an offence specifically directed at the non-consensual sharing or threatening to share intimate images. Unfortunately this is a common occurrence that our clients face both in circumstances where they were completely unaware of the existence of the materials (ie. It had been undertaken without her knowledge) or if it was with knowledge it was in circumstances that the items were to be shared as a couple and not for wider distribution. The sharing of these materials or the threat to do so is an effective tactic of abuse and causes our clients enormous distress, embarrassment and shame.



The establishment of criminality in the offence is the non-consensual act of sharing or threatening to share the intimate images. Unfortunately, the Queensland's current consent laws (including mistaken belief) in the Criminal Code will undermine the otherwise admirable policy objectives of the legislation. We will speak more to this in the body of the submission. WLSQ along with sexual violence prevention services have publically called for a review of these laws, as a matter of urgency.

## **B. Comments about the Bill**

### **B(1) An additional offence**

In addition, the recording of the intimate images without consent should also be an offence. It is important for the law to cover a situation where a person has recorded an intimate situation with someone. They may not release the image or even threaten to release the image. However, the mere knowledge by the woman of the existence of the image in his possession is enough to cause enormous fear and grief to the victim. Also, this separate offence would also send a message to the public that secretly recording intimate situations is wrong and will not be tolerated.

For example please see the New South Wales provision below:

#### ***91P Record intimate image without consent***

*(1) A person who intentionally records an intimate image of another person:*

*(a) without the consent of the person, and*

*(b) knowing the person did not consent to the recording or being reckless as to whether the person consented to the recording,  
is guilty of an offence.*

*Maximum penalty: 100 penalty units or imprisonment for 3 years, or both.*

*(2) A prosecution of a person under the age of 16 years for an offence against this section is not to be commenced without the approval of the Director of Public Prosecutions.*

## **Recommendation One**

**That an offence be created similar to Section 91P of Division 15 (C) of the Crimes Act 1900 in New South Wales for the recording of an intimate image without consent.**

In relation to the bill we make the following comments:

### **B(2) Definition of Intimate Image**

We have concerns that the proposed definition creates unnecessary loopholes and may undermine the achievement of the bill's objects. In particular, we are concerned about the use of "engaged in an intimate sexual activity that is not ordinarily done in public". The logical question is what intimate sexual activity is ordinarily allowed in public?

Also the use of “covered by underwear”. What if the person’s private parts were covered by a towel?

Again, we prefer the approach adopted by the legislature in New South Wales as more straight forward and less open to ambiguity.

***Intimate image means:***

*(a) an image of a person’s private parts, or of a person engaged in a private act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy, or*

*(b) an image that has been altered to appear to show a person’s private parts, or a person engaged in a private act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy.*

***private parts means:***

*(a) a person’s genital area or anal area, whether bare or covered by underwear, or*

*(b) the breasts of a female person, or transgender or intersex person identifying as female, whether or not the breasts are sexually developed.*

### **Cultural and/or religious sensitivity**

Some cultures or religion have different perspectives on the idea of “intimacy” and the impact of certain actions can have a devastating impact on women who live in these communities. The law should reflect these additional sensitivities. The new Commonwealth law *Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018* provides some drafting guidance in these circumstances. In this definition cultural and religious sensitivities are taken into account. The definition is ‘intimate image’ or video taken in circumstances where an ordinary reasonable person would have a reasonable expectation of privacy and includes the depiction of private parts, private activity and a person without attire they consider to be religiously or culturally significant (granted the accused knew that due to the person’s religious or cultural beliefs, they wore this attire constantly when in public).

### **Recommendation Two**

**That the New South Wales definition of intimate image in Division 15 (C) of the Crimes Act 1900 be adopted and be extended to include the religious or cultural sensitivity as expressed in the new Commonwealth law *Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018*.**

### **B(3) Consent**

**(i) Without the person’s consent**

The current proposed definition of consent is not adequate and should be extrapolated to ensure appropriate interpretation in the circumstances concerning these types of matters.

