

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

Explanatory Notes

Short title

The short title of the Bill is the Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018.

Policy objectives and the reasons for them

The policy objective of the Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018 (the Bill) is to give effect to the Government's election commitment to create a new offence related to non-consensual sharing of intimate images that would apply to sending, or threatening to send, intimate material without consent.

The distribution of, or threat to distribute, intimate images of a person without their consent is a form of technology-facilitated abuse commonly known as 'revenge porn'. Often these images will be acquired in the context of a relationship, where the person depicted shares the image consensually and in confidence.

Non-consensual distribution of the image, such as by posting to social media or sending to friends and family, can be humiliating and distressing. Likewise, a threat to distribute these images can provoke fear or be used to control or coerce another.

Dealing with this issue requires a multi-faceted approach including civil remedies, education and awareness-raising schemes, and the assistance of the community sector. Comprehensive criminal laws in this area are an essential component to ensure offenders are held accountable and to reflect community condemnation for such activity.

In May 2017, the then Law, Crime and Community Safety Council agreed to non-binding best practice national principles for offences criminalising the non-consensual sharing of intimate images. A number of Australian jurisdictions have introduced specific offences which criminalise the non-consensual distribution, or threatened distribution, of intimate images.

Queensland does not currently have an offence specifically directed at the non-consensual sharing of intimate images. However, there are a number of existing offences under the Criminal Code which may apply depending upon the specific circumstances of the case. Notwithstanding the availability of these offences, a potential gap exists that will be filled by amendments implementing the election commitment.

This gap exists in cases where it cannot be proven beyond reasonable doubt that an image was made in circumstances in which a person would reasonably expect to be afforded privacy and as a result the image does not constitute a '*prohibited visual recording*' for the purpose of section 227B (Distributing prohibited visual recordings); and the conduct does not otherwise fall within the ambit of the offence of Unlawful Stalking (section 359E) because, for example, it did not cause the complainant the requisite level of harm.

Further, Queensland does not have an offence to target threats to distribute this type of material; the existing offences only deal with scenarios where the image has been distributed.

Achievement of policy objectives

The Bill amends the Criminal Code to give effect to the election commitment.

A new offence will prohibit the distribution, without consent, of an intimate image of another person in a manner that would cause distress reasonably arising in all of the circumstances. A maximum penalty of three years imprisonment will apply. Intimate image is defined and includes moving or still images, and images that have been digitally altered, and is not limited by an expectation of privacy. The Bill provides that, where the image is of a child under the age of 16 years, that child is incapable of giving consent. The application of two defences will provide additional certainty to the operation of the offence.

New offences will prohibit threats to distribute intimate images or prohibited visual recordings without the consent of the person depicted. The offences will apply to threats made either to the person depicted or another person where distribution would cause distress reasonably arising in the circumstances to the person threatened or the person depicted. The offences require that the threat would cause the person threatened fear, reasonably arising in all of the circumstances, that the threat would be carried out. A maximum penalty of three years imprisonment will apply. For the purpose of these offences, it will be immaterial whether the image subject of the threat exists.

New powers will allow the court to order removal or retraction of distributed images upon conviction of the new offences or existing sections 227A (Observations or recordings in breach of privacy) or 227B (Distributing prohibited visual recordings) of the Criminal Code. Failure to comply with such an order will be an offence with a maximum penalty of two years imprisonment.

The maximum penalty applying to the offences under sections 227A and 227B of the Criminal Code will be increased from two years to three years imprisonment.

Alternative ways of achieving policy objectives

There are no alternative ways to achieve the policy objectives.

Estimated cost for government implementation

Any costs arising from these legislative amendments will be met from existing agency resources.

Consistency with fundamental legislative principles

The Bill is generally consistent with fundamental legislative principles (FLPs). The proposed amendments may impact on the rights and liberties of individuals by creating new offences, increasing maximum penalties and imposing obligations retrospectively (section 4(2) and (3) *Legislative Standards Act 1992* (Qld)). Potential breaches of the FLPs are addressed below.

Clauses 5 and 9 – new distribution offence and new offences of threatening to distribute intimate images or prohibited visual recordings

The proposed amendments will:

- create a new offence prohibiting the distribution, without consent, of an intimate image of another person, in a way that would cause distress reasonably arising in all of the circumstances. The new offence will apply to any intimate image regardless of how or where the image was captured or made and will include digitally altered images. A maximum penalty of three years imprisonment will apply; and
- create two new offences prohibiting threats to distribute, without consent, intimate images or prohibited visual recordings (pursuant to section 227B of the Criminal Code) including where the material may not exist. The threat may be made either to the subject of the image or to a third person. The offence will apply where the threatened distribution would cause distress reasonably arising in the circumstances to the person threatened or the person depicted, and, where the threat would cause the person threatened fear, reasonably arising in all the circumstances, that the threat would be carried out. A maximum penalty of three years imprisonment will apply.

