

6 September 2018

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,

**Submission to the Legal Affairs and Community Safety Committee in relation to the
*Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018***

1. Rape & Domestic Violence Services Australia (R&DVSA) thank the Legal Affairs and Community Safety Committee for the opportunity to comment on the *Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018* (the Bill).
2. R&DVSA is a non government organisation that provides a range of counselling services to people whose lives have been impacted by sexual, family or domestic violence and their supporters. Our services include the NSW Rape Crisis counselling service for people in NSW who have experienced or have been impacted by sexual violence; Sexual Assault Counselling Australia for people who have been impacted by the Royal Commission into Institutional Responses to Child Sexual Abuse; and Domestic and Family Violence Counselling Service for Commonwealth Bank of Australia customers who are seeking to escape domestic or family violence.
3. R&DVSA welcome the Government's efforts to strengthen the criminal law response to the non-consensual sharing of intimate images.
4. The non-consensual sharing (and threatened sharing) of intimate images is a tool of power and control that is commonly used within the context of sexual, family or domestic violence. It can have devastating consequences for the victim,¹ often causing them to experience similar complex trauma impacts to those experienced in relation to other types of sexual violence. The sharing of intimate images may also lead to adverse consequences for the victim in relation to their reputation, employment and relationships.

¹ Generally, R&DVSA prefer the term people who have experienced sexual assault and/or domestic and family violence to describe individuals who have suffered this type of violence, rather than the terms survivors or victims. This is in acknowledgement that, although experiences of sexual assault and/or domestic and family violence are very significant in a person's life, they nevertheless do not define that person. However, in this submission, R&DVSA will sometimes use the term 'victim' as this accords with the criminal law context.

5. Further, when perpetrated within the context of a domestic violence relationship, a threat to distribute intimate images may create a significant barrier for the victim to escape violence, seek support, or hold the perpetrator to account.
6. As such, we agree that a comprehensive criminal response is imperative “to ensure offenders are held accountable and to reflect community condemnation for such activity.”²
7. However, we believe the Bill could be further strengthened by removing “the distress element” from each of the following offences:
 - a. distributing intimate images in s 223;
 - b. threats to person A to distribute intimate image or prohibited visual recording of person A in s 229A(1); and
 - c. threats to person A to distribute intimate image or prohibited visual recording of person B in s 229A(2).
8. In each of these offences, the prosecution must prove the following two elements:³
 - a. that the conduct occurred without consent (**the non-consensual element**);⁴ and
 - b. that the conduct occurred in a way that would cause the other person distress reasonably arising in all the circumstances (**the distress element**).⁵
9. R&DVSA propose that the distress element should be removed as it creates an excessive hurdle for the prosecution and distracts from the core wrong underlying these offences: the lack of victim consent.
10. It should be sufficient for the prosecution to prove that the distribution or threat to distribute intimate images occurred without consent.
11. This perspective is supported by the Commonwealth Senate Legal and Constitutional Affairs References Committee, who stated in their 2016 report:

*The committee is persuaded by the arguments for consent to be the central tenet of any non-consensual sharing of intimate images offences. The committee is similarly convinced that non-consensual sharing of intimate images offences should not include 'an intent to cause harm' or 'proof of harm' elements: the perpetrator's intentions and whether or not the victim is harmed are not pertinent; the acts of nonconsensually taking and/or sharing intimate images should be sufficient for an offence to have been committed.*⁶
12. Similarly, in 2017 the Law, Crime and Community Safety Council recommended in the ‘National Statement of Principles Relating to the Criminalisation of the Non-Consensual Sharing of Intimate Images’ that:

² Explanatory Notes for the *Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Bill 2018*.

³ In the section 229A offences, the prosecution must also prove a third element: that the threat is made in a way that would cause the other person distress reasonably arising in all the circumstances, contained in sections 229A(1)(b) and (2)(b). R&DVSA does not oppose this element.

⁴ The consent element is reflected in section 223(1)(a), section 229A(1)(a)(i) and section 229A(2)(a)(i).

⁵ The distress element is reflected in section 223(1)(b), section 229A(1)(a)(ii) and section 229A(2)(a)(ii).