Again, New South Wales provides a preferred approach. Please see below Section 91O from Division 15 (C) of the Crimes Act 1900 (NSW).

**91O Meaning of consent in intimate image offences**

- (1) *This section applies to all offences under this Division.*
- (2) *A person consents to the recording of an intimate image if the person freely and voluntarily agrees to the recording of the intimate image.*
- (3) *A person consents to the distribution of an intimate image if the person freely and voluntarily agrees to the distribution of the intimate image.*
- (4) *A person who consents to the recording or distribution of an image on a particular occasion is not, by reason only of that fact, to be regarded as having consented to the recording or distribution of that image or any other image on another occasion.*
- (5) *A person who consents to the distribution of an image to a particular person or in a particular way is not, by reason only of that fact, to be regarded as having consented to the distribution of that image or any other image to another person or in another way.*
- (6) *A person who distributes an image of himself or herself is not, by reason only of that fact, to be regarded as having consented to any other distribution of the image.*
- (7) *A person does not consent to the recording or distribution of an intimate image:*
- (a) *if the person is under the age of 16 years or does not otherwise have the capacity to consent, including because of cognitive incapacity, or*
- (b) *if the person does not have the opportunity to consent because the person is unconscious or asleep, or*
- (c) *if the person consents because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person), or*
- (d) *if the person consents because the person is unlawfully detained.*
- (8) *This section does not limit the grounds on which it may be established that a person does not consent to the recording or distribution of an intimate image.*

In addition we would recommend an additional provision that:

- Being reckless as to whether the person consents is not true consent.

**Recommendation Three**

**The definition of consent adopted by 91O in Division 15 (C) of the Crimes Act 1900 New South Wales be adopted. Please see:**

- (1) **This section applies to all offences under this Division.**
- (2) **A person consents to the recording of an intimate image if the person freely and voluntarily agrees to the recording of the intimate image.**
- (3) **A person consents to the distribution of an intimate image if the person freely and voluntarily agrees to the distribution of the intimate image.**

- (4) A person who consents to the recording or distribution of an image on a particular occasion is not, by reason only of that fact, to be regarded as having consented to the recording or distribution of that image or any other image on another occasion.
- (5) A person who consents to the distribution of an image to a particular person or in a particular way is not, by reason only of that fact, to be regarded as having consented to the distribution of that image or any other image to another person or in another way.
- (6) A person who distributes an image of himself or herself is not, by reason only of that fact, to be regarded as having consented to any other distribution of the image.
- (7) A person does not consent to the recording or distribution of an intimate image:
  - (a) if the person is under the age of 16 years or does not otherwise have the capacity to consent, including because of cognitive incapacity, or
  - (b) if the person does not have the opportunity to consent because the person is unconscious or asleep, or
  - (c) if the person consents because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person), or
  - (d) if the person consents because the person is unlawfully detained.
- (8) This section does not limit the grounds on which it may be established that a person does not consent to the recording or distribution of an intimate image.

#### **Recommendation Four**

In addition the definition above should include a provision that true consent does not include circumstances where the defendant was “reckless as to whether the person consent or not”.

#### **(ii) Mistaken Belief**

The issue of consent in Queensland is fraught and undermined by the ability of defendants to utilise the Section 24 Mistaken Belief excuse. We see this time and time again in rape and sexual violence matters and unless Section 24 is explicitly excluded then there is potential for the effectiveness and protection of these new provisions for victims to be nullified and for perpetrator accountability to be avoided.