The distribution of, or threat to distribute, intimate images of a person without their consent is a form of technology-facilitated abuse and can be humiliating and distressing, provoke fear or be used to control or coerce another. The creation of new offences is considered justified to address and deter this offending behaviour where it is not currently covered by the Criminal Code.

While the new offences will apply to relevant images, regardless of whether they were created or obtained before or after the commencement, the offences operate prospectively and will only capture distribution or threats that occur following commencement.

Two defences will apply to the new distribution offence including a defence to provide protection to law enforcement and other relevant officers acting in the course of their duties. A further defence is provided if the alleged offending conduct was for a genuine artistic, educational, legal, medical, scientific or public benefit purpose and, in the circumstances, was reasonable for that purpose.

The defence necessarily reverses the onus of proof as the defendant is best placed to provide evidence of the purpose of their conduct. This is similar to section 228E (Defences for ss 228A-228DC) of the Criminal Code which provides a defence to child exploitation material offences.

The new offences make it clear that where an intimate image or prohibited visual recording depicts a child under 16 years that child cannot consent to distribution and, that consent must otherwise be freely and voluntarily given by a person with cognitive capacity to consent.

Clause 6 and 7 – increasing maximum penalty under sections 227A and 227B of the Criminal Code

The proposed amendments will increase the maximum penalty applying to the offences under sections 227A (Observations or recordings in breach of privacy) and 227B (Distributing prohibited visual recordings) of the Criminal Code from two to three years imprisonment. The proposed increases in maximum penalty are considered justified to provide consistency with the newly introduced offences and ensure offending behaviour which interferes with personal privacy can be sufficiently deterred.

Clause 9 – new powers to order removal or retraction of images and associated offence

Amendments will provide powers to a sentencing court to order that an offender take reasonable steps to remove, retract, recover, delete or destroy an intimate image subject of an offence (rectification order). Rectification orders will be available upon conviction for each of the new offences as well as the existing offences in sections 227A and 227B of the Criminal Code. Non-compliance with the order will be an offence with a maximum penalty of two years imprisonment. The proposed offence for failure to comply with a rectification order is justified to support compliance with a court order designed to address ongoing distress a victim may suffer as a result of the distribution of an intimate image. The offence will not apply in circumstances where an offender has taken reasonable steps to comply with the order.

Clause 10 – transitional provision

A transitional provision enables the court to make a rectification order upon conviction for an offence against section 227A or 227B of the Criminal Code after commencement, including where the offence was committed or the offender was charged before commencement. It may be argued that the amendment provides for a partial retrospective effect by allowing a court to make a rectification order upon conviction for an offence, whether committed before or after the commencement of the provisions. However, any obligations imposed on an offender under the provision will have a purely prospective operation.

The provision is justified to ensure that steps can be taken to protect victims from ongoing stress or fear that could be caused by the continued access by an offender or the public to such an image or recording.

Consultation

A consultation draft of the Bill was provided to key stakeholders including: Queensland Family and Child Commission; Bar Association of Queensland; Queensland Law Society; Aboriginal and Torres Strait Islander Legal Service; the Queensland Council for Civil Liberties; Legal Aid Queensland; Women's Legal Service; the Lesbian, Gay, Bisexual, Transgender and Intersex Legal Service; Youth Advocacy Centre, End Violence Against Women Queensland; and the Director of Public Prosecutions. Stakeholders were invited to provide feedback on the Bill.

Stakeholder feedback has been taken into account in finalising the Bill.

Consistency with legislation of other jurisdictions

The Bill is specific to the State of Queensland. However, the introduction of legislation will align Queensland with the majority of other Australian jurisdictions which have specific offence provisions targeting the non-consensual distribution of intimate images or threats to distribute such images.

In addition, New South Wales, the Australian Capital Territory and the Northern Territory have legislative provisions allowing a sentencing court to order the removal or retraction of relevant images upon conviction.

Notes on provisions

Clause 1 states that when enacted the Bill will be cited as the *Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Act 2018*.

Clause 2 states that the Act amends the Criminal Code.

Clause 3 amends section 1 (Definitions) to insert references to the definitions in section 207A of *intimate image* and *prohibited visual recording*.

Clause 4 amends section 207A (Definitions for this chapter) to insert a new definition of *intimate image*, amend and relocate the existing definition of *prohibited visual recording* from section 227B to section 207A and amend the definition of *state of undress*.