⁶ Commonwealth Senate Legal and Constitutional Affairs References Committee, *Inquiry into the phenomenon colloquially referred to as ‘revenge porn’*, February 2016, at [5.14].

*An offence for sharing intimate images should not require proof that harm has been caused to the person depicted in the image by the sharing of the intimate image.*⁷

13. R&DVSA recognise that the distress element included in the Bill is predominantly objective. It does not require that the prosecution prove the conduct *actually* caused distress to the victim. Rather, it merely requires that the prosecution prove the conduct occurred “in a way that would cause the other person distress *reasonably arising in all the circumstances.*”⁸
[emphasis added]
14. We accept that an objective harm element is different and preferable to a subjective harm element. However, we believe that the inclusion of any harm element is undesirable.
15. In essence, this is because harm is inherent within the non-consensual element of the offence. Thus, to require that harm be proven as a separate element of the offence implies that only certain, especially egregious instances of non-consensual sharing of intimate images are serious enough to warrant a criminal response.
16. Further, given that harm is intrinsic to the non-consensual element, it constitutes an unnecessary duplication to require that the prosecution prove each element separately. This duplication will inevitably result in longer and more costly trials.
17. R&DVSA acknowledge that in some rare circumstances, the non-consensual sharing of intimate images may occur in a way that does not breach community standards and therefore does not warrant a criminal response. Most such circumstances will be captured by s 223(4) which provides a defence where the person distributed an intimate image for a “genuine artistic, educational, legal, medical, scientific or public benefit purpose” and the conduct was “reasonable for that purpose”.
18. However, we accept there may be some additional circumstances which are not captured by this defence. In this respect, the Victorian Department of Justice and Regulation argued that in absence of any ‘community standards’ element, the offence “might capture activities which are generally considered to be socially acceptable, such as a parent sending family members and friends a photograph of their nude newborn baby.”⁹
19. In response to this issue, R&DVSA propose that the QLD Government adopt the NSW approach that includes the following defence in section 91T(1)(d) of the *Crimes Act 1900*:

S 91T Exceptions

(1) A person does not commit an offence against section 91P or 91Q if:

...

(d) a reasonable person would consider the conduct of the accused person acceptable, having regard to each of the following (to the extent relevant):

- (i) the nature and content of the image,*
- (ii) the circumstances in which the image was recorded or distributed,*

⁷ Law, Crime and Community Safety Council, *National Statement of Principles Relating to the Criminalisation of the Non-Consensual Sharing of Intimate Images* (2017) para 13.

⁸ Although we note the Bill does allow reference to some subjective factors, such as “the relationship, if any, between the person who distributes the intimate image and the other person”.

⁹ Criminal Law Review, Department of Justice and Regulation Victoria, *Victoria's New Sexual Offence Laws: An Introduction*, June 2015, p 30.

(iii) the age, intellectual capacity, vulnerability or other relevant circumstances of the person depicted in the image,
(iv) the degree to which the accused person's actions affect the privacy of the person depicted in the image,
(v) the relationship between the accused person and the person depicted in the image.

20. This approach represents an appropriate compromise. It ensures that the offence does not capture reasonable conduct. However, by positioning the reasonable test as a defence rather than an element of the offence, the NSW approach recognises that in absence of evidence to the contrary it can be assumed that the non-consensual sharing of intimate images is both harmful and unacceptable. In line with this assumption, it appropriately shifts the evidential burden from the prosecution to the defence.
21. R&DVSA recommend that the QLD Government insert a similar defence into section 223.
22. No such defence is necessary in relation to the s 229A offences as there are no circumstances in which it will be reasonable to threaten a person.

Summary of recommendations:

1. Ensure that non-consent is the determinative element of each offence by removing the following provisions containing the unnecessary distress element: section 223(1)(b), section 229A(1)(a)(ii) and section 229A(2)(a)(ii).
2. Insert an additional defence into section 223 which states that a person does not commit the offence in subsection (1) if a reasonable person would consider the conduct of the accused person acceptable.

Please do not hesitate to contact me on (02) 8585 0348 or by email at kajhalm@rape-dvservices.org.au if you have any questions or would like to discuss further.

Yours faithfully,

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