Section 24 of the Queensland Criminal Code states:

*A person who does not omit to do an act under an honest and reasonable, but mistaken belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believe to exist.*

The Court of Criminal Appeal in Queensland has interpreted this “reasonableness” in Mistaken Belief in a very generous way towards the defendant. There are a myriad of cases about this excuse but we highlight just two:

**R v Mrzljak (2005) Qd R 308**

The Court of Appeal held that it was relevant to the application of s24 that the appellant spoke little English, being a Bosnian immigrant, and had a mild mental impairment. These characteristics supported an argument that HE might reasonably hold a belief about consent that would not be reasonable if held by a native English speaker of average intelligence. Williams JA held that “the belief must be based on reasonable grounds, *it is nevertheless the belief of the offender which is critical... the critical focus is on the offender rather than a theoretical reasonable person. It is the information available to the offender which must determine whether the belief was honest and also was reasonable.*”<sup>45</sup>

This clearly establishes the prominence that is given in legal decision making to the defendant’s state of mind allowing disrespectful and misogynistic attitudes to women and their sexuality to proliferate and excuse time and time again, the behaviour of sexual violence perpetrators.

**R v Kovacs [2007] QCA 143**

The Court of Appeal held that the defence of mistake of fact under s24 should have been left to the jury because the complainant’s lack of English may have led the appellant to form a mistaken belief that the complainant was consenting to sex. This argument was accepted, despite evidence that the complainant had repeatedly resisted his advances, that she spoke little English, was in Australia illegally and had no means of financial support outside of living in a remote country town with the appellant and his wife.

It is abundantly clear from the case law, the “reasonableness” requirement focuses attention on accused’s beliefs and in doing so the law excuses violent perpetrator behaviour that is based on female sexuality stereotypes and misogynous beliefs held by perpetrators. There are concerns, therefore that a defendant’s access to the Mistaken Belief excuse along with the current definition of consent in the bill, will provide fertile ground in which to also avoid responsibility under the proposed laws. For example, the existence of Mistaken Belief allows these arguments and they may well be successful:

*“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.”*

All of these excuses could easily be viewed as “reasonable” under the current interpretation of Section 24 and the perpetrator may well avoid being found guilty, despite the best intentions of the proposed bill.

**Recommendation Five**

**That Section 24 of the Criminal Code (Mistaken Belief) be explicitly excluded from the Bill.**

## **Recommendation Six**

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

### **(B5) Causing the other person distress**

The two elements of the new offence are:

A person who distributes an intimate image of another person-:

- (a) Without the other person's consent (dealt with above) and
- (b) In a way that would cause the other person distress reasonably arising in all the circumstances.

The inclusion of (b) above creates another tier that the prosecution must prove and in addition, could be quite distressing to the victim to have to detail publically this information in order to establish the offence. Again, this is not a requirement in the Commonwealth or New South Wales legislative approach.

If a person distributes an intimate image without consent then this should be sufficient to establish criminal culpability.

## **Recommendation Seven**

**That Section 223 (1) (b) requiring "that the other person is caused distressed reasonably arising in all the circumstances" be removed.**

### **(C) Children**

This is not our area of expertise, however, we are drawn to the New South Wales provision that specifically provides that a prosecution of a person under 16 years for an offence is not commenced without approval from the Director of Public Prosecutions. We understand this may be the current policy approach in Queensland but there is a greater level of accountability if it is contained in the legislation.

## **Recommendation Eight**

**We recommend consultation with child and youth experts to determine whether the inclusion of a provision in the legislation that permission for the Director of Public Prosecutions be required before commencing an offence against a person under the age of 16 years, is appropriate in Queensland.**

**(D) A proposed change to QPS procedure**

Many clients do not come forward and seek police protection about these matters because the images/ video may also show them partaking in illegal activity eg. drug taking. Again these images/ video may be taken with or without their consent. This is of course the complexity of domestic violence and it increases the perpetrator's "hold" and power over the victim as they know the victim will be unlikely to pursue police or official action. We would recommend a change to police policy/ practice in light of the new law to ensure domestic violence victims seek protection and the perpetrator's threats and controlling behaviour is stopped.

**Recommendation Nine**

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

If you have any queries or seek further information please do not hesitate to contact me.

Yours faithfully,



Angela Lynch  
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Women's Legal Service Queensland