Intimate image of a person means a moving or still image that depicts the person engaged in an intimate sexual activity that is not ordinarily done in public or, that depicts a person's genital or anal region when it is bare or covered only by underwear or, that depicts the bare breasts of a female person or a transgender or intersex person who identifies as female.

The definition includes an image that has been altered to appear to show any of the things listed in paragraph (a)(i) to (iii), and includes an image even if the thing has been digitally obscured, if the person is depicted in a sexual way.

Prohibited visual recording is amended at paragraph (b) to modernise drafting language consistent with the new definition of intimate image.

State of undress is amended at paragraph (a), as it applies if the person is female to the person's bare breasts, to replace the reference to female with female or a transgender or intersex person who identifies as female.

Clause 5 inserts new section 223 (Distributing intimate images).

New section 223(1) provides that a person who distributes an intimate image of another person, without that person's consent, and in a way that would cause the other person distress reasonably arising in all of the circumstances commits a misdemeanour. A maximum penalty of three years imprisonment applies. Examples of circumstances that may be relevant for consideration are included. Section 223(1) requires the prosecution to prove that the distribution of an intimate image would cause distress, reasonably arising in all the circumstances, objectively on a case-by-case basis.

Subsection (2) provides that a child under 16 years is incapable of giving consent for the purposes of the offence.

Subsection (3) confirms that it is immaterial whether the person who distributes the image intends to cause or actually causes distress.

Subsection (4) provides a defence where the alleged conduct was for specified purposes and was in the circumstances reasonable for that purpose. This may include referral of an image to a law enforcement or professional registration body for investigation or disciplinary proceedings.

Subsection (5) provides a definition of *consent* for the purposes of the section.

Clause 6 amends section 227A (Observations or recordings in breach of privacy).

Subsection (1) increases the maximum penalty for the offences in section 227A(1) and 227A(2) from two years to three years imprisonment.

Subsection (2) amends section 227A(3) to provide a definition of *consent* for the purpose of the section and replace the definition of *genital or anal region* for the purpose of the section to modernise drafting language consistent with the new definition of intimate image.

Clause 7 amends section 227B (Distributing prohibited visual recordings).

Subsection (1) increases the maximum penalty from two years to three years imprisonment.

Subsection (2) inserts a definition of *consent* for the purpose of the section and omits the definition of *prohibited visual recording* relocated to section 207A by clause 4.

Clause 8 amends section 227C (Persons who are not criminally responsible for offences against subsection 227A and 227B) to also include new section 223.

Clause 9 inserts new section 229A (Threats to distribute intimate image or prohibited visual recording) and new section 229AA (Rectification order – offence against subsection 223, 227A, 227B or 229A).

New section 229A(1) states that a person commits a misdemeanour if the person makes a threat to another person to distribute an intimate image or prohibited visual recording of the other person, without the consent of the other person, and in a way that would cause the other person distress reasonably arising in all the circumstances and the threat is made in a way that would cause the other person fear, reasonably arising in all the circumstances of the threat being carried out. A maximum penalty of three years imprisonment applies. Examples of circumstances that may be relevant for consideration are included.

Subsection (2) states that a person commits a misdemeanour if the person makes a threat to another person (person A) to distribute an intimate image or prohibited visual recording of a another person (person B) without the consent of the person depicted (person B), and in a way that would cause either the person depicted (person B) or the person threatened (person A) distress reasonably arising in the circumstances, and where the threat is made in a way that would cause the person threatened (person A) fear, reasonably arising in all the circumstances, of the threat being carried out. A maximum penalty of three years imprisonment applies. Examples of circumstances that may be relevant for consideration are included.

Subsection (3) confirms that, for either of the offences in subsections (1) or (2), it is immaterial whether the intimate image or prohibited visual recording exists or does not exist or whether the person who made the threat intends to cause or actually causes fear of the threat being carried out.

Subsection (4) provides that a child under 16 years is incapable of giving consent for the purposes of subsections (1)(a)(i) and (2)(a)(i).

Subsection (5) inserts a definition of *consent* for the purposes of this section.

New section 229AA (Rectification order – offence against section 223, 227A, 227B or 229A) provides that, 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. Subsection (2) states that failure to comply with an order made under subsection (1) is a misdemeanour. A maximum penalty of two years imprisonment applies.

Clause 10 inserts new part 9, chapter 100 Transitional provision for Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Act 2018 containing section 742.

New section 742 (Application of section 229AA) provides transitional arrangements which apply to offenders who are convicted of an offence against section 227A or 227B after commencement. This section provides that the court can make a rectification order under 229AA for an offender convicted of an offence against section 227A(1) or (2) or

227B(1) after commencement even if the offence was committed or the offender was charged with the offence before commencement.