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Office of the President

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Our ref: [REDACTED]

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

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

Dear Committee Secretary

Criminal Code (Non-consensual sharing of Intimate Images) Amendment Bill 2018

Thank you for the opportunity to provide comments on the Criminal Code (Non-consensual sharing of Intimate Images) Amendment Bill 2018 (the bill) and for granting a one day extension to provide our submissions on the bill. The Queensland Law Society (QLS) appreciates being consulted on this important piece of legislation.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the QLS Criminal Law Committee who have substantial expertise in this area. With respect to the issues paper we raise the following:

- The ambiguity with the definition of intimate image (clause 4)
- The need to exempt children and young people under 18 years of age from Queensland's child exploitation material legislation and placement on the sex offender register (clause 5)
- The use of the 'distress test' (clause 5).

1. Clause 4 – amendment of s 207A (definitions for this chapter)

Clause 4 of the draft Bill seeks to amend section 207A which lies within Chapter 22 of the Criminal Code (offences against morality).

Proposed section 207A states:

intimate image, of a person—

(a) means a moving or still image that depicts—

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(i) the person engaged in an intimate sexual activity that is not ordinarily done in public; or

(ii) the person's genital or anal region, when it is bare or covered only by underwear; or

(iii) if the person is female or a transgender or intersex person who identifies as female—the person's bare breasts; and

(b) includes an image that has been altered to appear to show any of the things mentioned in paragraph (a)(i) to (iii); and

(c) includes an image depicting a thing mentioned in paragraph (a)(i) to (iii), even if the thing has been digitally obscured, if the person is depicted in a sexual way.

The Society is concerned about the definition of intimate image in proposed section 207A(ii) that states an intimate image can include a moving or still image that depicts the person's genital or anal region, when it is bare or covered only by underwear. Upon a strict reading of the provision, this may include images of men or women in an underwear catalogue or advertisement or a picture of a person in their swimsuit on the beach.

The Society also raised concerns about the definition of intimate image in proposed section 207A(c). This provision states that an intimate image includes a moving or still image that depicts the person 'in a sexual way'. In our view, the phrase is vague, unclear and subjective. What is considered an image of a person 'in a sexual way' can differ from person to person. Therefore, there is no uniform standard of appropriate behaviour from which to judge conduct.

Section 4(3)(k) of *Legislative Standards Act 1992* mandates that legislation in Queensland is unambiguous and drafted in a sufficiently clear and precise way. The legislation must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful. This fundamental legislative principle for a law to be clear and precise is essential. It ensures the introduction of predictability into the legal system so that the individual will know what is and is not permissible. As such, the definition of intimate image must be sufficiently clear and precise for a person to be able to judge whether his or her actions would amount to an infringement of the legislation. In our view, we envisage that the ambiguity of the provision will result in many individuals being charged inappropriately.

Therefore, we suggest that the provision be amended to provide broad judicial discretion to determine whether an intimate image falls within the proposed definition in all the circumstances.

We are very supportive of the wording in proposed section 207A(a)(iii) which contains an inclusive description of individuals who identify as female.

2. Clause 5 - insertion of new section 223

Clause 5 seeks to insert new section 223, which deals with the distribution of intimate images.

The Society is concerned with proposed section 223(1)(b) which imports the test of distress in relation to the distribution of intimate images. This provision states:

223 Distributing intimate images

(1) A person who distributes an intimate image of another person—

(a) without the other person's consent; and

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(b) in a way that would cause the other person distress reasonably arising in all the circumstances;

commits a misdemeanour.

The Society is concerned with the use of the subjective test of distress in this provision. The test of “distress” is novel. It is opaque and moveable. Criminal law tests which employ the standards of “harm” or “detriment” at least have some precedent in the criminal law, whereas the test of “distress” has no objective basis. In our view, the use of the test of distress might send a jury on a perilous journey having to determine whether an image, in the circumstances of the parties, causes distress to a particular member of society. The Society does not support the test of distress in proposed section 223(1)(b) and suggests that this provision be amended.

We note that the tests where the standard is “harm” or “detriment” at least have some precedent in the criminal law. Therefore, the preferable approach would be to utilise the standard employed in analogous Criminal Code offences. For example, the test of detriment in section 359B of the Criminal Code, which defines unlawful stalking. We note that section 359B(d) of the Criminal Code contains a subjective element whilst also preserving the usual safeguards by ensuring that the conduct reasonably arises in all the circumstances.

Proposed subsection 223(2)

We also note proposed section 223(2), which states that a child under the age of 16 years is incapable of giving consent. We support the continued operational practices of the Queensland Police Service to educate our children and young people rather than resorting to investigation and prosecution.

However, in our view, children and young people under 18 years of age should be exempt from Queensland’s child exploitation material legislation and excluded from being placed on the sex offender register. We support the approach taken in Victoria where anyone under 18 years of age who creates, possesses or distributes an intimate image or sext of himself or herself or of another minor who is less than two years younger than them will not be guilty of a child pornography offence. We consider that the legislation should recognise that teenagers who engage in consensual peer-to-peer sexting are distinct from child pornographers. This would strike the right balance by ensuring child exploitation offences are appropriately addressed and children are protected, whilst not criminalising the peer-to-peer sexual conduct of children and young people.

Proposed subsection 223(3)

We also note proposed section 223(3), which states

(3) For subsection (1)(b), it is immaterial whether the person who distributes the intimate image intends to cause, or actually causes, the other person distress.

The Society does not support the removal of intention as fault elements of these offences via proposed sections 233(3) and 229A(3)(b) of the bill. We note that there are very valid circumstances where a defendant would genuinely not intend to distribute the material in question. For example, if the defendant was signed up to BitTorrent applications such as uTorrent or the like, where the program itself sets up automatic sharing and distribution via peer-to-peer networks following download. In our view, defendants should only be liable for distributing material if they intend on its distribution. For this reason the QLS opposes the

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removal of intention as fault elements of these offences via the proposed sections 233(3) and 229A(3)(b) of the bill.

3. Clause 9 – insertion of new sections 229A and 229AA**Rectification orders**

Clause 9 seeks to insert new section 229AA which provides for the making of rectification orders. This provision states:

229AA Rectification order—offence against s 223, 227A, 227B or 229A

- (1) *If a person is convicted of an offence against section 223(1), 227A(1) or (2), 227B(1) or 229A(1) or (2) the court may order the person to take reasonable action to remove, retract, recover, delete or destroy an intimate image or prohibited visual recording involved in the offence within a stated period.*
- (2) *A person who fails to comply with an order made under subsection (1) commits a misdemeanour. Maximum penalty—2 years imprisonment.*

For many complainants, removal of the material will be the most important issue. In the experience of our criminal law committee members, the lack of available remedies is a frequent complaint. In this regard, we suggest that a provision be included which mirrors section 359F of the Criminal Code where a rectification order could be made “*whether the person is found guilty or not guilty or the prosecution ends in another way*”.

It is the view of the Society that highly trained judicial officers are in the best position to draft rectification orders. However, the Society raises the question whether this provision intends to provide some guidance on the framing of rectification orders.

Furthermore, there is no provision allowing for the possibility where a court order is made but the defendant is incapable of complying with the court order. For an example, if the defendant has already distributed the material and is incapable of locating / deleting every copy, or where the defendant suffers a head injury after the order is made and forgets all their passwords or is in a coma, or if the defendant is a reportable offender and has restrictions on online access of material etcetera. For this reason, we consider this provision could benefit from a “without reasonable excuse” exception.

The Society recommends that the drafting of this clause be amended to clarify the circumstances around which rectification orders can be made.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy Manager, Binny De Saram by phone on [REDACTED] or by email to [REDACTED]

Yours faithfully



Ken Taylor
President